Reply to Reporter's on-line "Response"

April 21, 2007

Return to the Model Penal Code Issue Page

Most significantly, the Reporter again[1] completely avoids responding to the merits of any of the motions or arguments proposed in favor of the motions. Indeed, were *all* of the Reporter's contentions correct (I submit that none are), that circumstance would present no reason for rejecting any of the motions. The Reporter "asks only that members of the Institute give a fair reading" to his purposes provision. I concur in that request, but also ask for a fair reading of the motions and, most of all, a thoughtful consideration of the *merits* of this debate.

This reply[2] to the Reporter's Response will first address the Reporter's contentions that my objections are "flatly inaccurate" and "rest on mischaracterizations of the draft." Then I will respond to the assertion that my contentions have repeatedly "failed to win the support of more than a small minority."

The contentions advanced in the motions are correct, and flow from accurate characterizations of the Draft

The Reporter correctly identifies my position that the DRAFT has the following profound flaws:

- it encourages the routine and pervasive use of prison
- it enshrines retribution as the lodestar of criminal justice
- it avoids responsibility for serving any social function, and
- it eschews public safety

Rather than respond to the merits of the arguments of *how and why* the DRAFT produces

---

[1] After a lengthy telephone conversation with the Reporter early in this project, I sent him some questions and thoughts in an effort to elicit his analysis and his agreement or disagreement on the issues at stake. See *Letter to Professor Reitz* (October 4, 2003), available at http://ourworld.compuserve.com/homepages/SMMarcus/LttrToProfReitz10-03.pdf). The Reporter has exercised his option of not responding. American Law Institute, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 19 (2005), available at http://www.ali.org/ali/ALIStyleManual.pdf. At our one joint appearance, the 2004 Conference of the National Association of Sentencing Commissions in Santa Fe, New Mexico, the Reporter offered two contentions in apparent response to the criticisms I raised with respect to his *Third Draft*: he has a laudatory reputation; his draft had many pages. As I develop below, his written representations to the ALI Council mischaracterized my contentions by suggesting that I would allow utilitarian purposes to trump proportionality. See text accompanying notes 15-18, *infra*.

[2] In my world, a "reply" is the proponent's response to the opponent's arguments against the proponent's proposal. The Reporter and I apparently come to this debate from different traditions of discourse. As a practicing lawyer for 20 years and a judge for another 17, I am used to decision-making that values direct and persuasive logical discussion of the merits of each issue. I cannot dispute that reputation has some role in my world as well, but no successful advocate avoids responding to an opponent's arguments – unless, of course, that advocate cannot provide a response to the merits. I would hope that the American Law Institute, as a deliberative body, would insist on consideration of the merits of important issues. Surely, that is near the heart of law. I address why the Reporter has no legitimate claim to precedent on the issues that separate us later in this text.

these consequences, the Reporter simply deems them "flatly inaccurate," based on "mischaracterizations of the draft," and somehow refuted by the existence of the "known *mechanisms* for achieving public safety" within the *goals* of rehabilitation, deterrence, and incapacitation.[3]

Here is the relevant language of the latest version of the DRAFT[4] distributed as of this writing [this is a quote from the DRAFT, not a "characterization"]:

> **§ 1.02(2). Purposes; Principles of Construction.**
> **(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*]

It bears noting that although the language has varied over the years of drafting, what the Reporter has always meant by "when reasonably feasible" is that before purporting to pursue these purposes – rehabilitation, deterrence, incapacitation, restoration – we should "insist[ ] that there be, at a minimum, a realistic basis for thinking [that] they will succeed."[5] He has also always meant that in *all* cases, the purpose should be proportionate severity.

The arguments I have advanced from this language – and to which the Reporter has never directly responded – are not that the language *says* the things I identify as flaws, but that they necessarily follow. Although the arguments are developed in more detail in the motions I have proposed in draft form, here is the basic outline:

---

[3] That the list includes the "known mechanisms" of public safety is, ironically, a substantial point of agreement. The approach embraced by the present wording of the DRAFT has persistently encouraged the fallacy that sentencing pits rehabilitation *against* public safety. The Reporter (apparently) and I agree that what the DRAFT lists as *goals* are *all* potentially *means* for achieving public safety.

