MPCS Discussion Draft No. 3 – Comments on *both* dimensions

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Introduction

Dear colleagues:

The Reporter's draft has two dimensions. The first dimension seeks confirmation and related input for the "determinate sentencing" premise of the Model Penal Code: Sentencing revision project [MPCS] as improvement over sentencing law promoted in the 1962 Model Penal Code. I largely agree with the Reporter's positions, even though his drafting of sentencing purposes, and choice of ineffective tactics for avoiding overuse of prison, have profoundly weakened his arguments. I will offer comments in response to his requests.

The other dimension is far more important. The Reporter's *Discussion Draft No. 3* unambiguously, commendably, and transparently reports in essence that the MPCS *is failing*. Although the Reporter does not expressly request our input on *that*, he is certainly entitled to that input. I assume you will agree that these matters are deserving of ALI's attention.

I submit that ALI, having now received a report that conveys the Reporter's essential concession that MPCS has failed to achieve anything like a consensus of states *or* reduction in overuse of prison should now require that we revisit precisely the obvious impediments to success.[1]

The Discussion Draft Reports that MPCS is *failing*:

My premises are these: First, the success of an ALI model code requires that it garner sufficient consensus among the states to provide leadership to improve the law.[2]

Second, a clear objective of the Reporter [which I have always shared][3] is to use the MPCS as a device to avoid overuse of prisons.

The Reporter's *Draft* reports:

1. His approach represents a minority view among the states; only about one-third of states have adopted a "determinate" sentencing guidelines approach, and the Reporter has failed to achieve essential consensus *even within the guideline states*.[4] Although the Reporter

had been hopeful in past years that the guidelines movement was growing, it is now clear that the guidelines tide is receding rather than rising. To the extent that ALI's role is to gather consensus for improvement through a model code, receding tide is a message of failure – regardless of the reason.[5]

2. The most success the Reporter can claim in resisting the explosion of prison use and sentencing severity is some correlation[6] with slower prison *growth* rates in determinate sentencing states. But he correctly reports that the MPCS has failed even in those states to prevent us from overusing prisons more than any other nation in the world:

> From the 1970s to the present, per capita incarceration rates quintupled for the nation as a whole. Although the rate of prison growth has slowed in recent years, the result of decades of past expansion is a plateau of carceral severity that remains steady at historically high levels.[7]

The only way to rescue the MPCS is to revisit purposes and tactics:

The Reporter insisted on purposes and tactics that are not at all required for a successful sentencing code that is "determinative" and employs guidelines and sentencing commissions. But his articulation of purposes and his tactics inevitably doom MPCS to rejection by the majority of states (including guidelines states that accept that a purpose of prison is public safety), and to failure as a mechanism for combating overuse of prison. The Reporter has, commendably, warmly embraced evidence-based practices to reduce recidivism at the lower levels of crime severity, but his persistent refusal substantially to base prison allocation on any basis other than "proportional severity" – particularly his refusal to tie prison use to offender risk and public safety – dooms any effort to assemble anything like a workable consensus necessary for success of a model code.

The most official record of the Reporter's choices surrounds his defeat of the motions I submitted at the 2007 Annual Meeting.[8] The full implications of his arguments against the motions are only apparent in the progression of his writings through this *Discussion Draft No. 3.*

At the 2007 Annual Meeting, the Reporter argued against my proposal[9] expressly to identify "public safety" as a purpose of sentencing by arguing that "Section 1.02(2) explicitly endorses goals of 'offender rehabilitation, general deterrence, [and] incapacitation' – which are the known mechanisms for achievement of public safety through criminal sentencing."[10] What he didn't say, but what is now obvious, is that the Reporter is continuing to resist *using prison to serve public safety through incapacitation*. This is the reason he refuses to require "proportional severity" to be shown to be "reasonably feasible" for achieving *any social purpose*, while using the "reasonably feasible" prerequisite to all other purposes – including incapacitation – to avoid any express use of prison to protect people on the outside from dangerous people on the inside.

Any hint that he was proposing *to use prisons* for public safety has also been dispelled by his vigorous and persistent resistance to use assessment of *high* risk offenders or pursuit of any purpose other than "proportional severity" to explain *imprisonment* – in spite of the obvious fact that incarceration is a "reasonably feasible" means of "incapacitation," which amounts to preventing offenders from committing harm on the outside while they are on the inside of prison.

The Reporter did not respond in writing to my 2007 motion concerning proportional severity. My concern was and is that while Section 1.02(2) reasonably requires every *other* sentencing purpose to operate only when "reasonably feasible," it requires *all* sentencing to inflict "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" *without any showing whatever that proportionate severity serves <u>any purpose whatever</u>* in any particular case.[11] My motion would have simply required that just deserts or "proportionate severity" have some relationship to "a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others."[12] I certainly agree that proportionality should always limit severity as a constitutional and subconstitutional matter [which helps maintain respect for legitimate authority which is corroded by excessive punishment].

My concern was and is that the Reporter's construct has freed all prosecutors and judges who determine sentences from *any* requirement that our sentencing serves *any* purpose – utilitarian [related to public safety] *or* related to what I would deem "public values" – which include all social purposes attributable to whatever might reside under the labels "just deserts," "proportional severity," or "retribution."[13]

The Reporter's successful argument in resisting any requirement that proportional severity connect to some social purpose was entirely oral. I recall it being simply a statement to the effect that "Marcus is simply too utilitarian." His tactical choice is now obvious because he makes no effort whatever to link proportional severity to *any* of the *social purposes* related to proportional severity – indeed, he vigorously resists any link between severity and any articulated social purpose other than resisting overuse of prison [*although this link remains largely hinted rather than articulated*] – and he makes no effort to demonstrate how this tactic should work. It cannot.

Here are the essential elements of the Reporter's choices and tactics:

1. Those who craft sentencing – such as the prosecutors who control roughly 90-95% of initial sentencing through plea bargaining and the judges who impose sentences – have no obligation under the MPCS to consider or pursue *any purpose of sentencing whatever* as long as the sentence is within the range prescribed by guidelines; sentencers are answerable to no performance measure and can claim complete success as long as the sentence is within the guidelines [or statutory equivalent].[14] Only those who present a social purpose to support a

sentence need to provide any justification of "feasibility" that a sentence might serve that purpose.

2. Although the Reporter acknowledges that incarceration has an incapacitation function, he has refused to identify "public safety" as a specific purpose of sentencing or prison. His continued resistance to using risk assessment as a reason *for* incapacitation [as opposed to a reason for *diverting* lower risk offenders *from* prison][15] suggests that utilitarian use of prison fails his "reasonably feasible" test for any purpose other than proportional severity. In any event he requires proportional severity for all sentencing *as a tactic to avoid using prison for public safety out of fear that linking public safety and prison will inflate the use of prisons.* He apparently believes – as a matter of faith wholly unconnected to anything resembling evidence-based practices or research – that driving mainstream sentencing and prison use by "proportionate severity" prescribed by an aloof guidelines commission is less likely to result in prison overuse than rational analysis in allocating resources, including prison, to achieve public safety and other sentencing purposes. He laudably increasingly recognizes the improvements of risk and needs assessment, but with enthusiasm only to divert low risk offenders from prison [while, ironically, allowing higher risk to disqualify *young* offenders from mitigation based on youth]. He evidences continued ideological discomfort with using validated instruments to identify offenders whose risk of doing harm is high enough, and likelihood of rehabilitation low enough, to warrant enhanced imprisonment to serve public safety.

