

Commissions: Rise and Lead!

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<http://www.smartsentencing.com>¹

Because of their expertise, commissions are best equipped to lead policy makers to hone sentencing toward efficient pursuit of public objectives. Though not the worst of the harm sentencing fallacies spawn, budget stress is most likely to allow commissions to be heard.

- Though enabling legislation often illustrates legislators' need for advice, it surely authorizes commissions to lead policy makers out of the confusion that squanders correctional resources
- Proportional, "just" sentencing is not sufficient performance; sentencing must also effectively pursue public safety, public confidence, and other social purposes. It is critical to recognize that just deserts (however named) has legitimate roles in many sentences, then find ways to evaluate its significance for each relevant sentence, or it will always be a free pass for all to evade accountability for results – even in cases with no victim and no public interest except to stop often collateral damage
- Outside treatment courts, sentencing is now overwhelmingly driven by the fallacy that "just punishment" is all that is required of prosecutors and judges – resulting in the biggest costs of all: avoidable recidivism, misuse of often counterproductive, expensive prison resources, and the public misunderstanding that severity and crime reduction are directly proportional for all offenders;
- Plea bargains drive the vast bulk of sentencing and thus correctional resources; any promising solution must harness plea bargaining to the rational pursuit of social objectives, as it now largely ignores public safety and, often, gives lip service to victim interests
- One of the most critical roles of commissions is to gather and or conduct solidly unbiased and credible research on what works and on which offenders, and effectively disseminate relevant data. Credibility requires that we're willing to follow evidence based practices to imprisonment when justified by risk [and within constraints of law and resource] and uncertainty of meaningful risk reduction. Credibility gaps are fueled by enthusiastic promotion of studies showing treatment works far better on most offenders than traditional punishment. These studies often measure recidivism from entry in treatment vs. release from prison, unfairly ignoring the impact of incapacitation. They are usually silent about what to do with the remaining offenders who are not susceptible to treatment and have high risk of continued crime – often including violent crime.

- I am confident that smart sentencing can be proven far more effective in reducing criminal conduct and cost effective over an offender's potential career, and saving prison costs by ensuring that the offenders sent there are the ones for whom lengthy incapacitation is essential. The vast bulk of those in prison get out in time to commit new crimes at present; many make up for lost time with increased recidivism rates, while some age out of criminal behavior. At present, the misuse of prison sucks funding from programs in or instead of imprisonment that would do a better job of crime reduction for most than prison. But none of this can be politically feasible unless sound, unbiased, and credible tracking and research prove the necessary points.
- Valid variables for risk assessment must be exploited in serious search for what works or not on which offenders – and followed to treatment *or* to prison to be entitled to credibility
- Range of “discretion” within typical “gridblock” is potentially far too rigid to allow meaningful evidence based best practices *and* appropriate pursuit of the social purposes of just deserts even where there are actually interested victims
- Legislation and data is useless without enlisted champions and enforcers; Oregon has had the legislation it needs for years² but has not achieved rational allocation of correctional resources; our advances in treatment and specialty courts have largely been limited to the least significant crimes due to the prosecution's motivation to handle the high volume cases expeditiously. Multiple agencies have reported studies showing treatment far more effective in crime reduction than traditional punishment, with no real impact on criminal law strategies most view as ineffective and costly.

My disagreement with the ALI Reporter, who has been seeking in a years-long process to modify the 1962 Model Penal Code as to sentencing (*Model Penal Code: Sentencing*), began in comments I offered on the MPC:S project as early as 2003, though they reached formal publication in 2007:

Professor Reitz would direct sentencing commissions primarily to the task of defining just deserts [called “proportional severity”] with narrow ranges of months or years for sentences for crimes, and then to the tasks of predicting imprisonment trends and researching the effectiveness of sentencing to achieve proportional just deserts, and, optionally and occasionally, how well we accomplish deterrence, incapacitation, rehabilitation, and restorative justice.

I would direct sentencing commissions primarily to the task of increasing our knowledge of what works to reduce crime by which offenders—considering the full range of available dispositions, and the full extent of potential criminal careers—and to the task of encouraging sentencing behaviors that exploit

that knowledge to the end of crime reduction. I would direct commissions secondarily to the tasks that Professor Reitz deems primary.

*Limiting Retributivism: [Revisions to Model Penal Code Sentencing Provisions](#), 29 Whittier Law Review 295 (2007)*³

My “harm reduction code” [in [Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users](#), 17 S Cal Interdiscipl L J 68 (2007)]⁴ makes recommendations for the role of commissions which existing state laws variously approach – Illinois has the closest yet to the ideal commission legislation. Its most advanced provisions have to do with evidence-based sentencing and differences among offenders that affect their susceptibility to “rehabilitation.” What *all* such legislation ignores is the importance of probing how the needs of victims and the legitimate social purposes of “retribution” can be evaluated in competition (or coherence) with public safety purposes – as to which my “harm reduction code” remains a lone voice as far as I am aware. The vast majority of cases can exercise best efforts at crime reduction without needing adjustment for purposes of “just deserts.” There are relatively rare exceptions, such as *some* deaths caused by non-recidivist drunk drivers; “shaken baby” offenders; or intrafamilial, opportunistic sex offenders. Until and unless just deserts (under any of its many names) achieves some scrutiny, it easily spares the primary sentencing actors – prosecutors who make plea bargains and judges – any real accountability for the impact of their sentences on public safety and public values. Here are some excerpts from the “harm reduction code”:

§ 12 The Role of the Sentencing Commission

The sentencing commission exists primarily to recommend to the legislative authority and to sentencing judges strategies and policies for ensuring that sentencing serves the purposes prescribed by Section 1. The sentencing commission also shall monitor, and report to the legislative, judicial, and executive departments the performance of the criminal justice and correctional systems measured in light of those purposes and the allocation and utilization of criminal justice and correctional resources.

