

# LIMITING RETRIBUTIVISM: REVISIONS TO MODEL PENAL CODE SENTENCING PROVISIONS

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My ongoing debate with Professor Reitz about revisions to the Model Penal Code regarding sentencing and sentencing commissions turns on the respective roles of crime reduction and just deserts.<sup>1</sup> As firmly established by those portions of his revision that were approved at the 2007 annual meeting of the American Law Institute,<sup>2</sup> Professor

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1. See Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 Am. J. Crim. L. 135, 136 (2003); Michael H. Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users* 5-6, 10-12, [http://works.bepress.com/michael\\_marcus/1/](http://works.bepress.com/michael_marcus/1/) (last accessed Dec. 31, 2007).

2. Model Penal Code: *Sentencing* (ALI tent. drft. no. 1, 2007) (approved in relevant part at the ALI Annual Meeting, May 16, 2007) (available at [http://extranet.ali.org/docs/mpc\\_2007.pdf](http://extranet.ali.org/docs/mpc_2007.pdf)) (last accessed Dec. 31, 2007) [hereinafter *Tentative Draft*]. Some portions, not here in issue, were not submitted for approval. Though contained in a draft denominated “tentative,” the Reporter and the ALI deem those sections approved to be beyond further debate absent unusual circumstances. The ALI process for promulgating and revising model codes is protracted and passes through a variety of stages. See The American Law Institute, *Overview: How the Institute works*, <http://www.ali.org/index.cfm?fuseaction=about.instituteworks> (last accessed Dec. 31, 2007). Professor Reitz’s project has provided many examples of the multiple iterations of drafts. These include (in addition to the *Tentative Draft*, the only

Reitz would have us pursue crime reduction only rarely. Instead, he would base all sentencing first and foremost on just deserts within limits of proportionality, and allow only on occasion that it may be “reasonably feasible” to pursue rehabilitation, deterrence, incapacitation, or restorative justice.

I would focus sentencing primarily on crime reduction within limits of proportionality, throughout the range of available sentencing dispositions, for all criminal behavior that is within our responsibility, and with due regard for available resources—and for other purposes of punishment when they are not adequately addressed by a sentence responsibly based on considerations of public safety alone. After all, every aspect of every sentence we impose—not just those we think of as rehabilitative—has an outcome in the sense that it does or does not correlate with reduced, delayed, or avoided recidivism.

Professor Reitz would direct sentencing commissions primarily to the task of defining just deserts, 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.

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version yet to be approved by the ALI membership) Model Penal Code: *Sentencing* (ALI plan for rev. 2002); Model Penal Code: *Sentencing* (ALI prelim. dft. no. 1, 2002); Model Penal Code: *Sentencing* (ALI rpt. 2003); Model Penal Code: *Sentencing* (ALI prelim. dft. no. 2, 2003); Model Penal Code: *Sentencing* (ALI prelim. dft. no. 3, 2004) [hereinafter *Third Draft*]; Model Penal Code: *Sentencing* (ALI prelim. dft. no. 4, 2005) [this draft was primarily devoted to responding to sentencing issues raised by *Blakely v. Wash.*, 542 U.S. 296 (2004)]; Model Penal Code: *Sentencing* (ALI discussion dft. 2006); Model Penal Code: *Sentencing* (ALI council dft. no. 1, 2006); Model Penal Code: *Sentencing* (ALI prelim. dft. no. 5, 2007) [hereinafter *Fifth Draft*]. Most references will be to the draft approved at the Annual Meeting (*Tentative Draft*) or to Preliminary Draft No. 3 (*Third Draft*) because they best represent the issues addressed by this paper. Several references to Preliminary Draft No. 5 (*Fifth Draft*) will be necessary for currency and completeness. References to the “Reitz revision” or simply “the revision” address the evolving project as a whole.

Professor Reitz would respond to the very real limitations of our knowledge about the crime reduction efficacy of sentencing by discouraging the pursuit of crime reduction, and by immunizing most sentencing from empirical accountability by assigning to it the quixotic mission of securing “limited” just deserts. His solution is to construct an elaborate process by which sentencing commissions prescribe guidelines based on “research” and consensus as to which deserts are just for what crimes and offenders, and to render guidelines-compliant proportional severity a sufficient accomplishment of sentencing “in all cases”—thereby allowing sentencing to avoid accountability for any demonstrable social purpose.

I would have us accept accountability for our public safety impact, make the best use of the best information we can access, focus our energies on improving our information about what works on which offenders, and adopt strategies to ensure the exploitation of that information in fashioning sentences. I would subject the public functions bundled within “just deserts” to the same rigor that we should apply to *all* purposes of sentencing.

Professor Reitz would respond to our misplaced faith that our deployment of prison beds effectively promotes public safety by using prison beds predominantly or exclusively for punishment *instead of* crime reduction. I would insist that we pursue best efforts to deploy all resources, including prison beds, based on best evidence-based efforts to serve public safety within limits of proportionality and resource.

I understand that we agree on many things, but this is no mere matter of emphasis. In Professor Reitz’s words, this is “more a chasm than a crevice.”<sup>3</sup> Unless the resulting code is ignored,<sup>4</sup> pursuing the path proposed by the revision would cause tremendous public harm, and accomplish almost<sup>5</sup> none of its stated or apparent purposes.

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3. *Third Draft, supra* n. 2, at 188.

4. The 1962 Model Penal Code was enormously successful in the sense that it was the basis of many states’ criminal code revisions. Such success is not inevitable. The ALI attempt at promoting a uniform residential landlord and tenant act had little impact. Instead, a dozen or so states adopted the *Uniform Residential Landlord and Tenant Act* promulgated by the National Conference of Commissioners on Uniform State Laws. Cornell U. L. Sch., Leg. Info. Inst., *Law by Source: Uniform Laws, Uniform Residential Landlord and Tenant Act*, <http://www.law.cornell.edu/uniform/vol7.html#lndtn> (Apr. 2003) (last accessed Dec. 31, 2007).

5. The Reitz revision would accomplish accommodation of the move towards sentencing guidelines in some American jurisdictions. The emergence of sentencing

## I. REALITY, FAITH, SCIENCE, AND THEORY

Most crime-related activities of notice in criminal justice result in a prosecution and, if successful (and accurately aimed), a conviction and sentence. But most sentences imposed for most crimes fail to prevent the offender from committing new crimes—often with new victims. And most offenders we sentence for the heinous crimes that drive public revolt against judicial discretion (producing elevated and mandatory sentences) have committed less serious crimes in the past, have been sentenced for those crimes, but have not been diverted from criminal careers by those sentences. As Professor Reitz notes, the 1962 Code, and the contemporary criminology it reflected, pursued rehabilitation essentially as a matter of faith—much as the emulators of Jeremy Bentham’s Panopticon had earlier assumed incarceration would improve offenders through penitence.<sup>6</sup> Tested by science, most efforts at rehabilitation were unproductive.<sup>7</sup> More recent science, however, has taught criminologists and correctional professionals a great deal about what works on which offenders and, if exploited, could greatly improve our allocation of correctional resources and our public safety

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guideline schemes was driven by concern for the more extreme examples of unbridled judicial discretion, and disenchantment with parole and indeterminate sentences that motivated calls for a revision to the 1962 Code. See e.g. Michael Tonry, *Sentencing Guidelines and the Model Penal Code*, 19 Rutgers L. J. 823, 823-24 (1987-1988). Given the *Third Draft’s* obvious and laudable disdain for the federal sentencing guidelines (e.g. *Third Draft*, *supra* n. 2, at 3, 12-13, 43-44, 112-13, 123, 132, 186-87, 188, 190, 206), Professor Reitz and I also apparently agree that accommodating guidelines is hardly sufficient in itself to justify a revision to the Code. Guidelines guide sentencing; their social utility depends both on how well they guide sentencing and to what end. They originate in part from an attempt to structure parole decisions so as best to accomplish public safety (Tonry, *supra* n. 10, at 831-33), and could be enlisted in an effort to encourage sentences productive of public safety. But the Reitz revision would have guidelines instead divert us from our public responsibility to reduce criminal behavior and thereby compound the very problems of punitiveness, mass incarceration and assaults on judicial discretion which Professor Reitz apparently seeks to address.

6. Am. Phil. Socy., *State Penitentiary for the Eastern District of Pennsylvania Records 1819-1892* [¶¶ 1-2], <http://www.amphilsoc.org/library/mole/s/statepen.pdf> (2001) (last accessed Dec. 31, 2007).