   a. This tactical choice abandons data, logic, and the best use of criminal justice commissions in debate with those who favor the use of prisons as a matter of just deserts *regardless of any connection to social purposes* of any kind. His tactic is to withdraw from this debate rather than dispute proponents of long sentences.[16] Withdrawal from the debate has certainly not impeded efforts to increase presumptive and mandatory prison terms for various categories of offenses.

   b. This tactical choice is so inconsistent with the understanding and values of policy makers and thoughtful citizens as to put MPCS well beyond the reach of any significant consensus. Whatever the complex mix of just deserts and public safety in the public's thinking, the data is overwhelming that citizens understand that a critical justification for the funding of prisons – in competition with higher education, public health, and other public services – is keeping dangerous people in prison from hurting people on the outside. Denying this obvious public understanding, and "reasonable feasibility" of "incapacitation," is to forfeit credibility with any significant portion of the public,

and any hope of achieving a consensus of states prerequisite to any success by ALI through MPCS.[17]

c. This tactical choice has worked neither to *end* the *growth* of imprisonment rates nor to attract a consensus of states to the MPCS.

3. The Reporter's laudable warm embrace of blossoming evidence-based practices,[18] treatment and specialty courts has been largely limited to the lower range of sentencing severity and withheld from mainstream sentencing which allocates the most expensive and severe resources, primarily including prison and post-prison supervision.

I submit that resuscitating MPCS into a viable means by which to attract a sufficient consensus of states to achieve an improvement in sentencing and a reduction in excessive use of prison requires:

- revisiting the sentencing purposes of Section 1.02(2), and
- abandoning the doomed tactic of avoiding meaningful analysis of the use of prison by excusing all mainstream sentencing from any performance *other than* opaque,[19] proportionate severity.

Answering the questions the Reporter *did* ask:

As mentioned, I largely agree with the Reporter on most of his questions, even though his purpose and tactic choices tremendously weaken his arguments.

Note that many of the Reporter's arguments are fictitious. In the great bulk of sentences, there *is* no actual "judicial determination" of proportionality to protect from subversion by a back-end bureaucracy in light of offense gravity, harm to victims, or offender blameworthiness. First, plea bargains determine 90-95% of sentences. Second, all the MPCS requires of sentencing is "satisfied" by the Reporter's only essential test merely if the sentence is within a narrow range of months assigned to the crime and convicted offender by a relatively arbitrary, opaque sentencing guideline – which spares sentencers any real involvement other than obedience. Third, a huge percentage of cases involve no victim at all, and many others include no real information about any actual victim's interest in the sentence. Fourth, although the Reporter in addressing back-end adjustments in this *Draft* suggests that mining offenders' "good" aspects is somehow appropriate to a "proportionate severity" decision, almost no initial sentencing involves discussion of good aspects in the offender's life unrelated to the crime. Existing traditions generally ignore such considerations when we're deciding whether, for example, to separate a functional father from his family for 25 years at initial sentencing.

It is not unfair to point out the ironic tension between the Reporter's invocation of the sanctity of the judicial determination of proportionality at the same time that he has gone through tremendous energy to erect guidelines or their equivalent to *restrict* judicial discretion by having commissions or their equivalent prescribe narrow ranges of acceptable sentences that are always unassailable simply because the crime and the offender are within the mandatory or advisory range.

Overall, the argument that prevails on front-end court control, as opposed to parole-release sentencing control, is not that parole boards don't mean well or are corrupt, but that court proceedings are far superior to back end bureaucracy in providing transparency, rules of decision, the prospect of appeal, and fairness. The Reporter's blessings for all who participate in sentencing to *ignore* all purposes of sentencing other than proportional severity – including even pro-social functions of punitive impacts – profoundly devalues all of this, but it still at least permits attempts at persuasion and discourse because, unlike the "no response required" ethos of ALI and academia, the culture of courtrooms allows an advocate to expect at least some attempt to refute an argument offered into the mix. Here are the variations that seem most significant in the issues the Reporter serves us.

I. *Yes, MPCS should continue to recommend a determinative as opposed to a parole-board sentencing determination function.*

Much of the Reporter's comments on the failures of parole boards are bizarre, as he has excused front end of mainstream sentencing *from any measure of performance, related to any social purpose in deploying prison terms other than proportional severity – which he has also deprived of any content or connection to public purpose*. Since mainstream sentencing has no other measure, by what comparisons is it persuasive to argue that parole boards are failures? How successful have our judicial prison sentences been at serving public safety or public values? Without asking those questions, there can be no comparison with the performance of parole boards.[20] But the courtroom protections add a level of actual opportunity for involvement of these important purpose-related issues – reducing recidivism, misuse of prison, and serving the remaining public purposes of sentencing – into the discussion, and that is enough to entitle this component of "determinate" sentencing to prevail.

What examples should MPCS consult as bases for the new MPCS Scheme?

There is no ideal system out there to emulate on a whole-sale basis. There are pieces of wisdom to be accumulated from the enlightened sentencing commissions in such states as Virginia, Missouri, Illinois, Oregon, Washington, and others. The search should also be for what helps us make the best choices and arguments for redirection, not just "examples" that we can claim as proof that we're "right." Endnote 18 has a good set of resources for this kind of effort.

II. Prison-Release Mechanisms Within a Generally Determinate Structure

Overall, I'd argue that once we revisit the purposes and tactic choices that have so misdirected the MPCS effort, we could and should be a lot more flexible for some prison term reduction options than the Reporter's present emphasis on the fiction of some judicial front-end involvement that needs protection – when so few decisions actually have meaningful judicial input at all. In general, I'd agree that policy makers (through, with, or in spite of commission recommendations) have the right to deem certain types of crimes, constellations of aggravating circumstances, or even risk assessment results as absolutely or presumptively preclusive of any reduction or any substantial reduction. But for most crimes and offenders, meaningful reassessment in light of the purposes of sentencing [including proportional severity linked to social functions] and actual consideration of impact on any victims should authorize a much wider range of adjustment than the Reporter can envision – presumably because of his commitment to the empty vessel he's erected to limit sentencing as if it were a magic wand.

1. Good-Time Credits: Does the current draft of § 305.1 properly resolve questions of the kind and amount of good-time or earned-time credits that should be made available to prisoners?

No, §305.1 does not optimally resolve these questions.

I certainly agree that earned time and good time credits can be used as incentives for avoiding institution-disrupting behavior and encouraging positive participation. Allowing best practices to have a role in using assessments to understand which offenders will actually benefit [in the sense of reduction in risk of recidivism and otherwise] from the encouraged participation can justify meaningful eligibility restrictions, but also should widen the availability of earned reductions.[21] I've repeatedly urged him to consider Oregon's "alternative incarceration program" device for substantial reduction in long sentences if an inmate completes a challenging, intensive and substantial treatment program [certainly *not* based on the disproved assumption that "boot camp" improves offender risk even if disconnected from meaningful assessment and validated programming]. For some reason, he's not addressed this suggestion. I would suggest that the draft allow (but not require) policy choices to carve exceptions for some categories of crimes and risks that prevent expediting release of the most dangerous offenders in light of the public safety purpose. And I'd suggest allowing greater ranges of reduction when they serve the purposes of sentencing the MPCS should recognize – with due inclusion of any consideration of any real victim interest [which on occasion, by the way, *favors* early release].