[4] References are now to TENTATIVE DRAFT NO. 1 (April 9, 2007), which is presumably the version which will be under consideration at the Annual Meeting.

[5] MODEL PENAL CODE: SENTENCING, COUNCIL DRAFT NO. 1, (American Law Institute, September 27, 2006), *Issues for the Council*, at xv.

Because proportionate severity is the only "purpose" that applies to all sentencing under the DRAFT, because that severity needs not be "reasonably feasible" to accomplish anything by any measure, and because we are not to pursue anything *other than* proportionate severity without passing the "reasonably feasible" hurdle, participants are effectively encouraged to rely on proportionate severity as the sole object and justification for any sentence. Participants risk measurement and assessment should they pursue any purpose other than severity. They are thereby discouraged from pursuing those other purposes – most significantly including public safety. Because rehabilitation, deterrence, incapacitation, and restoration are the only *means* identified to pursue any purpose, the DRAFT necessarily "encourages the routine and pervasive use of prison" (*i.e.*, incapacitation) [and the other means] in pursuit of proportionate severity as the *only* purpose. In other words, the guideline scheme proposed by the DRAFT presumes that we will continue our pervasive and routine use of prison;[6] it expressly encourages the promulgation of guidelines that pervasively and routinely distribute prison beds based on proportionate severity alone – even in the many situations in which no one contends that there is any realistic basis for achieving any purpose other than proportionate severity.

Because proportionate severity is retribution (however limited, and however named), because the DRAFT identifies proportionate severity as a purpose to be achieved in every sentence while screening only *other* purposes for "feasibility," and because the DRAFT structures the efforts of sentencing and appellate judges and sentencing commissions around this purpose in all cases, the DRAFT "enshrines retribution as the lodestar of criminal justice."

Because it is far more challenging to establish and articulate a "feasibility" for the pursuit of any objective *other than* proportionate severity (including social objectives which severity *can* serve[7]), and because the culture and tradition of criminal justice is so heavily characterized by "just deserts" (which is the same thing as proportionate severity), by directing the practice and focus of sentencing and appellate judges and sentencing commissions primarily to the purpose of proportionate severity, while giving them ubiquitous excuse for not pursuing *any* social purpose, the DRAFT "avoids responsibility for serving any social function."

Finally, because the DRAFT encourages that all *means* of sentencing be deployed in pursuit of proportionate severity as a purpose, while allowing the easy

---

[6] I share the Reporter's apparent interest in finding a means by which to combat the pervasive misuse of prison, as I have set forth in the motions. But it bears emphasis that the Reporter's primary mechanism is sentencing guidelines, which have as their primary function the distribution of prison beds according to ordered just deserts and resources – unless, of course, the DRAFT gets beyond the notion that sentences may properly be distributed in all cases according to proportional severity alone.

[7] Lest it be argued that proportionate severity *is* a social function *per se*, the Reporter apparently opposes Motion No. 1, which agrees that retribution *can be* a *mechanism by which to serve* social functions, but argues that it, too, should be subject to the requirement that it be imposed only when, to the extent, and in a form in which it is realistically likely of achieving any of the social functions that retribution can serve.

avoidance of public safety or any other purpose, and because this encouragement extends through the purposes provision to infect all other functions contemplated by the DRAFT, the DRAFT "eschews public safety."[8]

The Reporter comes closest to addressing the merits of the motions by reciting 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." As discussed in Motion No. 2, the change the Reporter *opposes* is this:

> **(ii) when reasonably feasible,[9] to ~~achieve~~ pursue public safety through offender rehabilitation, ~~general~~[10] deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community . . .**

That the DRAFT lists as *purposes* some sentencing elements that *can* serve as mechanisms for achieving public safety hardly means that the DRAFT sufficiently identifies public safety as a *purpose*. Were there any ambiguity, the rest of the purposes provision makes my point: these *purposes* are only to be pursued "when reasonably feasible," but they are the only *mechanisms* identified for pursuing *any* purpose of sentencing, and the only *other* purpose of sentencing the DRAFT articulates is proportionate severity.[11] *That* purpose is to be pursued in *all* sentencing, regardless of any realistic prospect of success. In other words, these "mechanisms" are to be employed in all sentencing, but need not pursue public safety or any purpose other than just deserts. We are therefore routinely to use these mechanisms *regardless* of their connection to public safety, as long as they deliver proportionate severity. Citing to their mere presence in the DRAFT, accordingly, is no logical response to the arguments just outlined or developed at greater length in the motions.