7. Lawrence W. Sherman et al., *Preventing Crime: What Works, What Doesn’t, What’s Promising*, <http://www.ncjrs.gov/works> (1997) (last accessed Dec. 31, 2007).

performance.<sup>8</sup> Instead of responding to the false optimism that *presumes* reformation from punishment and treatment with responsible empiricism, the Reitz revision replaces faith in penitence and treatment with an equally anti-empirical embrace of just deserts<sup>9</sup>—more specifically, Norval Morris’s “limiting retributivism,”<sup>10</sup> which is so prominent a talisman of Professor Reitz’s efforts as to have earned the status of the abbreviation “LR” in the *Third Draft*.<sup>11</sup> Morris’s theory remains the theoretical basis for the Reitz revision.<sup>12</sup> The revision would essentially codify the gulf separating sentencing from science, with the result that our crime reduction performance would remain essentially accidental, and therefore far from optimal. All of the Reporter’s criticisms of existing sentencing fallacies, except wide disparity, apply with equal force to the bulk of sentencing contemplated under the revision: “all cases” less the few categories that satisfy requirements for optional pursuit of “utilitarian objectives.”<sup>13</sup>

In addition, what is unspoken by the Reporter, but probably conceded, is that judges are generally neither informed, directed, nor skilled in the direction of accomplishing utilitarian purposes, and have little evidence or actual knowledge (as opposed to *a priori* philosophy, ideology, and impressionistic conclusions about what offenders “need”) to assist them in pursuing such objectives—so they either do not pursue them or pursue them with at best sporadic success and—more often than not—utterly predictable failure. The bulk of sentencing in practice now, and as contemplated by the revision, suffers from the same fatal flaw that infects the ineffective programs that could not withstand empirical examination. “Boot camp,” for example, was implemented because it seemed to make sense to those whose understanding of the complexities of criminal behavior rises

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8. See generally Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, <http://www.nicic.org/pubs/2001/017624.pdf> (last accessed Dec. 31, 2007).

9. See *infra* n. 17, at 17-18, 48-55 and accompanying text.

10. I have no quarrel with Norval Morris as far as I can tell; I agree that proportionality should provide at least the upper and, in serious cases, the lower level of “just punishment.” Nor does his concept of limiting retributivism justify a retreat from the challenge to pursue crime reduction through information-based sentencing *within* the limits of proportionality.

11. *Third Draft*, *supra* n. 2, at 192-93.

12. *Tentative Draft*, *supra* n. 2, at 30.

13. See *infra* nn. 14-23 and accompanying text.

only to the level of an unschooled conclusion that “what these people need is more discipline!” Without a basis in empiricism, we are making things up notwithstanding our best of intentions. Accordingly, we often fail, and succeed largely by accident. Giving us boundaries within which to engage in guesswork does not improve our success rate.

Nothing in the theory of “limiting retributivism” condones or compels such a result. Professor Reitz argues:

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. Morris’s theory of limiting retributivism was designed to capture these preexisting realities. To the degree that sentencing policy avoids warfare with the familiar process of reconciling multiple goals of punishment, it stands a realistic chance of being implemented—and of not being resisted—by official actors throughout the system. Morris’s theory achieves more than mere replication, however, in that it opens up motivations for inspection and provides the basic conceptual tools to allow decisionmakers to communicate, coordinate with one another, and review each other’s work.<sup>14</sup>

From this and other references to the work of Norval Morris, it is clear that the Reitz revision purports to combine Morris’s notion that proportionality must limit the severity (and often the leniency) of all sentences with the traditional “utilitarian” and more recent “restorative” objectives of sentencing:

It is a commonplace observation in sentencing theory that utilitarian goals often conflict with one another, or may conflict with retributive goals. Some theoreticians, in answer to this difficulty, have posited systems that respond primarily or exclusively to retributive purposes, or to particular utilitarian objectives. These approaches carry advantages of philosophical coherence, but the drafters of the revised Code concluded that they are too narrow to reflect the complexities and ambiguities of human response to criminal behavior. Section 1.02(2)(a) instead adopts a mixed or hybrid approach to sentencing purposes that allows different goals to operate in different settings. The organizing principle in § 1.02(2)(a) is that proportionality

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14. *Third Draft, supra* n. 2, at 9.

constraints always act as outer limits upon utilitarian or restorative impulses. Within the boundaries of proportionality, however, § 1.02(2)(a) gives no basis to prefer one utilitarian or restorative objective over another, except to provide that there must be a “realistic prospect for success” attached to whatever goal is pursued.

Subsection (5) invites the sentencing commission to provide further guidance to sentencing courts than contained in § 1.02(2)(a) on questions of multiple and conflicting purposes. It posits that there will be no single best hierarchy of considerations applicable in all criminal cases, but that the commission should craft provisions that speak to discrete categories of cases. For example, a commission might promulgate a guideline stating that, for serious violent offenses, the primary purposes to be weighed by sentencing courts should be retribution and incapacitation of the offender. Another guideline might provide that, for certain kinds of property crime, the leading considerations ought to be restitution to the crime victim and specific deterrence of the offender through the application of economic sanctions. For categories of cases at the lowest end of the gravity scale, the guidelines may direct the courts chiefly to restorative sentences that address the needs of victims, offenders, and their communities.

There is no reason to suppose that the operative goals of punishment should be the same from top to bottom of the criminal justice system, and much experience that dictates otherwise.<sup>15</sup>

I have not been alone in asserting that by contemplating pursuit of public safety and other “utilitarian” goals only when “reasonably feasible” while imposing “proportionate” “severity” “in all cases,”<sup>16</sup>

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15. *Id.* at 175-76.

16. In relevant part, the purposes section of the revision now reads:

§ 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

the revision has essentially abandoned public safety and reintroduced just deserts as the guiding principle of sentencing.<sup>17</sup> Responding to our criticisms, Professor Reitz has argued that his revision cannot be equated with “just deserts theory,” because his revision permits a role in crafting sentences to interests in uniformity, utilitarian objectives (when “reasonably feasible”), state sentencing commissions sensitive to local variation, and judicial discretion:

Between the extremes of just-deserts theory and unconstrained, or weakly constrained, utilitarianism, subsection (2)(a) charts a middle course that allows for effectuation of utilitarian purposes within, but not exceeding, the boundaries of proportionate sanctions.<sup>18</sup>

Most recently, the Reporter has claimed that “[t]he revised Model Penal Code endorses a framework of utilitarian purposes of [*sic*] within limits of proportionality in sentence severity.”<sup>19</sup>

For this proposition, he cites to his purposes provision, which makes proportional severity a *purpose* in “all cases,” while permitting (and never requiring) pursuit of “utilitarian purposes” only when “reasonably feasible.”<sup>20</sup> He allows that risk assessment, if and only if sufficiently validated, may be used to divert low risk offenders from prison and to lengthen the terms of the most violent offenders.<sup>21</sup> He allows (but does not require) that rehabilitative programs that pass

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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); . . . .

*Tentative Draft, supra n. 2, at 1.*

17. Edward Rubin, *Just Say No to Retribution*, 7 *Buff. Crim. L. Rev.* 17, 49-55 (2003). Professor Rubin, now Dean of Vanderbilt University Law School, described the Reitz revision 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.” *Id.* at 17-18.

18. *Tentative Draft, supra n. 2, at 30-32.*

19. *Fifth Draft, supra n. 2, at 3* (footnote omitted).

20. *Tentative Draft, supra n. 2, at 1.*

21. *Fifth Draft, supra n. 2, at 51-56.*



muster empirically may be used for some apparently narrow “layers” or cohorts of crime or offenders.<sup>22</sup>

He contemplates, however, that the great bulk of prison beds will be allocated by concepts of ordered just deserts rather than public safety or other utilitarian purposes, and successfully opposed holding punishment to any demonstrable social purpose.<sup>23</sup>

The main problems with all of this are that the Reitz revision overlooks:

(1) “the thoughts and impulses that are commonly felt by responsible officials”<sup>24</sup> (and by the public to which they are supposed to be accountable) are that within limits of proportionality we should be doing our best to reduce subsequent criminal behavior by those we sentence;

(2) the need for empirical validation for sentencing assumptions arises from the reality that with rare exception,<sup>25</sup> judges, however well intended, have no sufficient direction, training, data or information about what works on which offenders, and are encouraged by sentencing culture to rely on wildly diverse and often incorrect ideology, whim, sentencing folklore, and repeated guesswork to determine sentences; having sentencing commissions research such sources for a consensus and to publish guidelines of what deserts are “just” responds only to the breadth of disparity in sentencing while improving not at all public safety outcomes or any other legitimate social purpose;

(3) by allowing pursuit of “utilitarian” objectives only when “reasonably feasible” while prescribing proportionate severity in “all cases,” the *Third Draft* does not assist in selection among utilitarian objectives, and condones proportionate severity as a complete and sufficient performance measure for sentencing;

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22. Compare Preliminary Draft No. 1, *supra* n. 2, at 30; *Third Draft*, *supra* n. 2, at 175-76; *Fifth Draft*, *supra* n. 2, at 33.

23. See Model Penal Code § 1.02; Preliminary Draft No. 1, *supra* n. 2, at 30; *Third Draft*, *supra* n. 2, at 175-76; *Fifth Draft*, *supra* n. 2, at 33.