The present formulation of these issues by the Reporter encourages an unfortunate alternative to rational, evidence-based consideration of how earned time and earnable credits best serve social purposes. The alternative is the contest for earned days and offender disqualification as if they were trophies in an ideological contest – a contest playing out in many states as these issues arise when budgetary realities require desperate searches for relief from the expense of unwisely allocated prison resources.

When we actually enter the judicial realm and address the *circumstances of individual cases*, the ideological contentiousness whether earned time should be capped at 20% vs. 30% to reduce sentences would vary tremendously with those circumstances. Consider two examples: 1) The offender's series of addiction –based thefts were prosecuted with enthusiastic support of the offender's family member who employed him and felt deeply betrayed – but who is now convinced by the offender's performance in prison as a model of recovery and active in inmate 12-step programs, *and wants him back now to resume his role in his family and begin making restitution.* Assume as well that assessments validate his success in rehabilitation and likely low risk of recidivism. 2) The offender's series of addiction-based thefts tragically damaged the businesses and lives they impacted, costing good citizens their chosen livelihood and causing persisting collateral damage to those victims and their children's ability to pursue higher education. Assume that assessments suggest the offender's compliance with "treatment" has been merely feigned, with no confidence of real improvement in overcoming addiction and related dysfunctions.

Shouldn't we encourage the individual and evidence-based analysis rather than the ideological contest to "win" 20% or 30%?

If this function otherwise resides with agencies other than court proceedings, I would also expressly allow some ultimate means of judicial review of the agency decision to disallow credits or reductions, in the sense that all agency decisions should ultimately be subject to at least a narrow scope of appellate judicial review.

2. *Sentence Modification Based on Age or Infirmity, or for Extraordinary and Compelling Reasons – Does § 305.7 as drafted make the best possible statement of extraordinary grounds for sentence modification that should be available to prisoners at any point during an imposed prison term prisoner's advanced age, physical or mental infirmity, or other extraordinary and compelling reasons warranting modification of sentence?*

No, §305.7 does not make the best possible statement *because it is woefully distorted by the errors in section 1.02(2) [the purposes provision of the MPCS] and the role to which the Reporter has given proportional severity without regard to any social function.* The section would make much more sense, and give judges a much more meaningful role, were the purposes of sentencing and the connection between "severity" and social purposes [including victims' interests] permitted into the analysis.

I am familiar with a California case that may well illustrate how the relevant circumstances should and should not relate to this sort of analysis. The young defendant had begun a promising and creative acting career in a television series. He had a serious, persistent, and potentially deadly lung disease. He was convicted of a brutal sexual assault committed while armed with a knife; as I recall, his victim was locked in a car trunk and badly injured – many circumstances suggested psychopathy on the defendant's part.

The defendant was sentenced to a many-years long prison sentence that no one successfully challenged as disproportionate to the blameworthiness of the offender and the harm he threatened and caused.

Over the many years the defendant has been a California inmate, the California Department of Corrections has repeatedly saved his life from his persistent illness by providing health care. The defendant has learned how to look "tough" and swagger to deter assaults by other prisoners, and he has also become an expert in Braille so as to translate books into versions that can be read by sight-impaired people.

In spite of the difficulties that we could also discuss about how well we can learn the precise answers to these questions, shouldn't these pieces be obvious:

- If the defendant's underlying psychopathy and any valid risk assessment analysis confirms that he remains a high risk of repeating his crime if released into the community (assuming his physical illness does not preclude him from doing so), no revisiting of his "blameworthiness" or "proportional severity" connected to his early promise in the arts or highly developed an pro-social Braille skills can justify his early release into the community

- If we can be reasonably secure in assigning him to a very low risk of similar recidivism, and if the victim has no legitimate need served by his continued confinement in a prison, it may make sense to structure a release to a lower level of supervision that monitors variations in

risk, encourages his pro-social contributions through his Braille skills, and does not effectively terminate his life by withdrawing the medical care that has sustained his life.

The role the Reporter would apparently give in such an analysis to "proportional severity" the sense of "blameworthiness" is – I submit – so far from what it ought to be as to illustrate how important it is to revisit that role to save MPCS as a useful effort.

A. *Should § 305.7 include a requirement that the department of corrections or other gatekeeper must recommend sentence modification before a petition can be heard by the courts?*

I expect that those concerned with tightening budgets for judicial departments would applaud a device to divert a potential flood of petitions that would require judicial determination, just as the expense of prisons is likely to fuel funders' interest in emptying beds occupied with no public benefit. We've been most innovative in erecting all sorts of insurmountable barriers to judicial relief in most cases seeking such routes as habeas corpus, post conviction relief, and motions for new trials – yet somehow some survived the post-trial revisions requiring resentencing due to reasons such as *Blakely* and any number of issues that can invalidate a sentence long after trial. My inclination, for what it's worth, is to allow judicial review of the administrative decision *not* to approve the offender – probably without such criminal-justice rights as appointed counsel.

I also feel compelled to suggest some attention to the risk that we'd be authorizing dumping prisoners who are incapable of presenting future risk to anyone into communities *because we don't want to continue to pay for their life-prolonging health care – with the full expectation that interrupting their receipt of health care will hasten their deaths.* This, and the alternative of shifting health care expenses to other agencies and communities, deserves our attention if we're making this kind of recommendation.

B. *Should the sentence modification authority in § 305.7 include the power to release a prisoner prior to expiration of a mandatory-minimum prison term?*

Of course it should, but this is the less useful question. The important question is how we achieve the credibility and persuasiveness to overcome ideological resistance to "erosion" of mandatory minimum sentences. The answer is the one I've already given – revisiting the purposes and tactics the Reporter has established as barriers to both credibility and persuasiveness.

We need to adopt public safety as a purpose for all sentencing, including imprisonment, and re-engage in the evidence-based analysis of what really works best for public safety, victims' interests, and the other purposes legitimately to be pursued in sentencing.

Announcing the result, drafting it in a model code, and marching off with the empty chalice of "proportional severity" disconnected from any social function, cannot compete with the proponents of mandatory minimums. This error has also woefully promoted tremendous uncertainty as to the core of the judicial sentencing function, contributing to the fallacy that sentencing performance should not be measured for success against standards of public safety or achievement of any other articulable sentencing purposes. Together, these mistakes have devalued the public perception of the judicial role in sentencing and fueled the public-safety arguments in favor of the mandatory minimum [and enhancement] sentencing overrides of guideline attempts to limit prison use.

We can do much better, but we'd better get on the rational side of the debate to participate in it.

3. "Second-Look" Mechanism for Long Prison Sentences? Is § 305.6 an appropriate occasion for innovative prescription in a model code? Have we achieved the best possible final product in current drafting?

Yes, this set of concerns is an appropriate occasion for innovative prescription; no, this is not yet the best final product in drafting.

As I've noted before, the distortion of the sentencing purposes provision, the tactical mistake of embracing as justification of any sentence the empty chalice of "proportional severity" unconnected to any utilitarian or other sentencing purpose, and the entirely fictitious role of judges in the vast majority of sentencing in which plea bargains and other practical restrictions *preclude* any meaningful judicial input, vastly distort the persuasiveness of the Reporter's (MCG's, Advisors' and Council's) arguments about most of this.

In most cases, it matters not at all that the original judge wouldn't hear the request for release in 15 years. There is no credibility to the argument we shouldn't expect the judge hearing the new request to have sufficient courage to resist any public outcry *if we trusted the original judge to have the courage to resist public outcry*.