Importantly, I have asserted repeatedly my suspicion that the Reporter's unspoken agenda in resisting an express statement that we use incarceration *for the purpose* of achieving public safety is that he fears such a link would add to rather than resist mass incarceration. He has never commented on this assertion.

---

[8] "Eschew" means to avoid habitually, especially on moral or practical grounds.

[9] As discussed below and in the motions, I have no difficulty with the notion that we should only do that which is "appropriate" in the sense of reasonably likely of success – or even better, that which is based on evidence. Our point of disagreement is that I submit that this qualification should also apply to the employment of proportionate severity (or just deserts or retribution, however denominated) – *i.e.,* that it should only be pursued as a purpose when there is a sufficient basis upon which to believe its pursuit would actually serve the social functions associated with retribution. See Motion No. 1.

[10] Because he does not respond to the merits, the Reporter also fails to explain why this list should not extend to specific as well as to general deterrence – a minor but substantive point.

[11] §1.102(2)(2)(a)(i).

The Reporter properly advises caution when we try to predict future dangerousness when deciding who (within limits of proportionality) to incarcerate, but the implication that it is better to distribute years in prison based on abstract notions of just deserts than to engage in a cautious pursuit of risk assessment when allocating prison beds[12] (within limits of proportionality) is cruel to victims and offenders alike, irresponsible as a matter of management of public resources, and profoundly dangerous.

If my suspicion, that the Reporter's reticence to recognize "public safety" is based on his fear that admitting that purpose would increase the use of prison, is correct,[13] I share his goal of combating overuse and misuse of prison and jail, but for the reasons stated in the motions, I believe that

> [d]irectly addressing the efficacy of sentences to reduce criminal behavior is far more effective at combating unwarranted incarceration than endorsing retribution as the organizing purpose of all sentencing, while hoping that a sentencing commission can moderate punitivism. Eschewing public safety also offends the policies of most states and the rightful expectations of most citizens.

Clearly, the motions I present have nothing to do with a "mischaracterization" of the DRAFT, but rather with the implications of the DRAFT for sentencing law and policy. After all, the Reporter himself has repeatedly invoked "limiting retributivism"[14] as his organizing principle, and it is hardly surprising that his DRAFT has been criticized by other commentators as

---

[12] *See, e.g.,* TENTATIVE DRAFT NO. 1, *supra* note 4, at 34-35, at which the Reporter impliedly expresses his comfort with deploying prison primarily to inflict proportional severity without any "utilitarian" objective. *See also* Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 Fed Sent Rptr 227 (2006)

[13] I continue to believe that this is the Reporter's reasoning, but I cannot take his nonresponse as vindicating that belief.

[14] I have no problem with "limiting retributivism" as a principle by which to limit sanctions. My concern is when limited retribution is asserted as itself a sufficient accomplishment of sentencing, when our social responsibility is to employ dispositions within the limits of proportionality to achieve public safety and other legitimate objectives of sentencing. My concern is that the Reporter's formulation of purposes enables wholesale evasion of that responsibility.

> The concept of "just desert" sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles. [Norval Morris, MADNESS AND THE CRIMINAL LAW 199 (U. Chicago Press 1982)]

Norval Morris counseled that we would never achieve a "rational sentencing policy" until "Justitia . . . remove[s] that anachronistic bandage from her eyes and look[s] about at the developments in society," and until we learn to analyze criminals and their environment in a painstaking and objective exploitation of developing social sciences and correctional technology. Norval Morris and Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 138-44 (U. Chicago Press 1970).

wrongly embracing retribution.[15] If the Reporter is suggesting that I have *misread* the DRAFT and that my motions would change nothing in meaning or effect, surely the room for such a misreading is further support for the necessity of the motions.

The contentions advanced in the motions have repeatedly received warm endorsement and represent the mainstream of modern thought in corrections, criminology, and criminal justice

Avoiding the merits, the Reporter contends that the "suggestions" embodied in the motions have been advanced over the past several years to the Reporter, Advisers, Members Consultative Group, and the ALI Council, and that the arguments have failed to win the support of more than a small minority. Although I must concede that the *Reporter* unanimously disagrees with my suggestions,[16] there are persuasive reasons why this contention should fail to divert anyone from the merits of the motions.