24. See *infra* n. 42 and accompanying text.

25. Of the relatively rare enclaves of evidence-based sentencing, the “treatment” or “helping” or “therapeutic” courts—drug courts, drunk driving courts, mental health courts, and domestic violence courts—are probably the most common, though not all are examples of evidence-based sentencing.

(4) any responsible approach to varying “layers” of crime would recognize crime reduction as a major purpose of virtually all sentencing, while acknowledging that the *means* by which to pursue public safety may well vary with the crime, the offender, and the circumstances;

(5) by making ordered just deserts the overarching purpose of sentencing rather than a limitation upon severity, the revision endorses the notion that punishment is a purpose regardless of any social utility of punishment, enables punitivism, and shields sentencing from accountability for best efforts at anything of value; and

(6) the teachings of Norval Morris undermine none of these propositions and endorse most.

That we should be attempting crime reduction with sentencing is obvious to the vast majority of public officials and citizens.<sup>26</sup> It is the expectation and preference of the great majority of all citizens who have been polled on the issue.<sup>27</sup> The vast majority of state laws, following the lead of the 1962 Model Penal Code, prominently address public safety in articulating the purposes of sentencing.<sup>28</sup> My

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26. Peter D. Hart Research Assocs., Inc., *Changing Public Attitudes Toward the Criminal Justice System* 1, [http://www.soros.org/initiatives/justice/articles\\_publications/publications/hartpoll\\_20020201](http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201) (last accessed Dec. 31, 2007).

27. *Id.*; Belden Russonello & Stewart, *Optimism, Pessimism, and Jailhouse Redemption: American Attitudes on Crime, Punishment, and Over-incarceration*, [http://www.prisonpolicy.org/scans/overincarceration\\_survey.pdf](http://www.prisonpolicy.org/scans/overincarceration_survey.pdf) (last accessed Dec. 31, 2007); Judith Greene & Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis* 5-8, [http://www.justicepolicy.org/images/upload/02-02\\_REP\\_CuttingCorrectly\\_AC.pdf](http://www.justicepolicy.org/images/upload/02-02_REP_CuttingCorrectly_AC.pdf) (Feb. 12, 2002) (last accessed Dec. 31, 2007); U.S. Dept. of J., Natl. Inst. of Correcs., *Promoting Public Safety Using Effective Interventions with Offenders* Section 1, <http://www.ncicic.org/Downloads/PDF/2000/016296.pdf> (Feb. 2001) (last accessed Dec. 31, 2007) [hereinafter *Effective Interventions*].

28. The existing purpose provision of the 1962 Model Penal Code provides:

- (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
  - (a) to prevent the commission of offenses;
  - (b) to promote the correction and rehabilitation of offenders;
  - (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
  - (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
  - (e) to differentiate among offenders with a view to a just individualization in their treatment;

encounters with colleagues within and outside of the United States have convinced me that most judges want to reduce crime with our sentences. Surely the vast majority of corrections<sup>29</sup> and probation<sup>30</sup> professionals agree.

Existing state guidelines have survived not because their authors' concern with ordered just deserts resonates with the "thoughts and feelings" of responsible officials, but because—however crudely—the guidelines do not offend the widely held notion that those who commit the worst crimes who have the worst records should be locked up longest *to protect us from their future crimes*. This basic structure of sentencing guidelines reflects an understanding that *of course* we should predict future dangerousness in distributing prison bed resources among offenders. Most guidelines do so—however crudely—based on the seriousness of the crime and the extent of the offender's prior record.<sup>31</sup> And when the public or policy-makers come to believe that the guidelines do not adequately protect society from crime, they have responded by adjusting sentences *understanding that they did so to improve crime reduction*.<sup>32</sup> What the revision should

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(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

Model Penal Code § 1.02 (ALI 1962).

29. See e.g. *Effective Interventions*, *supra* n. 27.

30. See e.g. Natl. Assoc. of Probation Execs., *Executive Exchange* 2-5, 14-16, 18 (Spring 2004).

31. Model Penal Code: *Sentencing* (ALI discussion dft. 2006), *supra* n. 2, at 124.

32. For example, the arguments in favor of Oregon's *Ballot Measure 11* mandatory minimum sentences stressed that increased incapacitation prevents crimes while offenders are on the inside, contributes to public safety through enhanced general deterrence, and makes "Oregon a safer place to live." Or. Secretary of St., *Oregon 1994 General Election Voters' Pamphlet: State of Oregon General Election November 8, 1994* 54-55 (Or. Secretary of St. 1994). Proponents cited a "Rand Corporation" study estimating that incapacitating persistent offenders saves far more than it costs—probably a reference to Peter W. Greenwood, et al., *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law* (Rand 1994). *Id.*; see also Ark. Code. Ann. § 16-90-804 (2003); Kan. Stat. Ann. § 21-4701 *et seq.* (2003); Fla. Stat. § 921.0016 (2003); N.C. Gen. Stat. § 15A-1340.16 (2003); 204

attempt is resonance with the obvious consensus that sentencing should protect the public within the limits of proportionality, and vast improvement in the means, precision and rigor with which we seek crime reduction. Only in the rarified air of academia<sup>33</sup> and among the ranks of sentencing guideline authors—and their endorsers within the American Law Institute—does the notion that sentencing should not pursue crime reduction escape the label “preposterous.”

The *Third Draft*'s suggestion that sentencing commissions distribute retribution, incapacitation, restitution, specific deterrence through fines, and restorative sentences according to “layers” of crime<sup>34</sup> strongly demonstrates the revision's denigration of public safety as an objective of sentencing. In a rational system—one consistent with public expectations that we at least attempt crime reduction—the issue is how best to achieve public safety under widely varying circumstances. Virtually all “punishments” extract some measure of “retribution”—even a fine. The proposed distribution of purposes to some extent belies adherence to “limiting retributivism,” which in Professor Reitz's interpretation prescribes some minimum measure of retribution for all crimes.<sup>35</sup> Incapacitation is a powerful means by which to reduce the criminal behavior of any offender while the offender is in custody. Dictates of proportionality and resource, and the prospect of increasing criminal behavior after release, may militate in favor of reserving this crime reduction device for the most dangerous of offenders. “Specific deterrence”<sup>36</sup> is potentially a

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Pa. Consol. Code Stat. § 303 *et seq.* (2004), reproduced following 42 Pa. Consol. Stat. Ann. §9721 (Purden Supp 2004).

33. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1456 (2001). On the day I was first appointed to the bench in 1990, I was serving on a panel at a conference on alternative dispute resolution and the criminal law. When the dean of the host law school, another member of the panel, articulated that we should not attempt crime reduction because seeking anything but punishment *per se* is a perversion of criminal sentencing, it is fair to say that my fellow panelists and our audience expressed something approaching astonished disbelief. *Id.* at 1455. See also Michael H. Marcus, *Thoughts on Strathclyde: Processing the Second Sentencing and Society Conference 5*, [http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts\\_on\\_Strathclyde.pdf](http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.pdf) (last accessed Dec. 31, 2007).

34. Preliminary Draft No. 1, *supra* n. 2, at 30.

35. *E.g.* Model Penal Code: *Sentencing* (ALI plan for rev. 2002), *supra* n. 2, at 1.

36. The *Third Draft* mentions specific deterrence (the function of being unpleasant enough to an offender to convince that offender not to repeat criminal conduct) only in

function of any unpleasant disposition, not just fines; restitution may be available across the spectrum of crime, but more likely of payment when the offender is employable and likely to stay or remain in the community.<sup>37</sup> And the notion that restorative sentences are appropriate only at the lowest levels of crime largely misses the point of restorative justice.<sup>38</sup>

Although recidivist property offenders are the most troublesome for the system because we shrink from their extended incapacitation (probably more as a matter of resources than of deontology), our

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the context of layers. *Third Draft, supra* n. 2, at 176. In resisting articulation of public safety as a sentencing purpose in the revision, Professor Reitz has also successfully prevented reference to specific deterrence in the purposes provision—which refers only to “general deterrence.” *Compare Tentative Draft, supra* n. 2, at 1; Michael Marcus, *Motion #2: Articulate “Public Safety” as a Purpose of Sentencing* 1-2, 4-5 n. 11, <http://www.ali.org/doc/MPC%20Motion-Marcus-April%2024-Articulate%20Public%20Safety.pdf> (Apr. 20, 2007). I gather that Professor Reitz would consider specific deterrence a utilitarian purpose to be pursued only if “reasonably likely of success.”

37. There is no good reason to preclude restitution in more serious crimes. An arsonist I sentenced to a substantial (and mandatory) prison term inherited property which could make a substantial dent in the amount he owes for restitution.