Yes, we do need to consider the budgetary consequences for budget-strapped judiciaries before imposing an enormous new load of casework, though it's worth noting that almost every legislative session has this sort of impact on judiciaries.

The arguments about disparity are woefully inflated by the flaws in the consistency fallacy – see endnote 2.

The best argument for judicial involvement requires revision of sentencing purposes – which can best be responsibly and fairly addressed by the judicial context of representation, rules, review, and the assumption that issues raised need competent response – an assumption we retreat from as we enter the administrative and academic worlds.

I expect that the "compromise" of allowing a "judicial panel" as an alternative to a single judge" makes the proposal more attractive to a larger range of states.

III. Life-Sentences

Again, the Reporter's investment in the empty "proportional severity" chalice and refusal to acknowledge public safety as a purpose of mainstream sentencing profoundly distorts this analysis. I find this argument from Preliminary Draft No. 7 (2009) bizarre, not in the abstract, but in the context of the rest of the MPCS and the culture of sentencing in the real world:

> Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time-even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far distant future, are not supportable.

Of course, over long periods of time, our ability to achieve and detect risk reduction – "rehabilitation" – may well vary tremendously and strongly support release or at least reduction in security level with which we manage the higher risk offenders who otherwise should be in prison. However, the notion that "natural life sentences" "rest on the premise that an offender's *blameworthiness* cannot change substantially over time" represents, again, the Reporter's total

abandonment of the fundamental understanding of most thoughtful policy makers and members of the public *that the best justification for permanent incarceration is a high risk of recidivism insufficiently addressable by known mechanisms for reducing risk.* Yes, the nature and circumstances of the offender's offense of conviction must be sufficient to make an initial "natural life" sentence consistent with proportional severity as a matter of the "moral calculus of permanent incarceration."

Virginia's sentencing commission achieved the credibility to develop risk assessment instruments to divert 25% of offenders who would otherwise go to prison *by validating instruments to identify for enhanced sentences for offenders at likelihoods of horrible recidivism crimes at levels of 41%, 66%, 83%, and 100%*.[22] The Reporter's continued insistence upon diluting these realities by revisiting "blameworthiness" in the same context would surely baffle most members of the public – if the offender's crime was serious enough not to offend subconstitutional or constitutional limits on severity at the time of sentencing, *and if nothing changes the validity of the assignment of a risk of, say two out of three that he'd repeat his crime of relief*, exactly what audience should be weighing the possibility of his release because of "heroism" in prison or other good works?

Of course, if we've learned enough to be confident that his risk really has been sufficiently reduced by rehabilitation or profound disability or both to make release a rational choice, there ought to be a mechanism for considering that choice and for reasons I've stated already, I prefer the judicial context.

For what it's worth, the notion that we somehow look for examples of "good" in the offender 15 years after sentencing might make sense in evaluating his actual values and risk at the time we're newly considering whether to expose the community to the risk he represents. But the real world of sentencing is that we may see elements of "mitigation" in the circumstances of the crime or the factors that "drove" the offender to his acts, but we almost never cast wider nets for acts of heroism or other good acts as relevant to mitigation in sentencing. It may make more sense to relegate good behavior in prison to earned time issues than specifically to life sentence adjustments – particularly given my preference for opening up the ranges of credits once the purposes of sentencing are fully and responsibly involved in the analysis.

1. *Should the MPCS generally disapprove of the sanction of life prison terms without prospect of release, while endorsing the use of that sanction when it is the sole alternative to the death penalty?*

   Most important to me is not what answer we give but *how* we phrase the answer. Of course, the use of LWOP is most palatable if the alternative is the

death penalty.[23] I'd answer the question by endorsing LWOP when we know that permanent imprisonment is not disproportionally severe in light of the circumstances of the offense and offender *and* strongly supported by the purposes of sentencing [including the purposes of proportionality of sentencing].

I'd be happy with an LWOP endorsement that includes sentence reduction options in recognition of change in risk or other factors that are properly recognized under a revised purpose provision pursuing the prosocial functions of "public safety" and "proportional severity."

2. *Should current MPCS drafting be amended to expand the chances of release now afforded to life prisoners, and to prisoners serving terms of years so long as to be de facto life sentences?*

Yes, with the same qualifications.

IV. Needs and Risk Assessments of Offenders at Sentencing

As I've repeatedly asserted, the Reporter's persistent resistance to use of validated risk and need assessment to use prisons where most thoughtful policy makers and members of the public expect their best use to be – protecting people on the outside from the most dangerous offenders we can identify – is illogical, fatal to any hope of garnering the kind of consensus prerequisite to the leadership by any model code, and encouraging for the most dysfunctional use of prison as part of our arsenal of correctional resources. As noted, the success of this degradation of the use of prison to a mystical "proportional gravity" unconnected even to the purposes of punishment other than crime reduction, has discredited the judicial role, encouraged the promoters of enhanced sentencing schemes, and left the Reporter's camp with no standing, credibility, or content with which to resist the arguments that our rudderless approach to sentencing requires legislative overrides to serve public safety.

Part of the tragedy is that the MPCS approach to sentencing is so misdirected that the proponents of mandatory and minimum sentences and other enhancements have far stronger arguments for public safety than they would were we only to bring evidence-based sentencing to the table with the credibility of applying evidence, including risk and need assessment, to the higher end of crime and the allocation of prison resources. Virginia has shown us the way; the Reporter asks us not to follow.

1. *Should research-based risk and needs assessment be incorporated into sentencing guidelines and made an explicit part of the judicial sentencing process?*

   Yes. I've drafted legislation to this effect in Oregon,[24] resulting in a sentencing commission recommendation to add risk assessment to guidelines that failed in a follow up legislative session. Our commission's leadership will soon provide an advisory risk assessment instrument which 89.3% of responding judges said they'd expect to find useful in *all* sentencing.

2. *Is the MPCS draft correct to encourage the use of actuarial risk assessment at sentencing as a prison-diversion tool, while hesitating to endorse a similar use of risk assessment as a basis for enhanced penalties?*

   The MPCS draft is right to encourage risk assessment where it does so, but wrong, drastically, in discouraging risk assessment and rational use of prison for public safety, for all of the reasons stated.

   The Reporter laudably increasingly recognizes the improvement (and importance of validation) of risk assessment instruments in recent years. "Social-science research has firmly established the superiority of actuarial risk prediction over clinical or intuitive prediction (including projections of offender recidivism made by judges)"[25]

   But the Reporter persists in profound thinking errors about risk assessment.

   First, the notion that "When seeking to identify offenders who present a high probability of serious reoffending, existing technologies yield more 'false positives,' than 'true positives'"[26] is not science or logic, but ideological diversion from logic to slogans. If Virginia's instrument identifies, correctly, a sex offender as at a 17%, 41%, 66%, 83%, or 100% likelihood to reoffend *if we let him out*, which of those is a "false positive"? The correct answer is *none* – a false positive is a *false assessment of risk*, not an offender who doesn't commit a crime because we continue to incapacitate him – or even if we incarcerate him because the best we can expect is a 66% chance of recidivism given our best available tools by which to reduce his risk.[27]

   Second, the "war" between predicting future risk and "proportionality" so as to use prison to house the most dangerous is one on which the Reporter has chosen the wrong side. Not until we accept that the obviously highest value of prison is to protect those on the outside from the most dangerous of offenders can we expect to communicate with, much less persuade, well-intended policy makers and members of the public that we have anything to

offer to the allocation of prisons or to reduce their inappropriate or excessive use. Until we understand which side is correct, we are bound to failure – both as to avoiding overuse of prison and to attracting a consensus sufficient to provide leadership.