Those familiar with Adviser and Consultative meetings are aware that they do not amount to referenda on ideas. Matters are discussed, the Reporter is free to take what he wants from the discussion, and another draft is produced. There are no votes of the Adviser or Consultative groups that I know of – or any other basis other than the Reporter's impression of how much support existed for his or for my position on any of these issues. For what it may be worth, it was *my* impression that my views were favorably received by many of those who attended the most recent Members Consultative Group meeting on this project. The major focus of the discussion was the response to *Blakely v. Washington*.[17]

The Reporter has consistently enabled, endorsed or acquiesced in a "misreading" of my arguments.[18] In all prior discussions – to the extent that I have been able to ascertain his position

---

[15] *E.g.*, James Q. Whitman, *A Plea Against Retributivism*, 7 Buffalo Criminal Law Review 85 (2003)[http://wings.buffalo.edu/law/bclc/bclrarticles/7/1/whitman.pdf]; Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Criminal Law Review 17 (2003) [http://wings.buffalo.edu/law/bclc/bclrarticles/7/1/rubin.pdf].

[16] Again, I've been unable in spite of my best efforts to achieve any certainty as to where we agree and disagree. See *Letter to Professor Reitz* (October 4, 2003), available at http://ourworld.compuserve.com/homepages/SMMarcus/LttrToProfReitz10-03.pdf). I assume that the Reporter's "small minority" is of those present. If he means that only a small fraction of Advisers, Consultative Members, and members of the ALI Council actually attend, then these occasions could not provide any more than a "small minority" of support to anyone's views, including the Reporter's.

[17] At the Members Consultative Group meeting and in advance of that meeting, I supported and I believe contributed to the Reporter's approach to the jury trial rights that *Blakely* recognized with respect to "sentencing enhancement facts." I contributed substantially to Oregon's version of that adjustment, 2005 Or SB 528.

[18] For example, *see* Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING: REPORT (April 11, 2003) at 41: "And no voice has been raised in favor of a pure utilitarianism, unbounded by moral limits upon penalties. [Fn50:] But see Michael H. Marcus, *Comments on the Model Penal Code: Sentencing, Preliminary Draft No. 1* (unpublished manuscript submitted
to ALI,February 21, 2003) (Judge Marcus would elevate the goal of public safety to the first order of sentencing theory)." [My *Comments* on PRELIMINARY DRAFT NO. 1 were subsequently published at 30 Am J Crim Law 135 (2003)]. See also text accompanying notes 16 and 17, *infra*.

– the Reporter has incorrectly suggested that my concern with public safety is such that I would allow it to trump proportionality – that I urge us to abandon the limits of proportionality to seek public safety. Now, for the first time that I know of, he concedes that we agree (as we always have) that proportionality should limit every sentence.[19] To whatever extent any actual or perceived opposition to my proposals was based upon the misreading that those proposals would allow us to exceed proportionality, that opposition was misplaced and provides no rational argument against these motions.

On the only prior occasion of anything approaching a vote on my suggestions, it was not my motions that were before the ALI Council. Rather, the Reporter proposed his own motions, apparently crafted to obtain endorsement for his position on issues in dispute (or guidance on issues on which he had no preference). As I pointed out in my written submissions to the Council,[20] the Reporter incorrectly presented as "responsive to the criticisms of Michael Marcus" a motion to remove the limitation of proportionality from the pursuit of utilitarian purposes – to allow "the various utilitarian purposes to trump proportionality."[21] It is hardly logical to cite rejection of a position that is contrary to mine as precedent against my position.

With respect to articulating the goal of public safety, the Reporter presented to the Council (and opposed) a motion to add goals of "public safety" *and* "offender reintegration." He then argued – as relevant to the present issues -- *only* that the terms might fall from common use,[22] that they would add to the length of the provision without adding meaning, and – as here – that the "mechanisms for the pursuit of public safety . . . are enumerated in the existing draft." As mentioned in my written Comments to the Council, "public safety" has been ubiquitous at least since the 19th century, and the *meaning* at stake is tremendously important for the reasons stated above: as long as the routine use of prisons and jail may properly be for "proportional severity" when there is no evidence that it furthers the goal of public safety, and as long as

---

[19] On the other hand, he continues to suggest that my emphasis on public safety would weaken the limitations imposed by proportionality. *See* TENTATIVE DRAFT NO. 1 (April 9, 2007), *supra note 4*, at 32. The suggestion is wrong and also ironic, since the Reporter opposes Motion No. 1, which would substantially increase limitations on severity by proscribing severity, even if proportional, if severity is not reasonably likely to accomplish something of value.