38. Restorative justice encompasses a wide range of devices, including victim-offender mediation, restitution, alternative community service, sentencing circles, victim impact panels, and neighborhood accountability boards. At its best, it restores economic and psychic losses of the victim (often with far greater success than traditional dispositions) while instilling values in the offender conducive of lawful behavior. Although restorative justice devices are most commonly employed for property crimes, their potential for benefit is proportional to the victim’s loss and the offender’s need for redirection—and therefore greater with more serious crimes. *See generally* U. of Minn. Ctr. for Restorative J., *About the Center* [¶ 2], <http://rjp.umn.edu/about.html> (last accessed Dec. 31, 2007). Of course, the risk of harm, and therefore the need for care, competence and preparation for such modalities as victim-offender mediation also increases with the severity of the crime.

While restorative justice at least receives a nod from the text of the proposed revisions, an equally important and emerging approach to crime reduction through the criminal justice system is the use of drug courts and similar applications of “therapeutic justice”—courts in which the process and the priorities are arranged to encourage offenders through treatment in hopes of reducing the sources of their criminal behaviors. *See generally* David B. Wexler, *International Network on Therapeutic Jurisprudence*, <http://www.law.arizona.edu/depts/upr-intj/> (last accessed Dec. 31, 2007). For a fairly wide range of sentencing occasions, either or both of these approaches, alone or in conjunction with traditional sentencing devices, may provide the best means by which we can achieve crime reduction. Both restorative and therapeutic justice deserve far greater attention in any modern revision to the sentencing provisions of the Model Penal Code than they receive in the revision.

purpose is still crime reduction however our range of dispositions may vary. Our challenge is to learn what works best on which cohort of offenders.

A major irony of Professor Reitz's reliance on Norval Morris is that his writings provide ample support for this critique of the revision:

If the evolution of criminal sanctions is to be adapted to the needs of community protection, it is essential that we evaluate different correctional methods in their application to different categories of offenders. . . . We must know which of our available methods work best with a range of classifications of types of criminal.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup> To invoke Morris to direct our energies primarily at elucidation and celebration of just deserts is a rejection rather than an implementation of his counsel. Instead, we should make every effort to make what works on which offenders matter in sentencing, and to insist that participants seek and rely upon the best information modern society can produce to govern the deployment of sentencing dispositions for public safety.

Professor Reitz successfully resisted a motion to unpack "proportionate severity" (just deserts) into its underlying social functions: "to serve a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate

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39. Norval Morris & Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 245 (U. Chi. Press 1970).

40. Norval Morris, *Madness and the Criminal Law* 199 (U. Chi. Press 1982) (footnote omitted).

41. See Morris & Hawkins, *supra* n. 39, at 138-39. See also Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 *Intl. J. Punishment & Senten.* 1, 2-4 (2005) (available at [http://www.sandstonepress.net/ijps/IJPS\\_sample.pdf](http://www.sandstonepress.net/ijps/IJPS_sample.pdf)) (last accessed Dec. 31, 2007).

authority, or to enhance respect for the persons, property, or rights of others.”<sup>42</sup> He argued that such an approach was quaintly and excessively “utilitarian.”<sup>43</sup> By defeating all attempts to hold punishment to some demonstrable purpose, he achieved a purposes provision which contemplates that the vast majority of sentencing will punish for no demonstrable social purpose whatsoever.<sup>44</sup> Norval Morris had this to say on this point:

This principle [of parsimony] is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty.<sup>45</sup>

In the final analysis, the revision’s invocation of “theory” lends neither coherence nor persuasion to its proposals. Having a theory may promote the consistency of an analysis; it may be helpful to a proposition’s successful promulgation and implementation. Invoking a theory that is popular in academic or political circles may gain adherents for a proposal.<sup>47</sup>

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42. Michael Marcus, *Motion #1: Limit Retribution to Occasions of Demonstrable Need and Effect* 1, 11, <http://www.ali.org/doc/MPC%20Motion-Marcus-April%2024-Limit%20Retribution.pdf> (Apr. 20, 2007).

43. *Id.* at 6.

44. *Id.* at 11.

45. Norval Morris, *The Future of Imprisonment* 61 (U. Chi. Press 1974) (as quoted in *Tentative Draft*, *supra* n. 2, at 35).

47. These benefits are, of course, not guaranteed. Particularly in academia, theories gain and lose followings, popularity, criticism, and even ridicule. (At the Second International Conference on Sentencing and Society (Glasgow 2002), graduate students strove to insert “managerialism” into as many titles and paragraphs as possible.) And, though a theory may help promulgate or implement a proposal by offering a basis upon which to extrapolate its application in new circumstances, even this benefit is challenged by complexity. A hybrid theory that combines disparate rules may be useless in a new application. For example, Professor Reitz’s interpretation of limiting retributivism asks a sentencer to choose a punishment within a range of moral equivalency in response to the blameworthiness of the offender and the despicability of the act. The goals deemed “utilitarian” are supposedly to be acted upon only if there is sufficient likelihood of success to pass some threshold. The utilitarian goals are themselves disparate and hardly provide a guide for behavior—general deterrence, incapacitation, and rehabilitation. The Reitz hybrid sentencing theory offers no means by which to prioritize them with respect to each other or with respect to punishment *per se*—or by which to determine whether a rehabilitation modality such as in-patient treatment qualifies for punishment as well as for utilitarian purposes.

The lines separating philosophy, ideology, and theory are elusive in the context of sentencing. Norval Morris and Paul Robinson both hold forth largely as philosophers—punishment *should* not seek utilitarian objectives for want of offending

But whether any proposal has merit ultimately depends on whether the objective is beneficial; a critical test of any associated theory is its efficacy as a tactic for achieving that objective. A theory can fail at several stages—it may pursue an inappropriate objective, it may be ineffective or even counterproductive in pursuit of an appropriate objective. A theory is particularly destructive when it is a useful tactic for implementing a dangerously ill-conceived objective.

Assuming, as I do, that Professor Reitz's objectives are to respond to the trend towards mass incarceration and away from judicial sentencing discretion, the revision and its hybrid theory of sentencing amounts to a poor tactic for achieving appropriate objectives. Because it is derived without adequate analysis of and response to the reasons for our trend towards mass incarceration, it cannot achieve its objectives. Because it settles for normalization of undirected, uninformed and unprioritized sentencing rather than insisting upon evidence-based, effective, and accountable pursuit of public safety, the revision cannot improve the outcomes that largely spawn attacks on judicial discretion. Because it would displace and avoid the objective of crime reduction, it would exacerbate the reasons for mass incarceration.

Were we instead to respond to our shortcomings with renewed vision and vigor—as have the hard and social sciences over the last century—we should vastly improve our ability to employ data, to deploy resources and to sentence offenders so as to reduce criminal behavior<sup>48</sup> unless we are otherwise achieving our best crime reduction

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the public, Paul H. Robinson, *supra* n. 33, at 1456; punishment *ought* to be within a bounded range for a given set of circumstances, Morris, *supra* n. 40, at 199. Neither purports to build on an empirical foundation. Both depend in some part on the invalid premise that the public follows all sentencing behaviors (not just the rare, publicized event).

I must confess that the foundation of my critique of the Reitz revision is itself theoretical. The critique is ultimately posited on the notion that we would achieve far better crime reduction by making a responsible effort to learn how to do so and to apply that learning than we now achieve without that effort and essentially by accident.

48. I would employ research and data to discover the dispositions and offender and offense characteristics that best correlate with crime reduction, and build sentencing support tools like those we have constructed in Multnomah County. The Reitz revision would research how well we predict resource use and guideline compliance, with any sentencing support tools presumably resembling those of New South Wales, Scotland, and Israel—constructed to encourage judges to do what other judges have done in similar circumstances, wholly without concern for public safety outcomes. *Compare*



potential by accident). The result would be fewer victimizations and reduction in the number of offenders we punish and incarcerate ineffectively and therefore repeatedly. We would also reduce our cruelty to offenders punished with no demonstrable purpose (or in only nominal pursuit of any purpose) and to the victims whose crimes would be avoided by smart sentencing. Such a course should also substantially expand public support<sup>49</sup> for resources productive of crime prevention and crime reduction.

Modern probation and correctional trends have created a substantial potential for partnership in pursuit of these objectives. Yet the revision would instead accelerate a retreat from crime reduction as a purpose of sentencing. Had medicine reacted to its failures by retreating to myth and ritual, it would provide an excellent analog. If adopted and implemented, the revision would continue to divert our attention from crime reduction, deny our accountability for public safety outcomes, and—quite simply—result in serious crimes against our citizens that smarter sentencing would have prevented.

This is not exaggeration but tautology: if a more concentrated and rigorous attempt to achieve crime reduction through sentencing would be more successful than our present sentencing behaviors to prevent rapes, murders, and assaults, avoiding the attempt—as encouraged by the revision—will allow rapes, murders, assaults, and thefts that we could and should prevent.<sup>50</sup>

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Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed. Senten. Rptr. 76, 76 (2003); *Comments, supra* n. 1, at 160 and authorities cited.