Third, the Reporter's apparent fear that risk assessment might involve jury rights is a) inconsistent with the best minds of ALI and the legal profession who recognize the jury as the best form of government of, by and for the people; b) no basis for abandoning risk assessment in allocating prison beds, given the long and successful experience of states like Oregon allowing offenders whose sentences may be enhanced by dangerous or sexually dangerous enhancement facts to have jury trials if they wish; c) so light in comparison with the public interest, the impact on credibility, and the value of the judicial function in sentencing as to have no effective weight as argument against this use of risk assessment; and d) completely inconsistent with the Reporter's recognition of the fairness, transparency, reviewability, and superiority of the judicial arena for resolving such issues.

Fourth, the Reporter's subtle suggestion that risk assessment accuracy is easier at the low end than at the high end of risk of serious harm is entirely contrary to the best research in the area. The suggestion is "projections of low risk are more often correct than to those in search of high-risk offenders, because the target population is much larger."[28] The truth to this is that vast numbers of first offenders at the lowest level of crime are not coming back no matter what we do – their lives are organized enough, their values sufficient, and their circumstances sufficiently supportive *that they are not going to recidivate no matter what we are likely to do with minimal sanctioning.* But the much more important knowledge about risk assessment *that assesses our potential impact on future criminal behavior* is that predictions of *high* risk are most likely to achieve validity precisely because we move into populations that exhibit the variables that are relatively unusual and demonstrably causally related to risk by standard statistical regression analysis.[29]

The Reporter's choices invoke Voltaire's enduring wisdom:

"Those who can make you believe absurdities can make you commit atrocities."[30]

Absurdities: that sentencing performance is sufficient if it does not offend abstract proportional severity, regardless of any actual connection to any social purpose to be achieved by sentencing; that prison allocation is socially and fiscally responsible if it merely offends no abstract proportional severity;

that proponents of rational sentencing should abandon evidence-based debate about the use of prisons.

Atrocities: the brutality of crimes including murders, rapes, sexual and physical assaults on adults and children *that more responsible insistence upon meaningful performance by sentencers would have prevented by best efforts*;[31] the persistent devaluation of the judicial role in mainstream sentencing by providing ambiguity instead of directing its focus; the brutality of prison sentences (sometimes including rapes and assaults *on* inmates, and sometimes increasing the harm they cause when they are released) imposed in service of no social purpose because we've abandoned engaging those who cause over-use of prison with evidence-based argument, and substituted for engagement the chalice of "proportionality" devoid of contents related to any social purpose.

I'd add depriving the MPCS of credibility with which to achieve a consensus with which to urge improvement via a model code, but I can't rate *that* as an atrocity in this context.

V. Sentencing Juveniles Convicted in Adult Court.

There's some irony in the Reporter's unusual tolerance for risk assessment instruments to *deprive* some younger offenders eligibility for the "specialized" presumption that youthful offenders are less "blameworthy" than older offenders, and should be "privileged" with emphasis of "utilitarian purposes of rehabilitation and reintegration." I do agree that in general, what we're learning about maturing of youth explains divergent behavior as less "blameworthy" in younger than in older offenders. In general, I have no objection to recognizing that we actually have more hope of rehabilitating more youthful offenders than older offenders.

The reality that we also must face is that the dysfunctions and disabilities that tragically distort the development of some youth on rare occasion presents the criminal justice system with some who are tremendously dangerous and unreliably susceptible to "rehabilitation" or "reintegration" notwithstanding their youth.

My primary concern with the Reporter's approach here is its support for the abandonment of public safety benefits for so much of mainstream sentencing – by allowing "blameworthiness" to excuse us from making best efforts at "rehabilitation" or "reintegration" with other offenders. Almost all of them will return to communities; he allows sentencing to ignore "rehabilitation" and "reintegration" efforts if it merely does not offend proportional severity.

Again, the Reporter's wand-waiving avoidance of mandatory minimum sentences is hardly self-executing, and crippled until and unless we regain credibility and participation in the evidence-based sentencing debate by revisiting purposes and tactics.

I agree with second-look and separate housing recommendations.

VI. *Post-Release Supervision Terms - Does the above outline for a new MPCS provision on the use and duration of post release supervision terms represent good public policy?*

In general, I am in agreement with the propositions the Reporter promotes – particularly once we've rescued sentencing purposes and prison use from the absurdities I've addressed throughout this paper. I agree that some sex offenders are properly subject to presumptive life-time supervision, and would argue that there are some murderers who are equally subject to such recognition in light of their actuarial risk of doing harm.

Colleagues, though they are rare and should not drive routine sentences, we have a small percentage of psychopathic offenders who have no internal restraint against deadly violence, and need our attention as a matter of public safety.

Yes, proportionality severity must be a cap; where it inserts a ceiling on available post-prison supervision will remain debatable. The credibility in such a debate depends in large part upon the success of revisiting purposes and tactics.

The one caution I'd suggest is *ex post facto* considerations that ultimately require that the exposure to the full potential range of post-prison supervision [which is life-long for murder in Oregon, for example] be part of the available sentence upon conviction for a crime committed under a statute with that range attached to a conviction. Regardless of the other implications, MPCS or any other source is likely not going to allow legislation or administrative extensions of supervision beyond those at least reserved upon conviction under authority of a statute in effect at the time of the crime.

1 *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. Cal. Interdisc. L. J. 67 (2007); *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 Whittier Law Review 295 (2007); *MPC--The Root of the Problem: Just Deserts and Risk Assessment*, 61 Fla L Rev 751 (2009); Comments on Preliminary Draft #7.

I'd argue, separately, that also critical to success is meaningful performance measures for assessing the impact of sentencing practices on achieving public safety and other purposes of sentencing.

I enthusiastically applaud the Reporter's promotion of "demographic impact statements" to accompany legislative proposals for new sentences or guidelines [along with fiscal impacts], and agree with his suggestion that innovations must make the MPCS project "worth doing." *Preliminary Draft No. 3* at 13. But three reasons preclude demographic impact statement proposals from justifying continuing MPCS on its current destructive course: It hardly takes a sentencing revision to prevail on such issues as demographic impact statements; the success in attracting the necessary consensus of states to provide leadership on anything is hardly demonstrated by *two state's* institution of such a statement and the consideration of following suit by a "handful of others" – particularly given the inclusion of such a recommendation by MPCS "from its earliest drafts" (*Preliminary Draft No. 3* at 13, n. 26); and what needs fixing is so very much broader than the demographic and budgetary bludgeoning misdirected sentencing inflicts on public safety and misallocation of prison resources.

2 In many areas of the law, consistency is itself improvement. Examples are those affecting commerce, probate, and legal fields whose predictability largely provides value to those reliant upon discernable and enforceable rules. Criminal law (as well as juvenile and family law) also affects issues of public safety and community well-being, and requires more than mere consistency to deliver optimal benefits to the communities we impact. The "consistency" delivered by guidelines is often achieved by ignoring differences that actually matter to success to *pretend* that we treat like alike, but one real advantage of guidelines is some restraint of the range and frequency of outliers. *See, e.g., Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Federal Sentencing Reporter 76, 77 & n. 7 (2003).