[20] *Comments on Model Penal Code: Sentencing, Council Draft No. 1* (Submitted to the 2006 ALI Council meeting of October, 2006)

[21] MODEL PENAL CODE: SENTENCING, COUNCIL DRAFT NO. 1, *supra* note 5, *Issues for the Council* at xiv-xv. As far as I can discern, the progression was something like this. At the last Members Consultative Group meeting, I repeated my concern for the implications of conditioning "utilitarian" objectives (all that seek crime reduction or other social ends) on "realistic prospects of success," while allowing just deserts to be pursued with no such limitation. The Reporter asserted that I must mean we should pursue utilitarian purposes even when there are no prospects of success. No, I replied, we should be equally rigorous and responsible with the deployment of all sentencing resources for all purposes. The Reporter then introduced this twist - if we are only to pursue proportionate severity in "appropriate cases," Marcus must mean that we are appropriately *excessively* severe in other than "appropriate cases." Of course, my point was quite to the contrary – that we have no business being severe unless and to the extent that severity serves some social purpose. Motion No. 1, "Limit Retribution to Occasions of Demonstrable Need and Effect," would correct all of this "confusion." Nothing the Reporter has offered so far presents any basis for rejecting it.

[22] "'Public safety' is a term of wide current usage – as was 'truth in sentencing' in the 1990s. It may not be equally in vogue a few years from now." *Id.*, at XIV.

"proportional severity" is the sole *pervasive* purpose of sentencing even without any basis to believe that it serves public safety or *even any of the social functions which retribution might serve*, the DRAFT's formulation

- encourages the routine and pervasive use of prison
- enshrines retribution as the lodestar of criminal justice
- avoids responsibility for serving any social function, and
- eschews public safety

I have not yet seen any written record of what the Council did with this discussion; I only know that it voted to forward the COUNCIL DRAFT to the Annual Meeting. Because I am not an officer, the Reporter, or a member of the Council, I was not permitted to attend, to hear, or to participate in the discussion at the meeting. I submit that the arguments about the number of words in the DRAFT and the sustainability of the term "public safety" are wholly without weight – particularly in light of the Reporter's inclusion of "reintegration" in the latest TENTATIVE DRAFT NO. 1.[23]

The remaining argument is critical, and stands at the vortex of the archaic and the enlightened strains of thinking in criminal justice. At least in his writing, the Reporter surely made no attempt to convey to the Council why I contend the issue is important and has great meaning. I doubt that the Reporter is suggesting that *because* the Council did not approve his disapproving articulation of my proposals, this critical argument should not be taken seriously by the members at the Annual Meeting. I doubt that the Reporter is suggesting that a forum in which only one side of an issue gets to participate orally, where only that side gets to frame issues, is a forum which is properly citeable as the source of persuasive authority. After all, such suggestions would be a disservice to the American Law Institute and the rule of law. They surely would have no claim to issue preclusion in any trial or appellate courtroom I know of.

In any event, nothing before the Council and nothing in the Reporter's Response even purports to address the merits of Motions 1 and 3. Motion No. 1, suggesting express functional limits to the role of retribution in addition to the limits of proportionality, and Motion No. 3, suggesting a rewrite of the revision around the principles of evidence-based harm reduction, have not been presented before to any of the prior "levels" mentioned.

On the other hand, if the Reporter is arguing that the arguments I advance have been rejected by most audiences, the contrary is certainly true. The principles embodied in the motions have been accepted by my judicial and criminal justice colleagues at the local level[24] and

---

[23] It bears noting, that "offender reintegration," as to which novelty of nomenclature had at least some plausibility, is now unashamedly back in TENTATIVE DRAFT NO. 1 – a good result, but also one which should wholly discredit any argument based on risks that the terms in question should be omitted for fear they might go out of fashion.