49. One of the dysfunctions of a penal system built on punishment to the detriment of crime reduction is that it hungrily and unfairly consumes resources that would be far more productive of public safety if aimed at crime prevention, such as parenting education, high school completion, and infant visitation programs. Another is the resulting gross inadequacy of funding for programs and devices for reducing the criminal behavior of offenders already in the system—both in prisons and in communities.

50. Resistance to this obvious reality among judges and prosecutors may be the main constituency for the Revision's refusal to accept accountability for outcomes. At a recent meeting of a National Institute of Justice Court Technology Working Group, the prosecutor representative strongly objected to the notion that many crimes are committed *because* we have irresponsibly sentenced the offender in the past. Of course, the offender's blame is paramount. But to assert the offender's culpability as an excuse for avoiding our own responsibility should be no more persuasive than it would be if invoked to shield failed law enforcement—or, by analogy, inadequate performance by any social agency or profession. It surely does not work dependably

Notwithstanding Professor Reitz's claim that the revision "continues the original Code's investment in utilitarian goals,"<sup>51</sup> and his wish "to avoid any suggestion that utilitarian concerns should be of little or no importance to the Code's sentencing scheme,"<sup>52</sup> it is abundantly clear that crime reduction is a disfavored member of the disfavored class of "utilitarian" purposes of sentencing articulated in section 1.02(2).<sup>53</sup> The revision disfavors utilitarian objectives because, unlike the favored objectives of limited just deserts, predictability, parsimony, enhanced judicial discretion, neutrality, and resource management, utilitarian objectives are legitimately pursued only when "reasonably feasible."<sup>54</sup> Only they are scrutinized for inadequate scientific support on grounds they alone pose an "empirical dilemma."<sup>55</sup> Meanwhile, it is the favored objectives, most importantly limited retribution, followed closely by a managerial concern for prison resources, that are overwhelmingly to dominate the deliberations of sentencing commissions and appellate courts. This purposes provision, heavily skewed away from public safety, is to guide every other function under the revision. Thus, for example, the commission is not primarily (or necessarily) charged with collecting and exploiting research about how we might more effectively protect the public from recidivism, but with assessing sentencing policies and practices "as measured against their purposes, see [section] 1.02(2)(a)."<sup>56</sup> Although the *Tentative Draft* offers a nod towards "evidence-based"<sup>57</sup> practices,

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for managers in the private sector whose subordinates fail to serve the company interest.

51. *Third Draft*, *supra* n. 2, at 7.

52. *Tentative Draft*, *supra* n. 2, at 31.

53. *Id.* at 1. References are to sections of the *Tentative Draft*, *supra* n. 2 unless otherwise indicated. The relevant text of the section is quoted at *supra* n. 16.

54. *Id.*

55. *Third Draft*, *supra* n. 2, at 11.

56. *Id.* at 16. Similarly, in the *Tentative Draft* as in the *Third Draft*, the articulation of sentencing objectives in §1.02(2)—prescribing proportionate severity in all cases, and permitting pursuit of other purposes only "when feasible"—would guide the functions of sentencing commissions generally (§6A.01(2)(e)), the initial (§6A.04(3)(a)) and ongoing (§6A.05(2)(e)) research functions of such commissions, sentencing guidelines (§6B.03, 6B.06), sentences for multiple offenses (§6B.08(1)(e)), judicial sentencing authority and discretion (§7.XX), and appellate review of individual sentencing decisions (§7.ZZ). *Tentative Draft*, *supra* n. 2, at 1, 50, 92, 112, 177-87, 211-30, 249, 264-91, 318-39.

57. *Tentative Draft*, *supra* n. 2, at 21.

it is obvious that empiricism is reserved as a filter against “infeasible” utilitarian purposes, but has no role in assuring that proportionate severity serves any social purpose:

Sentencing policies and practices are to be assessed for their effectiveness as measured against their purposes. The Code embraces the ideal of “evidence-based” criminal-justice interventions, where utilitarian sanctions are evaluated using high-quality research designs to test for successful implementation and results achieved.<sup>58</sup>

Crime reduction is disfavored *within* the class of utilitarian goals because of Professor Reitz’s apparent and entirely laudable distaste for the rise of mass incarceration. Distaste is the only logical explanation for the revision’s stubborn avoidance of the obvious efficacy of incarceration as a crime reduction device in individual cases *during the period of incarceration*. There is no “empirical dilemma,” after all, with respect to this utilitarian aspect of incapacitation.<sup>59</sup>

Lest there be any doubt of the intensity of the revision’s avoidance of crime reduction, section 6B.03 compounds the message. Even though section 1.02(2) already proscribes pursuit of “utilitarian purposes” unless they are “reasonably feasible,”<sup>60</sup> section 6B.03(3) reminds commissions:

Within the boundaries of severity permitted in subsection (2), the commission may tailor presumptive sentences for defined classes

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58. *Id.*

59. The empirical dilemma of incapacitation arises from the literature that questions the relationship between incarceration and crime rates and that supports the fear that some offenders’ recidivism increases after incarceration. Compare Morgan O. Reynolds, Natl. Ctr. for Policy Analysis, *Crime and Punishment in America: 1998*, 3, <http://www.ncpa.org/~ncpa/studies/s219.html#ex> (Sept. 1998) (last accessed Dec. 31, 2007); Jenni Gainsborough & Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s*, 3, <http://www.sentencingproject.org/pdfs/9039.pdf> (Sept. 2000) (last accessed Dec. 31, 2007); Paula Smith, Claire Goggin, & Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* 9, [http://www.sgc.gc.ca/publications/corrections/200201\\_Gendreau\\_e.pdf](http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf) (last accessed Dec. 31, 2007) (cited in Off. of the Sol. Gen. of Canada, *The Effects of Punishment on Recidivism* 2, [http://www.sgc.gc.ca/publications/corrections/pdf/200205\\_e.pdf](http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf) (May 2002) (last accessed Dec. 31, 2007); see also Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, 2, <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf> (June 2002) (last accessed Dec. 31, 2007).

60. Model Penal Code: *Sentencing* (ALI discussion dft. 2006), *supra* n. 2, at 24.

of cases to effectuate one or more of the utilitarian or restorative purposes in § 1.02(2)(a)(ii), provided there is realistic prospect for success in the realization of those purposes in ordinary cases of the kind governed by each presumptive sentence.<sup>61</sup>

It is surely not my purpose to derogate any call to cast off the faith-based assumptions that sentencing accomplishes any of its purported objectives. I profoundly agree that we have run our enormous, expensive, cruel and wasteful system of criminal justice with no meaningful attempt to evaluate its traditional claims of deterrence, rehabilitation, and incapacitation. My complaint is not with the notion that we should be realistic (and evidence-driven) in those pursuits. My central purpose is rather to insist that sentencing be driven by reliable information about what works to reduce crime. My despair over the revision is generated by the notion that we somehow advance anything of value by abandoning the pursuit of public safety in favor of a celebration of just deserts, however “limited”—particularly a

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61. Model Penal Code: *Sentencing* (ALI discussion dft. 2006), *supra* n. 2, at 132-33. The full text follows:

§ 6B.03. Purposes of Sentencing and Sentencing Guidelines.

- (1) In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2).
- (2) The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.
- (3) Within the boundaries of severity permitted in subsection (2), the commission may tailor presumptive sentences for defined classes of cases to effectuate one or more of the utilitarian or restorative purposes in § 1.02(2)(a)(ii), provided there is realistic prospect for success in the realization of those purposes in ordinary cases of the kind governed by each presumptive sentence.
- (4) The commission shall recognize that the best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.
- (5) The guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes.
- (6) The guidelines shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission consistent with this Section.

*Id.*

celebration wholly exempted from any empirical validation. Why should we expend these tremendous correctional and judicial resources, particularly in spite of our growing knowledge of their human costs,<sup>62</sup> for *any* purpose without “realistic prospect” of success? Anyone outside academia would be astonished to learn that taxes support prison inmates in custody for purposes exclusive of keeping them from committing crimes on the outside while they are inside. Even on its own terms, “success” of a just deserts model would be as measurable as general deterrence—why not require that we use prison beds only when and to the extent that research or data demonstrates that use necessary to achieve public satisfaction with the “justness” of sentences?

My quarrel has never been with the notion that sentencing should be empirically accountable. I proposed, and Professor Reitz successfully prevented, amendments to the *Tentative Draft* that would have rendered the social functions of “proportionate severity” subject to the same “reasonably feasible” standard as those purposes Professor Reitz deems “utilitarian.”<sup>63</sup> On the same occasion, Professor Reitz

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62. “No doubt those who still subscribe to the curious notion that by hurting, humiliating, and harassing offenders we can somehow morally improve them will see this as a defect in our approach. But until some evidence is adduced in support of this idea we are not disposed to take it seriously.” Morris & Hawkins, *supra* n. 39, at 144. See also *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15-19, 22-25 (Marc Mauer and Meda Chesney-Lind, eds., The New Press 2002).