3 This is no small matter. I believe that prisons, in addition to their unnecessary cruelty, may even *produce more recidivist crime than they prevent by incapacitation*, as they've often become boot camps that teach inmates criminal values and techniques. Recidivism rates exceed 50% once the analysis includes misdemeanors as well as felonies. *See, e.g., Four Steps to Progress: A Reality Test for Assembly Bill 900,* 43 University of San Francisco Law Review 13, 14-16 & nn. 8-12 (2008). We've also created a strong set of interests economically motivated to resist any reduction in prison use or construction, sometimes referred to as the "prison industrial complex." *E.g.*, Eric Schlosser, *The Prison-Industrial Complex*, The Atlantic Monthly, p.63 (December 1998).

4 For example, while the Reporter attempts to ensure that neither public safety nor the social purposes of proportional severity *have any role in sentencing offenders to prison*, Oregon insists that the purpose of all sentencing includes "protection of society" (Or Const, Art I, §15). Virginia's Criminal Sentencing Commission achieved credibility for using risk assessment to divert offenders from prison by first establishing its viability to *enhance prison sentences* for the most dangerous sex offenders. Virginia's guidelines and risk assessment are now used to enhance sentences for the few most dangerous sex offenders and to divert the lower risk 25% offenders from prison. ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA, 13, 91 (January 2001) http://www.vcsc.state.va.us/sex_off_report.pdf; 2009 ANNUAL REPORT, 36, 40-41 http://www.vcsc.state.va.us/2009AnnualReport.pdf. Oregon has long had dangerous and sexually dangerous offender sentencing schemes to identify the relatively rare offenders who need to be incarcerated for enhanced periods to protect society; we've continued the laws since adopting guidelines, and have had no trouble accommodating jury trial rights and steadily improving risk analysis tools – notwithstanding the US Supreme Court's serpentine exclusion of *consecutive* sentencing from the *Blakely*

rationale for *fact-based enhanced* sentencing. *See, e.g., State v. Hopson*, 228 Or App 91, 206 P 3d 1206 (2009), and authorities cited.

It is not my claim that I've persuaded anyone, but that common sense and reality have captured states that are beyond the reach of the draft's present choices for consensus. Illinois has recently adopted legislation that I submit common sense endorses, and illustrates ALI's need to redirect the MPCS if it seeks success. 1009 Illinois Public Act 96-0711 - Sentencing Policy Advisory Council (SPAC) illustrates quite directly the fundamental error of the MPCS sentencing purposes choices – both as a tactic for achieving consensus and as a tactic for reducing misuse of prison. *Compare* the text of Public Act 96-0711 *with Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. Cal. Interdisc. L. J. 67, 72-83 (2007). PA 96-0711 directs the commission to report on how sentencing can be improved to pursue the purposes of sentencing, as well to address the obviously related economic issues. John J. Cullerton, Peter G. Baroni, Daniel S. Mayerfeld, Ryan J. Rohlfsen, Paul H. Tzur, *New Law Creates Sentencing Policy Advisory Council to Improve the Illinois Criminal Justice System*, 22 Federal Sentencing Reporter 109 (2009).

5 *Discussion Draft No. 3* at 2-3. I suspect that the Reporter attributes the failure of the guidelines movement to the US Supreme Court's decisions in cases like *Blakely v. Washington,* 542 U.S. 296 (2004), and the subsequent decisions of some states to avoid jury rights by making guidelines advisory rather than "mandatory" – following the model of *United States v. Booker*, 543 U.S. 220 (2005), in which the United States Supreme Court "solved" the inconvenience of jury trial rights by striking as unconstitutional federal statutes making guidelines "mandatory" so as to leave them advisory.

Recognizing a jury trial right when state law makes a finding of a fact necessary to increase the severity of available sentencing seems entirely appropriate to me. Although offenders often waive this jury right, I've watched juries at work with such issues for over 20 years [enhancement facts and even dangerous offender facts have been considered by juries long before *Blakely*], and I helped Oregon craft legislation to deal with *Blakely* jury issues. I find juries not only fully capable but illustrative of the highest form of government of, by and for the people that has ever existed on the planet. Juries seem remarkably hopeful of rehabilitation and probably far more resistant to retributivism than the Reporter fears. They seem to produce the best form of citizenship we get to see in real life. It is clear to me that the Reporter's celebration of transparency, rules of decision, prospect of appeal, and fairness at the front end of sentencing by courts collides with his disturbing antagonism to jury trial rights because of his laudable objective to reduce excessive use of prison and sentencing severity.

Does it not concern other ALI members – who I'd expect to be passionate promoters of the American jury as the crowning glory of democracy – that our Reporter is antagonistic to juries in this context?

But it simply doesn't matter whether we agree as to the proper role of juries in sentencing-related facts, or as to the the accuracy of the Reporter's explanation for the reversal of the guidelines tide. He is reporting that MPCS has not exceeded penetration beyond the one-third of guideline states, and he cannot claim consensus even with all guideline states. That is a report of failure that requires our attention.

My view of the history of sentencing from faith-based assumptions of "penitence," rehabilitation, and the "medical model," through the stampede arising from the 1974 Martin Martinson's overstatement that *nothing* works, the regrouping of the rehabilitationists into the guidelines movement, and the steady recovery from faith-based to evidence-based allocation of correctional resources among our partners largely external to sentencing, is accessible in *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. Cal. Interdisc. L. J. 67 (2007). Virtually all of my published work related to the MPCS and sentencing is accessible as well at http://www.smartsentencing.info/ArticlesonSSP.htm.

6 The Reporter notes that states that follow the MPCS path of guidelines and without parole board release authority have "experienced below-average prison *growth*." [Emphasis added]. We all tend to invoke correlation as causation when we like the connection, but I can't be sure whether the Reporter is making such a claim here. It may be that the same considerations that make guidelines attractive to

thoughtful state policy makers also lead to slower prison expansion; it may be that the guidelines themselves have some moderating impact on prison expansion. But what counts for the dimension of most importance here and now is that the MPCS has failed to *stop or reverse* prison growth, and that the MPCS has failed to attract a sufficient consensus of states to lead anyone anywhere. The real limitation on prison growth that is now consuming attention from so many states is the enormous budgetary imbalance that our nation-wide misallocation of prisons has inflicted. To have any hope of influence, we need to engage in *that* discussion, which requires that we tie sentencing benefits and costs to the social purposes of crime reduction [and, in a small minority of sentences, meaningful additional prosocial purposes]. We cannot expect to influence that debate by refusing to participate in it.

7 *Discussion Draft No. 3* at 15.

8 A complete account is at http://www.smartsentencing.info/MPC2007AM.htm. How to fix this mistake is suggested at *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. Cal. Interdisc. L. J. 67 (2007).

9 Http://www.smartsentencing.info/MPC2007AM.htm. For some reason, it took the Reporter years to recognize that I never suggested that "just deserts" or "limiting retributivism" or "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" had no proper function in sentencing. And I have always agreed that limiting retributivism should be a goal of the MPCS.

10 http://www.ali.org/doc/Reitz_Response.pdf. For the record, I've repeatedly asked the Reporter (with no response) why he deletes "specific deterrence" from his vocabulary – the function of deterring *the sentenced offender* from repeating crime because the offender seeks to avoid repeated punishment. "General deterrence" captures the function of using punishment of an offender to deter *other* potential offenders from committing crime. There are, of course, many important issues [and increasingly rich research and evidence] to help determine when and with which offenders either is or is not a rational or useful tactic, but they are surely both in the "arsenal."