[24] Some years ago, I persuaded our local criminal justice partners to devote "public safety technology" bond funds to the construction of the world's only recidivism-based sentencing support tools, and convinced my colleagues to revise our local order for a presentence investigation to direct attention to what is most likely to work to reduce future criminal conduct. More recently, I have supported a collaboration between our probation department and judges to transform the probation officer into a court's resource for evidence-based best practices. See, e.g., *Sentencing Support Tools and Probation in Multnomah County* Executive Exchange (Spring

state-wide in Oregon,[25] and have also found their way into legislation in at least three sessions of the Oregon Legislature.[26] They've been found sufficiently worthy to be included in a wide variety of journals and publications,[27] and have been warmly received at a National Institute of Justice Technology Information Work Group[28] and at repeated conferences of the National Association of Sentencing Commissions[29] and of the National Center for State Courts' Court Technology Conferences.[30] Notably, they are included in NCSC's "FUTURE TRENDS FOR STATE COURTS."[31] They have been subject of invited presentations nationally and beyond.[32]

2004).

[25] By partial example, in response to my contentions, the Oregon Judicial Conference has adopted a resolution urging judges to "consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct" (1997 Or. Judicial Conf. Resolution #1); the present "Justice 2020 Vision" statement addresses using technology to produce better public safety results in sentencing (at page 5); and the 2001 Oregon Criminal Justice Commission Public Safety Plan made as its first recommendation: "Oregon should develop availability of offender-based data in order to track an offender through the criminal justice system and to facilitate data-driven pre-trial release, sentencing and correctional supervision decisions."

[26] The 1989 Oregon Legislature, largely as a result of my efforts, adopted a statute that requires the Department of Corrections to publish a directory of "rehabilitative programs" and to address their actual effectiveness in reducing criminal behavior. ORS 135.980 (1989 Or Laws ch 790 7(a)). The 1997 Oregon Legislature, largely as a result of my efforts, adopted 1997 HB 2229 (1997 Or Laws ch 433), amending a wide range of statutes to establishing reduction in future criminal conduct as the dominant measure of performance in corrections (adult and juvenile) and directing criminal justice agencies to collect, share, and manage data to allow us to see what seems to work on which offenders. The 2005 Oregon Legislature, largely as a result of my efforts, adopted two bills: 2005 SB 914 (2005 Or Laws ch 473), adopting the "what works" version of the presentence investigation order (see note 24, *supra*) state-wide, and 2005 SB 919 (2005 Or Laws ch 474), directing Oregon's 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." Of course, the Oregon Legislature has adopted other laws that embody the principles for which I advocate here, but these are the primary products by which I can claim vindication of my proposals.

[27] See articles collected at http://ourworld.compuserve.com/homepages/SMMarcus/ArticlesonSSP.htm.

[28] The NIJ's Court Technology Working Group met in Washington, D.C., in 2006, and adopted proposals to link records and sentencing support technologies as top priorities. Its next meeting is in April, 2007.

[29] I presented criticisms of the Reporter's Third Draft at the 2004 Conference in Santa Fe, NM, and a presentation on "*Focusing Sentencing on Public Safety, and the Role of Sentencing Commissions*" at a plenary session of the 2006 Conference in Philadelphia, PA.

[30] I presented on smart sentencing and sentencing support tools at "CTC7" in Baltimore, MD, and "CTC9" in Seattle, WA.

[31] My piece, *Smart Sentencing: Public Safety, Public Trust and Confidence Through Evidence-based Dispositions*, appears at page 56 of the National Center on State Court's FUTURE TRENDS IN STATE COURTS 2006, and is also available separately on NCSC's web site at http://www.ncsconline.org/WC/Publications/Trends/2006/SentenSmartTrends2006.pdf.

[32] *Pursuing Evidence-Based Harm Reduction in Sentencing, "Using the New Sentencing Tools,"* Missouri Sentencing Advisory Commission and Institute of Public Policy, University of Missouri School of Law, 2006; *Sentencing Support Technology: Sentencing for Public Safety*, Provincial Judges of Manitoba education session (2002); *IT as Intentional Transformation, 2002 Conference*, National Association for Justice Information Systems (2002); *Sentencing*

More significantly, the principles which the Reporter resists are precisely those of ordering sentencing around evidence-based best practices, clearly the overwhelming trend of modern thinking in corrections, criminology, and government in general.[33] Also of great importance is the reality that all responsible attempts to assess public opinion on the relevant questions have found that the public consistently places public safety (and rehabilitation) ahead of punishment as the proper function of sentencing.[34]

Support Technology and Accountability for Public Safety Outcomes, Second International Conference on Sentencing and Society, Strathclyde University, Glasgow UK (2002); Yale Law School Sentencing Seminar (Hon. Nancy Gertner, US District Judge) (2001).