63. *Motion #1*, *supra* n. 42, at 1. The argument against the motion was that it was excessively utilitarian and did not allow for a minimum sentence—not that such need and effect are incalculable, as the revision contemplates that commissions, in promulgating guidelines prescribing proportionate severity, rely on social research no less ambitious than that necessary to determine what sentence under what circumstances is effective “to serve 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.” *Id.* As for the contention that there must be *some* punishment in all cases of crime, if so that can only be because of one or more of the functions in this list of the purposes of punishment *other* than utilitarian purposes, or because of any utilitarian purpose [which the motion would retain and render co-equal in terms of the need for reasonable feasibility]. In other words, if a minimum sentence is needed for a legitimate purpose, the proposed amendment would prescribe a minimum sentence; only if that sentence served no purpose would no minimum be prescribed. As for excessive utilitarianism, punishing with *no* social benefit “defines cruelty” according to Norval Morris, and I agree. See Morris, *supra* n. 45, at 61.

successfully opposed another motion that would have listed “public safety” as a purpose of sentencing.<sup>64</sup>

While I object to immunizing any function of sentencing from accountability for its claims, I would focus our efforts first and foremost upon crime reduction within the limits of proportionality, resources, and responsibly set priorities. A rigorous approach to criminal sentencing as a mechanism for crime reduction would intelligently pursue the best data we can gather to tell us which offenders should receive which dispositions. That is how we should determine which offenders should receive alternative or community-based sentences, which should be incarcerated for how long and with what programs and devices, and which should be subject to what form and extent of post prison supervision. Changing the emphasis to spotlight public safety should allow us to allocate resources within communities, prisons and jails to reduce the criminality of those offenders who are indeed susceptible to such efforts.<sup>65</sup> But, apparently due to fear that acknowledging the crime reduction function of incapacitation would support or increase mass incarceration, the revision would rather have us use prison to pursue “just punishment” for its own sake—hoping to usurp the public’s role in evolving perceptions of proportionality by the creation of what amounts to a council of elders in the temple of denunciation.<sup>66</sup> Restoring caning—at least for those offenders who opt for caning as an alternative to prison—would be kinder to taxpayers and offenders, and perhaps no less productive of crime reduction than prison primarily or exclusively deployed with no intelligent attempt to use it to reduce crime.

Ironically, by their combination, those who fear that smart sentencing would increase incapacitation and those who fear that it would instead encourage leniency have effectively agreed that it is

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64. *Motion # 2, supra* n. 36, at 1.

65. Although I would readily bow to data supporting the notion that an individual sentence ought to be modified to achieve crime reduction by general deterrence rather than by specific deterrence, incapacitation, or rehabilitation, until such data is available, I continue to agree with Norval Morris and Gordon Hawkins:

[I]n regard to the general deterrence question, it is better in the present state of knowledge for the penal system to concentrate on the task of making the community safer by preventing the actual offender’s return to crime upon his release than to pursue the problematic preclusion of offenses by others.

Morris & Hawkins, *supra* n. 39, at 122.

66. Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice’s Weakest Link*, 1 Ohio St. J. of Crim. L. 671, 674 (2004).

preferable to use prison primarily for punishment and to ignore public safety, notwithstanding the resulting cruelty to those who are imprisoned and to their post-prison victims. For they have in effect agreed that it is better to tolerate avoidable crimes than to accept responsibility for crime reduction.

## II. THE FUTILITY OF EVADING RESPONSIBILITY FOR CRIME REDUCTION

Professor Reitz posits his work on the notion that the existing Code is based on an “insufficiently critical optimism about the effectiveness of rehabilitative and incapacitative sanctions,”<sup>67</sup> and, presumably, general deterrence. Intervening science has at least demonstrated that we can be a lot smarter about how to attempt crime reduction with various cohorts of offenders—and in identifying those who can be rendered safe only by incarceration.<sup>68</sup> And incapacitation is unavoidably effective as long as the offender is in custody.<sup>69</sup>

In his latest draft, Professor Reitz acknowledges that risk assessment *might* have a legitimate role at both ends of the spectrum of sentences contemplating prison—by identifying offenders at the low risk end who could be diverted from prison in favor of community-based treatment, and by increasing the length of sentences for high risk, violent offenders.<sup>70</sup> These applications of risk assessment are

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67. Model Penal Code: *Sentencing* (ALI rpt. 2003), *supra* n. 2, at 28.

68. See e.g. authorities cited in n. 58; see also *Archaic Sentencing Liturgy Sacrifices Public Safety*, *supra* n. 47, at [¶ 1, 3, 10, 12]. I am aware of and respond to the “false positive” critiques of risk assessment, e.g. *Comments*, *supra* n. 1, at 146-47; Michael H. Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 Fed. Senten. Rptr. 227, [¶ 5] (2006). In short, that we cannot predict with certainty is no excuse to avoid our best efforts to protect potential victims from a convicted dangerous offender; that an offender at *high risk* of reoffending may not actually reoffend is no excuse to avoid a sentence crafted to avoid that risk—within the limits of proportionality. The critics would neither increase precision nor decrease the proportion of false positives and false negatives measured by public safety—they would abandon public safety in favor of an ephemeral standard of just deserts. The critics universally ignore that the status quo they defend apportions prison beds according to just deserts *instead of* public safety. Oregon’s Department of Corrections has produced research that shows that compared with validated risk assessment, guidelines are wrong two times out of three. See Paul Bellatty, *Identifying Parolees and Probationers Who Will Not be Rearrested* (unpublished PowerPoint presentation 2007) (on file with author at Or. Dept. of Corrections).

69. Exceptions for cult and organized crime leaders prove the rule.

70. *Fifth Draft*, *supra* n. 2, at 51-56.

permitted only if accuracy is “reasonably feasible.”<sup>71</sup> Curiously, the Reporter struggles with “enormous concern” that risk assessment predicting future dangerousness is somehow ethically flawed because imperfect, yielding to its employment for especially dangerous, violent offenders, only under the weight of the “human suffering” brought about by their subsequent crimes, which “is both horrible and, in statistical terms, ineluctable[.]”<sup>72</sup>

It is difficult for some to countenance the extended incarceration of any human being for crimes they have not yet committed, even in the case of “true positives” who will in fact commit the predicted criminal acts if released. With false positives, extended incarceration is imposed for crimes they will *never* commit.<sup>73</sup>

Curiously, the Reporter contemplates in the same section of his latest draft that risk assessment—if it passes muster—may be used to determine which low risk offenders are diverted from prison and which are relegated to prison.<sup>74</sup> There is no suggestion that any of these offenders pose any particular risk of future violent crime; instead, the distinction would depend upon an assessment that those diverted from prison present “an unusually low risk of future offending.”<sup>75</sup> There is, of course, no logical escape from the proposition that this application of risk assessment results in the imprisonment of some low risk offenders based on assessments of their not-so-low risk of future offending.

In a rational system, the overwhelming justification for prison is incapacitation in service of public safety. A high risk offender is not imprisoned for a long time to punish him for future crimes as yet not committed, but because the crime for which his sentence was imposed was one for which a lengthy sentence is not disproportionate *and* because incapacitation is appropriate in light of the *risk* of harm at the hands of the offender in the future. Within the bounds of proportionality, an elevated risk of harm is sufficient justification for incapacitation. It offends no sense of fairness or ethics.

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71. *Id.* at 54.

72. *Id.*

73. *Id.*

74. *Id.* at 53-54.

75. *Id.*



What challenges ethics and fairness is what the Reporter would do with the bulk of those imprisoned without risk assessment. These are offenders who are between the low risk and high risk offenders for which risk assessment may be permitted if validated, or all offenders for whom prison is proportionate—because risk assessment fails to pass sufficient muster at all. For either enormous category of offenders, the revision would imprison them solely to impose proportional severity, with no requirement of any demonstrable social purpose, moderated only by guidelines erected merely to curb disparity of sentences imposed without direction, priority, or knowledge. As Professor Reitz argues in the course of advocating for the abolition of parole-board release discretion,

we should be wary of building important components of a sentencing system, especially rules and processes that apply indiscriminately to large numbers of prisoners, upon an absence of knowledge.<sup>76</sup>

Yet the revision does exactly this, by contemplating imprisonment for most or all more serious felony offenders *with no attempt whatsoever* to require that imprisonment actually serves any social purpose. Again, for Norval Morris, this “defines cruelty.”<sup>77</sup> Professor Reitz’s persistent resistance to including public safety as an articulated purpose of sentencing<sup>78</sup> and, specifically, to acknowledging the legitimacy of imprisonment to seek public safety through the device of incapacitation, undoubtedly flow from his laudable opposition to excessive incarceration.<sup>79</sup> But, as a device to moderate mass

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76. *Id.* at 12.