11 The Reporter's assignment of "reasonably feasible" as prerequisite for pursuit of any purpose [including incapacitation] *other than* proportional severity remains at the core of his tactic to allow use of prison with no demonstration of feasibility in relation to any purpose – utilitarian or otherwise:

> §1.02(2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:
>
> (a) in decisions affecting the sentencing of individual offenders:
>
> (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
>
> (ii) *when reasonably feasible*, to achieve offender rehabilitation, general deterrence, *incapacitation of dangerous offenders*, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and
>
> (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii)
>
> [*emphasis added*]

The Reporter's resistance to use of even validated risk assessment to identify offenders whose incapacitation is required to achieve public safety is further proof that he continues to insist that prison allocation not be based on evidence, not be exposed to logical argument, and instead be entrusted to the obviously failing hopes that sentencing commission prescriptions would withstand legislative and ballot-

measure overrides which continue to swell prison populations and budgets – and leaves the MPCS with neither credibility nor argument with which to respond on the basis of public safety or best return on public safety expenditures. It is also strange that the Reporter seems to ignore the obvious "feasibility" of incapacitation in the sense of preventing crimes on the outside while the offender is inside prison – including ignoring evidence-based analysis of the net crime impact of incapacitation on the one hand and the *criminogenic* impact of imprisonment on many of the 97% of offenders who will be returned to their communities. *See, e.g.,* Evidence-Based Practice: Principles for Enhancing Correctional Results in Prisons, December 2005.

12 The motion as submitted is at http://www.smartsentencing.info/MHMMotionNo.1.pdf. If there are other legitimate purposes for this retributive function of sentence, they can be added; the issue is whether this is a function of sentences or an excuse from any responsibility for any pursuit of any purpose by those who create sentences. So far, the Reporter's insistence is that it function as an excuse – except, perhaps, his hope that mere language effectively supplies subconstitutional limits on severity. His *Draft* concedes that we haven't accomplished even that, and that we've failed to attract anything resembling a consensus sufficient to lead states toward sentencing improvement.

13 Probably the most prominent academics who have outlined the pro-social purposes of just deserts are Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U.L. Rev. 453-499 (1997). They identify the social purposes of desert to be essentially the same that I identify. Illogically, however, they insist that sentencing should not pursue utilitarian objectives. Only through a faith-based theory totally separated from the perceptions of the bulk of policy makers and citizens can it be proposed that sentencing can both enhance the legitimacy of authority and the law on the one hand and refuse on the other hand to pursue public safety with the most expensive resources allocated by sentencing decisions.

14 It needs to be said that judges and prosecutors overwhelmingly mean well. Prosecutors and judges are public servants who find pride and value in their roles. Prosecutors take pride in delivering justice in response to crimes, and *to* victims when crimes have victims. Judges want best outcomes – sometimes in spite of their statements suggesting outcomes are the responsibility of others. The overwhelming evidence of best intentions includes the transformative impact of a stint in treatment court upon the judge – an impact repeatedly noted in the judiciaries of many states; the obvious care of so many judges who handle dependency, delinquency, and family law matters – including their efforts to collaborate with agencies and social workers who help improve the chances that lives will succeed; and the common volunteer efforts of judges involved in organizations to serve families, children, and special needs people in our communities.

But no one wants to be blamed for bad outcomes that may have some alternate explanation. The fact that the Reporter would give us all a free pass from responsible best practices, coupled with plea bargaining and other realities that *preclude* routine meaningful attempts at best practices in mainstream sentencing, *ensures that we do not prevent all the new crimes best practices would prevent.* That some prosecutors insist that all available blame must reside with the criminal *changes not one iota that better attempts by us would prevent some crimes we made no responsible effort to prevent.* Blame, like love, is not diminished in its sharing – and I've yet to meet a prosecutor who would not blame me if my opposed release decision was promptly followed by a new crime. Causation is more complex as time increasingly separates the next crime from our sentencing decision – but that does not change the reality that the better effort we make now, the greater likelihood that we will prevent even that distant victimization.

15 I discuss the proper role of risk assessment and prison, and the ideological "false positive" distraction, later in this paper. Of course, I concede that the Reporter can argue that using low risk to divert offenders from prison logically acknowledges the use of higher risk to explain prison use. But it is overwhelmingly obvious that his baseline tactic is to ensure that commissions and similar sources of limited ranges of "proportional severity" based on categories of crime seriousness [with or without criminal history variables] be insulated from compromise by discussion of *any other measure of impact on utilitarian or*

non-utilitarian purposes, even ignoring the vast distinction between crimes with and without victims, the subset of incarcerations that actually deliver harm rather than benefit to victims, the issue whether increased incarceration increases or decreases the risk of recidivism by the defendant when [as almost all do] the defendant returns to the community, or exactly what incarceration is supposed to accomplish.

16 I understand why ALI expressly excuses reporters from any obligation to respond to any argument from any source – if for no other reason than allocation of reporters' time and resources. But this is not an excuse for ALI avoiding analysis; it cannot condone mere repetition of a position as a substitute for any basis on which to conclude that a tactical choice is likely to succeed. Creating an empty vessel designated "proportional severity" – expecting it to be populated by an aloof commission only with numbers that at least provide a range of somewhat predictable sentences for various levels of crimes (with or without variation for criminal history) – only gets us so far. It has repeatedly proven completely ineffective in resisting legislation and ballot measures elevating presumptive or mandatory sentences promoted by the fans of incarceration who always carry both just deserts *and* public safety flags. That the Reporter can ignore what happens in these debates ("Zimring's eraser"?) and find comfort within the Minnesota academia group has no bearing on the likely failure of his tactics in resisting over-incarceration; it offers no basis for hope that his drafting to evade, discard, or avoid mandatory minimum sentences will be adopted by states that actually make sentencing policy by legislative and ballot measure processes. No one can win these struggles by abandoning the stadium.

17 In his MPC *Preliminary Draft No. 3* (2004), the Reporter explained the necessity of addressing proportional severity in sentencing in this manner: "A sentencing theory provides a sound platform for the exercise of authority only if it gives structure to the thoughts and impulses that are commonly felt by responsible officials." I agree. But I submit that it is flatly absurd to contend that the thoughts and impulses commonly felt by responsible officials (and their constituents) do not include protecting people on the outside from dangerous offenders in prisons – as a predominate reason to fund and use prisons.

> Express pursuit of public safety is, of course, resonant with the policies of the many states that have adopted some version of the existing Model Penal Code—and probably with the populations of all jurisdictions. Although our submission to the reign of just deserts has promoted the corrosive fallacy that severity and safety are directly proportional, all students of public attitudes have found that—notwithstanding the perceptions of most policy-makers to the contrary—citizens are primarily supportive of public safety and rehabilitation, as opposed to punishment per se.
>
> *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. Cal. Interdisc. L. J. 67, 80 & authorities cites n. 40 (2007).

The public's correct insistence on a primary role of prisons to serve public safety is also obvious from the debates currently raging in legislatures and newspapers around the country whether devices such as "earned time" to shorten prison terms have sacrificed public safety – as evidenced by rapes and murders by newly released prisoners.