§ 12.1 Functions of the Sentencing Commission

The sentencing commission shall

- a. Conduct research, collect and assess data and research, and disseminate to sentencing judges and to policy-makers such research and data, concerning:
 - i. Which dispositions and correctional modalities best reduce recidivism for which offenders and offenses;

- ii. Which terms and conditions of incarceration, prisoner reintegration, and supervision best reduce recidivism for which offenders and offenses;
 - iii. Which instruments best assess risk and susceptibility to reformation of which offenders;
 - iv. Under what circumstances and for what crimes sanctions serve the purposes of general deterrence, and whether and when any interests in general deterrence are consistent with or require adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;
 - v. Under what circumstances and for what crimes sanctions promote public trust and confidence in the criminal justice system, and whether and when promoting public trust and confidence is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;
 - vi. Under what circumstances and for what crimes sanctions promote human dignity, compassion, and respect for the persons, property, and rights of others, and whether and when promoting such values is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;
 - vii. Under what circumstances and for what crimes sanctions prevent private retaliation and vigilantism, and whether and when preventing private retaliation and vigilantism is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct; and
 - viii. The nature, reliability, and validity of evidence and data relevant to Subsection 12.1(a)(i)–(viii).
- b. Recommend to the legislative authority the creation or modification of presumptive ranges and modalities of sentence for categories of crimes and offenders;
 - c. Recommend to the legislative authority the modification of maximum sentences for categories of crimes and offenders;
 - d. Recommend to the legislative and executive authority changes in the utilization and allocation of correctional resources;
 - e. Recommend to the legislative and judicial branches the adoption of strategies to further the purposes of sentencing prescribed by Section 1;
 - f. Collect, interpret, and report to the legislature, the judicial department, and the executive branch data concerning:
 - i. Sentencing patterns;
 - ii. The allocation and utilization of correctional and criminal justice resources;

- iii. The nature and efficiency of the processes and procedures of sentencing; and
 - iv. The impact of new or proposed legislation on sentencing purposes, processes, and correctional and criminal justice resources.
- g. Review new and proposed legislation regarding crimes and sentencing as relevant to the commission's functions under this subsection.

§ 1 Purposes of Sentencing

Within the context of criminal justice, the purposes of sentencing are to provide public safety and to promote public values.

§ 1.1 Means of Pursuing Public Safety

Sentencing pursues public safety by responsibly employing such means as:

- a. Incapacitation and reintegration of released offenders;
- b. Deterrence;
- c. Reformation;
- d. Alternative sanctions;
- e. Restorative justice;
- f. Therapeutic justice;
- g. Dispositions promoting values preclusive of crime; and
- h. Dispositions allocating limited correctional resources to reduce harm consistently with public priorities.

§ 1.2 Means of Promoting Public Values

Sentencing promotes public values by responsibly employing such means as:

- a. Imposing punishment that is not disproportionate to the moral culpability of the offender and the harm risked or occasioned by the crime;
- b. Denouncing criminal conduct;
- c. Promoting human worth and dignity;
- d. Responding to the interests of victims of crime;
- e. Restorative justice;
- f. Therapeutic justice;
- g. Promoting values preclusive of crime; and
- h. Pursuing dispositions that are consistent in severity with those imposed on like offenders sentenced for like crimes, with due regard to differences in offenders and offenses that correlate with differing susceptibility to reformation or need for incapacitation, and to variations in the availability of suitable correctional resources.

The table of contents to the "code" [it is in the midst of a longer article] provides some clue as to the topics covered:

A Harm Reduction Sentencing Code

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1 If you're seeing this document on-line and you're connected to the internet, you should be able to access the web contents cited. Most are also within the [articles](http://www.smartsentencing.info/ArticlesonSSP.htm) [<http://www.smartsentencing.info/ArticlesonSSP.htm>] or [legislation](http://www.smartsentencing.info/legandpolicy.htm) [<http://www.smartsentencing.info/legandpolicy.htm>] pages on <http://www.smartsentencing.com>. For hard copy readers, I will supply hidden links by these end notes.

2 The law and policy page of the sentencing support site, <http://www.smartsentencing.info/legandpolicy.htm> lists six pieces of legislation from 1989 through 2005 that have good content but little impact. I helped draft all but the 2001 and 2003 pieces listed – the latter's description of an "evidence based" program, unfortunately, seems to look at how a program resembles one for which there are good studies *without* ensuring that the program produces good results – in part because it ignores the characteristics of the cohort of its clients as compared with those connected with studies, and ignores the details of delivery of the treatment mechanisms. It requires that "the program Incorporates significant and relevant practices based on scientifically based research . . . and . . . [i]s cost effective."

3 <http://www.smartsentencing.info/WhittierLRart.pdf>

4 <http://www.smartsentencing.info/USCIDLJTips.pdf>