77. See Morris, *supra* n. 45, at 61.

78. See *Third Draft*, *supra* n. 2, at 4-5; *Tentative Draft*, *supra* n. 2, at 1; see also *Motion #2*, *supra* n. 36, at 1.

79. “[A] policy of incapacitation may push toward the longest prison term allowable within limits of proportionality.” *Fifth Draft*, *supra* n. 2, at 7.

The drafters hoped that rehabilitative successes would predominate in American sentencing and corrections, and that the nation’s use of incarceration would decline through the late twentieth century. Instead, incapacitative goals gained precedence during the 1970s, 1980s, and 1990s, and American imprisonment rates expanded by a factor of five. Indeterminate sentencing systems such as the one suggested in the original Code became far more oriented toward long-term confinement, and far less invested in offender change, than most criminal justice professionals had anticipated in 1962. For the past quarter century, the sentencing structures most often and most dramatically associated with explosive

incarceration, the revision's solution—an attempt at seizing control of the definition of proportionality through the establishment of a sentencing commission and related appellate review—is not much more likely of success than the mere presumption of the efficacy of rehabilitation it would replace.

Oregon, for example, had a system very similar to that proposed by the *Third Draft*—a Criminal Justice Council and Sentencing Guidelines Board that promulgated guidelines for all felonies and presumptive sentences subject to departure, with judicial review for improper departure.<sup>80</sup> On repeated occasion, the public and the legislature overrode Oregon's original version of the crime commission—both by replacing it with a new body (a more law-enforcement and prosecution-oriented body with roughly the same functions, the Criminal Justice Commission) and overriding even its sense of proportionality to create harsher and mandatory minimum sentences.<sup>81</sup> In the *Fifth Draft*, Professor Reitz concedes that

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growth in imprisonment rates have been in those states working with indeterminate sentencing regimes.

*Third Draft, supra* n. 2, at 6-7.

80. For example, the Oregon Criminal Justice Council was created by chapter 558 of the 1985 Oregon Laws and Resolutions. 1985 Or. Laws 1072. In Chapter 619 of the 1987 Oregon Laws and Resolutions, Section 2 directed the Council to develop sentencing guidelines, and Section 3 created the Sentencing Guidelines Board consisting of Council members who served by virtue of their office in the executive branch of government or by appointment to the Council by the governor. 1987 Or. Laws 1222. The resulting guidelines were adopted initially by chapter 790, section 87 of the 1989 Oregon Laws and Resolutions. 1989 Or. Laws 87.

81. Sections 2 and 3 of chapter 1, and section 82 of chapter 790 of the 1989 Oregon Laws and Resolutions required previous mandatory “gun” minimum sentences to trump guideline sentences, and required “determinate” sentences without reduction, leave, or parole for certain felonies if committed by offenders with similar prior convictions [“Denny Smith” sentences]. 1989 Or. Laws 1-3; 1989 Or. Laws 82. In 1995, Oregon voters adopted mandatory minimum sentences for a similar range of serious felonies. Or. Sen. 1, 68th Leg., Reg. Sess. § 47 (June 30, 1995). The legislature proceeded in the same vein in further codifying that ballot measure, found in chapter 421 of the 1995 Oregon Laws and Resolutions, 1995 Or. Laws 1, and by replacing the Criminal Justice Council and Sentencing Guidelines Board with the present Criminal Justice Commission, found in chapter 420 of the 1995 Oregon Laws and Resolutions, 1995 Or. Laws 1. In its required *Public Safety Plan*, the Commission's first recommendation is: “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.” Crim. J. Commn., *Report to the Governor and the Legislature: Public Safety Plan* 6, <http://www.ocjc.state.or.us/Public%20Safety%20Plan.pdf> (Mar. 2001) (last accessed Dec. 31, 2007).

guidelines are indeed susceptible to “Zimring’s eraser,” a simple change in prescribed sentencing ranges that can vastly increase the presumptive sentence for any given crime.<sup>82</sup>

There are good reasons why creating a carefully populated body (even with a token member of “the public”) to ponder and to promulgate just deserts is an anemic tactic—one that is not reasonably feasible—by which to moderate punitivism or mass incarceration.

First, using the secular church analogy,<sup>83</sup> the congregation does not attend services. Like most blue ribbon deliberative bodies, commission promulgations and appellate opinions may be followed by the rare interest groups that attend to such matters. But the public at large is totally unaware of the process and of the product of such activities—until and unless the media publicizes an outcome that generates outrage. Time and time again, the efforts of the best minds have proved inadequate to persuade the public that it should not be outraged by what it perceives as outrageous.

The vast majority of crimes are well below the public’s radar—except for the victims of those crimes. Ask any elected district attorney—the crime that matters is the crime that is committed against you or your loved ones or close friends. There *is* no public consensus about what sentences are appropriate for most of the 75 percent of crimes that are misdemeanors and the many lower level felonies—particularly none that is achieved with any knowledge of resource limitations, budgetary implications, or the efficacy of alternative sanctions. Yet most guidelines of the sort promoted by the revision consist of a set of graduated presumptive ranges hacked out along a continuum of minor to substantial sanctions with no actual connection whatever to what the public wants or needs for “justice.” Given the limitations of resource and the consequences of blind and ineffective punishment, this is profoundly irresponsible stewardship. The Model Penal Code should assail, not encourage, such irresponsibility.

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82. The reference is to Franklin E. Zimring, *A Consumer’s Guide to Sentencing Reform: Making the Punishment Fit the Crime*, 6 Hastings Ctr. Rpt. 13, 17 (1976): “[I]t takes only an eraser and pencil to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense.”

83. *Sentencing in the Temple of Denunciation*, *supra* n. 65, at 674. If sentencing is simply about denunciation and morality play, courts are essentially secular churches expected only to perform spiritual rituals of approval and opprobrium. *See also Archaic Sentencing Liturgy Sacrifices Public Safety*, *supra* n. 47, at [¶ 34].

Second, within the realm of crime that the public predictably notices, just deserts is simply not easily susceptible to manipulation by a commission. A good analogy is the law of negligence. We may have to call experts to explain what due care means among doctors, lawyers, architects or engineers, but we expect that jurors, as representatives of the public, come equipped to understand the standard of care applicable to the general public. We cannot expect to have much impact on what seems to the public to be an inadequate punishment by holding essentially invisible proceedings and publishing sentencing opinions in the official reports of the appellate courts.<sup>84</sup> Which deserts are just is, after all, a resiliently democratic question. The *Third Draft's* solution is oligarchical, and no match for what some may deem "populist punitivism."<sup>85</sup> On the other hand, it would be at least realistic to expect that the public might actually defer to expertise in crime reduction—should we develop it *and demonstrate success*.<sup>86</sup> And the most powerful and effective existing restraints on incapacitation—budgetary limits in the states—have as a natural ally data demonstrating that prison raises post-release recidivism for most low and medium risk cohorts, and for many common cohorts is not as effective as responsibly vetted and allocated programs and alternatives.<sup>87</sup> A public that already supports the notion that crime

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84. Most appellate opinions are even less likely to achieve public distribution than notices in the back pages of newspapers of "general distribution" we pretend afford notice when personal service cannot be had.

85. I first encountered the phrase at the Second International Conference on Sentencing and Society, held at the Strathclyde University in Glasgow, UK, in 2001. See *Thoughts on Strathclyde*, *supra* n. 33, at 1, 4. I think the phrase unfairly blames the public for what is in essence our failure to provide the public with good reason to trust us. The public expects and hopes that we pursue crime reduction; the revision—to the extent that it captures contemporary thinking of academia and practitioners—is good evidence of how thoroughly we betray that expectation and shirk that responsibility.

86. See Michael Marcus, *Sentence for Safety, Not for Message*, <http://ourworld.compuserve.com/homepages/SMMarcus/safetynotshow.html> (Oct. 1, 2003).

87. E.g. Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates, 1975-1999*, 15 *Crim. J. Policy Rev.* 212, 224, (June 2004); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, <http://www.doc.state.ok.us/offenders/ocjrc/96/Backfire.pdf> (last accessed Dec. 31, 2007); Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served* 8, <http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf> (Sept. 1993) (last accessed Dec. 31, 2007); Or. Dept. of Correcs., Community Correcs. Comm., *The Effectiveness of Community-Based Sanctions in Reducing Recidivism*,

prevention and rehabilitation are higher priorities than punishment *per se*—and is actually ahead of policy-makers in its support for effective rehabilitation<sup>88</sup>—is certainly amenable to the argument that prison ought to be reserved for offenders whose crime is best reduced through prison, *and that their money and safety are at risk when we send the wrong offenders to prison.*

In any event, sentencing guidelines, commissions, and appellate review are not reliable bulwarks against public outrage fanned by media attention to a heinous crime. At best, they may allow an avenue by which state budget restraints can temper punitivism—but it is the budget restraints and not the guidelines that restrict the use of prison.