18 A refreshing review of the growing value of evidence-based practices in best allocation of correctional resources is the Crime and Justice Institute's EBP [Evidence Based Practices] Box Set Papers. One in particular (Evidence-Based Practice: Principles for Enhancing Correctional Results in Prisons, December 2005) is loaded with evidence and logic that *putting the wrong people in prison increases their overall criminal conduct when they can be more effectively (and economically) diverted from criminal careers with wiser sentencing.* Other good sources: The Center for Effective Public Policy; The Pretrial Justice Institute (among other wonderful innovations is using pretrial release processing to assess risk and need in a way to pass up the chain in the event of conviction, sentencing, and supervision in custody or on supervision instead of or after incarceration; "'Outcomes' under a risk reduction model are defined as

decreases in the rate or severity of reoffense by offenders, decreases in the harm caused to communities as a result of crime, increases in the level of satisfaction with the justice system by victims, and increases in the level of public confidence in the justice system." The Justice Management Institute; A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems [I've been on the National Advisory Committee related to this project].

19 Although the Reporter would otherwise enshrine a fictitious judicial proportional severity analysis in each sentence to shield against disrespectful revision, his especially iconic version of just deserts, lacking any connection to any social purpose that might be served by proportional severity, typically represents no meaningful judicial input whatever. First, 90-95% of sentences are plea bargained, and the judge moves the case by imposing the sentence as long as it is within lawful limits and agreed by the parties.

Second, in most guideline states, the range of available presumptive sentences – typically narrow, but even if wide – has no meaning, no matrix, no standard by which to check or assess. Instead, it is "opaque" in the sense of obscuring any purpose, any meaning, and any analysis. *See* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. Crim. L. & Criminology 1293, 1327–34 (2006). Prof. Edward Rubin, described the Reporter's path as "a serious mistake, both for the Code and for the country . . because it would align the Code with the worst features of contemporary American penal practice. . . . [T]he revised Code will remain shackled to an approach that will seem primitive and inefficient, the artifact of an abandoned theory." Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev 17, 17-18 (2003).

Third, an enormous proportion of sentences, including prison sentences, have no victims at all [the drug wars having fueled billions of dollars of criminal justice activities and prison construction, while inadvertently tremendously improving the profitability of drug trafficking [and even the potency of narcotic and marijuana crops]. Is no one else bothered by the treatment of "proportionate severity" as if it is precisely the same exercise whether or not there is a victim affected by the crime? I submit that this approach undermines the substance of the Reporter's concern with victim interests as well.

20 In our local jurisdiction, the parole and probation officers work with the same offenders – if released to "post prison supervision," after an initial or a probation-revocation sentence, our increasingly educated, competent, and directed colleagues in corrections are steadily improving their ability to use a wide range of assessments to make the most effective choices in allocating resources. We have entered a new and promising era of effective collaboration with corrections, probation, and even health and mental health workers in pre-trial release, sentencing and probation violation proceedings.

Unfortunately, because of the continued distorting impact of the role of just deserts freed of any responsibility to demonstrate any service of any social purpose, Oregon, too, misallocates prison by ignoring best practices in the 90-95% of cases controlled by plea bargains – as well as in the many more serious cases in which our ineffectiveness in persuading those who prefer prison and punishment to data has left sentencing judges with no choices to make. Even assuming that everyone in prison belongs there and that there is no one out who doesn't belong in [both assumptions are clearly wrong], our best research suggests that the terms are too long for one third, too short for another third, and about right for the remaining third of our inmates – a terribly expensive competitor for the resources that could divert many more from crime if those resources were available to corrections. 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. 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 about to publish a web-based risk assessment tool that 89.3% of responding judges said they'd appreciate having for all sentencing purposes.

21 Some of the best work in understanding how risk and need assessment can powerfully guide us in selecting which offenders to improve with which tactics is that of 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).

22 As in endnote 4, Virginia's guidelines and risk assessment are now used to enhance sentences for the few most dangerous sex offenders (with rates of recidivism varying from 8% to 100%) and to divert the lower risk 25% offenders from prison. ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA, 13, 91 (January 2001) http://www.vcsc.state.va.us/sex_off_report.pdf; 2009 ANNUAL REPORT, 36, 40-41 http://www.vcsc.state.va.us/2009AnnualReport.pdf.

23 In light of the Reporter's reference to the *Furman v. Georgia,* 408 U.S. 238 (1972), it may be worth noting that I coauthored a law review article arguing at exceptional length against capital punishment (coauthored with now Prof. David S. Weissbrodt of the University of Minnesota), *The Death Penalty Cases*, 56 California Law Review 1268 (1968). The article – though student work – was cited several times in *Furman*, and was also involved in temporarily successful support of Anthony G. Amsterdam and the NAACP Legal Defense Fund's nation-wide attempt to declare capital punishment unconstitutional when it reached California. *People v. Anderson*, 6 Cal 3d 628, 649-50 & n.36, 493 P2d 880, 895-96 & n.36 (1972). I argued with Anthony Amsterdam that his tactic of relying heavily on the currently declining numbers of actual executions (which seemed successful with the court) was extremely vulnerable to the pendulum cycles of such matters; I deeply regret how correct I was. *People v. Anderson* ruled capital punishment unconstitutional under California's version of cruel and unusual punishment. The people of California reversed that decision by ballot measure and legislation that overrode a veto. *See, e.g.*, *Ghent v. Superior Court* 90 Cal App 3d 944, 952,153 Cal Rptr 720, 726 (1979).

24 2005 Oregon Laws Ch 474 (SB 919) directed the Oregon Criminal Justice Commission to "conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission's sentencing guidelines and, if it is possible, the means of doing so." See endnote 20, *supra*. The CJC's 2007 response explained its pursuit of inserting risk assessment into our guidelines. I've been working with the CJC director Craig Prins and DOC's researcher Paul Bellatty to provide a version sufficiently intelligible to judicial users, and expect meeting soon with our Chief Justice to approve presentation of precisely such an instrument to judges and advocates in Oregon to make risk assessment an ingredient in the full range of sentencing occasions.

The Reporter's support of evidence based analysis as part of "judging the amenability of individual offenders to specific rehabilitative programs in confinement or in the community" is commendable. We [Multnomah County judges] introduced locally a requirement that presentence investigations include an analysis of what disposition is most likely to reduce the offender's criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment *in or out of custody*. In 2005, we persuaded the Oregon Legislature to extend that requirement to *all* presentence investigations in Oregon: 2005 Oregon Laws Ch 473 (SB 914).

Ironically, the number of PSIs was drastically reduced by the introduction of the guidelines in Oregon. Some 20 PSI writers were required in our county before guidelines; we now have four.

25 *Discussion Draft No 3* at 25.

26 *Id.* at 26.

27 See the full discussion at MPC –*The Root of the Problem: Just Deserts and Risk Assessment*, 61 Fla L Rev 751, 753-63 (2009).

28 *Discussion Draft No 3* at 25.

29 *See, e.g.,* ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA, 13, 91 (January 2001) http://www.vcsc.state.va.us/sex_off_report.pdf; Wesley G. Jennings, *Revisiting prediction models in policing: Identifying high-risk offenders,* 31 American Journal of Criminal Justice 35 (2006).

30 *Ceux qui peuvent vous faire croire à des absurdités peuvent vous faire commettre des atrocities*.

31 Of course I do not suggest that we can through best efforts prevent all future criminal behavior by those we sentence. I submit that we surely would be more effective in affecting future criminal conduct if we routinely insisted on best efforts to produce the best results in sentencing, and refused to accept proportional severity as sufficient performance by sentencers instead of merely a legitimate limitation on sentencing choices.