[33] Perhaps the best introduction to this modern thinking is Brad Bogue, Nancy Campbell, Elyse Clawson, *et al.*, Crime and Justice Institute, *Implementing Evidence-based Practice in Community Corrections: the Principles of Effective Intervention* (National Institute of Justice 2004), available at http://www.nicic.org/pubs/2004/019342.pdf. As noted in that piece,

> [E]vidence-based practice implies that 1) there is a definable outcome(s); 2) it is measurable; and 3) it is defined according to practical realities (recidivism, victim satisfaction, etc.). Thus, while these three terms are often used interchangeably, EBP is more appropriate for outcome focused human service disciplines (Ratcliffe et al, 2000; Tilley & Laycock, 2001; AMA, 1992; Springer et al, 2003; McDonald, 2003).
> * * * *
> The current research on offender rehabilitation and behavioral change is now sufficient to enable corrections to make meaningful inferences regarding what works in our field to reduce recidivism and improve public safety. Based upon previous compilations of research findings and recommendations (Burrell, 2000; Carey, 2002; Currie, 1998; Corbett et al, 1999; Elliott et al, 2001; McGuire, 2002; Latessa et al, 2002; Sherman et al, 1998; Taxman & Byrne, 2001), there now exists a coherent framework of guiding principles. These principles are interdependent and each is supported by existing research.

See also, e.g., Edward J. Latessa, *The Challenge of Change: Correctional Programs and Evidence-based Practices*, 3 Criminology & Public Policy 547 (2004); Doris Layton MacKenzie, *Corrections and Sentencing in the 21st Century: Evidence-Based Corrections and Sentencing*, 81 The Prison Journal 299 (2001); Todd R. Clear, Scott H. Decker,Tony Fabelo, Darrel Stephens, David Weisburd, B. Diane Williams, Max Williams, *Evidence-Based Policies and Practices: Making the Case That Research Can Provide What Criminal Justice Policymakers Need*, Plenary Panel, National Institute of Justice Conference (2005), agenda available at http://www.ojp.usdoj.gov/nij/events/nij_conference/2005/agenda.pdf; Michael Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Exchange (Spring 2004), available at http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf; *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*,1 Ohio State Journal of Criminal Law 671 (2004), *and authorities cited*, available at http://moritzlaw.osu.edu/osjcl/Articles/Volume1_2/Commentaries/Marcus_1_2.pdf; *Justitia's Bandage: Blind Sentencing*, 1 Int'l J. Punishment & Sentencing 1 (2005), available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf; Crime & Justice Institute, EVIDENCE-BASED PRACTICES: A FRAMEWORK FOR SENTENCING POLICY (2006).

[34] Princeton Survey Research Associates International, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS (National Center for State Courts, July 2006), available at www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf ; US Department of Justice, National Institute of Corrections, "*Promoting Public Safety Using Effective Interventions*," Section 1 (February 2001), available at http://www.nicic.org/Library/016296, citing, *e.g.,* B.K. Applegate and F.T. Cullen, and B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 Prison Journal 237-58 (1997); Fairbank, Maslin, Maulin & Associates, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998); Peter D. Hart Research Associates, Inc., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM (Feb 2002) [for The Open Society Institute], available at

But the issues joined for the Annual Meeting are too important for resolution other than on the merits of the motions themselves. I join with the Reporter in asking that you give his DRAFT and arguments a fair and thoughtful reading. I also ask that you give a fair and thoughtful reading to *both* sides of this dispute.

Michael Marcus

Return to the Model Penal Code Issue Page http://www.smartsentencing.com

---

http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf; Belden, Russonello & Stewart, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION (Washington, DC 2001); Judith Green and Vincent Schiraldi, CUTTING CORRECTLY - NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 5-8, and authorities cited (Justice Policy Institute, February 7, 2002), available at http://www.justicepolicy.org/article.php?list=type&type=24.