The heart of the problem is that the revision identifies shortcomings of the existing Code—failure rigorously to assess the potential of rehabilitation and failure to predict the growth of incarceration rates—and proceeds to construct a solution without any attempt to examine the reasons the existing Code failed to prevent or to mediate mass incarceration. Had the revision not exempted its solutions from the “empirical dilemma” to which it relegates objectives it deems “utilitarian,” the revision would perhaps have conceded that there are within retribution some utilitarian objectives that are themselves at least as susceptible to scrutiny as that most ephemeral of the “utilitarian” objectives—general deterrence.<sup>89</sup>

Among the utilitarian functions of just deserts are reinforcing social values, obviating vigilantism, and fostering confidence in and respect for institutions of lawful authority—the government, law enforcement, criminal justice, and the judiciary.<sup>90</sup> When science attempts to quantify these functions, the results suggest that pursuing

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[http://www.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness\\_of\\_sanctions\\_version\\_2.pdf](http://www.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version_2.pdf) (Sept. 5, 2002).

88. See Peter D. Hart Research Assocs., Inc., *supra* n. 27; Belden Russonello & Stewart, *supra* n. 27, at 3-6; Greene & Schiraldi, *supra* n. 27, at 5-6; *Promoting Public Safety Using Effective Interventions*, *supra* n. 27, at 7-16.

89. Instead, the Reporter successfully resisted an amendment to unpack “proportionate severity” (just deserts) into its underlying social functions: “to serve 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.” See *supra* n. 42 and accompanying text; *Motion #1*, *supra* n. 42, at 1, 11.

90. It might be a productive exercise to attempt to articulate what is left of retribution *other* than the listed components. Perhaps it is full employment of criminal justice workers, including judges such as myself.

crime reduction would be more “reasonably likely of success” than the path proposed by the revision. The British Sentencing Advisory Council commissioned public opinion polls to assist in recommending sentencing guidelines to the Court of Appeal because it saw such polls as a better measure of what it takes to maintain “public confidence” than press coverage of notorious cases.<sup>91</sup> Unfortunately, the Council stacked the deck by focusing on public attitudes toward factors of aggravation and mitigation and particular variations in targeted crimes.<sup>92</sup> The United States Sentencing Commission adopted a similar approach in commissioning a study of how Americans would sentence federal crimes.<sup>93</sup> Asking the public to hold forth on what punishment “fits the crime” is like asking the public for an opinion on religion. Had either body asked what the public *wanted sentences to accomplish*, as had the British *Halliday Report*,<sup>94</sup> it would have found this:

When asked unprompted what the purpose of sentencing should be, the most common response is that it should aim to stop re-offending, reduce crime or create a safer community. Next most frequently mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation.<sup>95</sup>

Every attempt to determine the public’s priorities for criminal justice has produced a similar result in the United States: The public is far more interested in crime reduction than in retribution.<sup>96</sup>

The growth of incarceration rates and punitivism, and the loss of judicial sentencing discretion, are not results of the existing Code’s

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91. Senten. Advisory Panel, *Annual Report* 25, <http://www.sentencing-guidelines.gov.uk/docs/sentencingadvisorypanel2003.pdf> (last accessed Dec. 31, 2007). In the UK, appellate courts rather than legislative bodies promulgate sentencing guidelines, typically around groups of crimes. *Id.* at 2. These systems already incorporate appeals based on leniency or severity, essentially as promoted by the *Third Draft*. *Id.* at 59.

92. *Id.* at 24.

93. Peter H. Rossi & Richard A. Berk, *National Sample Survey: Public Opinion on Sentencing Federal Crimes: Executive Summary*, [http://www.ussc.gov/nss/jp\\_exsum.htm](http://www.ussc.gov/nss/jp_exsum.htm) (last accessed Dec. 31, 2007).

94. The Home Off., *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* 108 (Home Off. 2001).

95. *Id.* (footnote omitted).

96. See Peter D. Hart Research Assocs., Inc., *supra* n. 27, at “A Fundamentally Different Perspective;” Belden Russonello & Stewart, *supra* n. 27, at 4-6; Greene & Schiraldi, *supra* n. 27, at 5-6; *Promoting Public Safety Using Effective Interventions*, *supra* n. 27, at 7-16.

undue optimism, but of our failure to achieve acceptable crime reduction. We cannot hope to solve these problems by attempting to usurp public opinion and by diverting our attention from crime reduction to objectives for which our failures will be less obvious. After all, our crime reduction failures would not disappear from public view or concern. Were we actually to accept responsibility for crime reduction and prioritize achieving best efforts with the use of all of our correctional resources (in and out of custody), we would be far more likely of success. If the objective of the revision is to increase public respect for the courts and criminal justice, it had better come to terms with what the public actually wants of us, and with why we are found wanting in the public's assessment.

Moreover, the revision does more than avoid the problem, it compounds it. By celebrating, studying, and promulgating just deserts, the system proposed by the revision would continue to encourage the tragically false public perception that punishment *is* crime prevention. That we would clothe this effort in limiting retributivism to set ceilings and floors for punishment will not change the social impact of our efforts: since the public assumes and expects that we are pursuing public safety with sentences, it will understand (to whatever extent it notices through sporadic reports of heinous crimes) that we agree that punishment is the same thing as crime prevention. Would a rational people exclude public safety as a reason to respond to crime with punishment? It should come as no surprise whatever that when we fail to accomplish crime reduction—an outcome we presently ignore and the revision would have us resolutely and rigorously ignore—the public understands that the answer must be increasingly punitive sentences.

And the revision would not show any greater “reasonable likelihood of success” with respect to its other objectives. In pursuing prison resource management the revision ignores the simple circumstance that the most pervasive pressure on prison and jail beds is recidivism. Seven out of ten inmates have been incarcerated before, well over sixty percent of those released from prison will commit new crimes, and most of those we sentence have been sentenced before.<sup>97</sup>

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97. See *Comments on the Model Penal Code*, *supra* n. 1, at 138-39, and authorities cited. Note that departments of correction are fond of publishing recidivism rates, typically around 30 percent, based on new *felony* convictions—a measure grossly understating actual recidivism because misdemeanors account for roughly three-

Without improving our attention to and knowledge of what works on which offenders to reduce their recidivism, we cannot hope to solve prison resource problems. Surely it is not sufficient merely to gain the ability to predict the magnitude of those problems.

With respect to “parsimony,” it is critical to note that the revision is seeking a very different objective than are proponents of “least restrictive alternatives,” who seek the minimal imposition on offenders commensurate with public safety.<sup>98</sup> The thrust of the revision is to promote the use of prison primarily to accomplish punishment (albeit within limits of proportionality), and to promote sentences that predictably result in imprisonment whenever the council of elders (the sentencing commission) somehow deduces that the range of sentences for a given crime should include prison. If what the revision really seeks is a reduction in punishment, an increase in the use of alternative sanctions, and a general reduction in punitivism, it cannot have any “reasonable likelihood of success” until it provides leadership in separating crime reduction from punishment in the public understanding of what it is we do—or attempt to do. And achieving the least severe disposition consistent with crime reduction is—tautologically—parsimonious with respect to crime reduction. It would also reduce the total punishment we impose on offenders whose

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quarters of all crimes. Compare e.g. Robert Barnoski & Steve Aos, *The Effects of Parole on Recidivism: Juvenile Offenders Released From Washington State Institutions, Preliminary Findings* 13, <http://www.wsipp.wa.gov/rptfiles/parolerecid.pdf> (Mar. 2001) (last accessed Dec. 31, 2007) (typically measuring recidivism by conviction for a new felony); Or. Dept. of Correcs., *Recidivism of New Parolees and Probationers*, <http://www.oregon.gov/DOC/RESRCH/docs/Recid.pdf> (Nov. 1, 2007) (defining recidivism in terms of conviction for new felony); and Ky. Dept. of Correcs., *Recidivism 1999-2000*, 1-2, 5-7, <http://www.corrections.ky.gov/NR/rdonlyres/36F7C969-3842-4EF3-9C22-973D10EEFB02/7177/recidivism00.pdf> (last accessed Dec. 31, 2007) with U.S. Dept. of J., Office of J. Programs, Bureau of J. Statistics, *Criminal Offenders Statistics: Recidivism*, <http://www.ojp.gov/bjs/crimoff.htm#findings> (last accessed Dec. 31, 2007) (showing “[o]f the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years”) (emphasis added); and Michael Marcus, *Smarter Sentencing: On the Need to Consider Crime Reduction as a Goal* 19, [http://aja.ncsc.dni.us/courtrv/cr40\\_3and4/CR40-3Marcus.pdf](http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf) (2004) (last accessed Dec. 31, 2007) (showing almost 80% of new criminal filings as misdemeanors based on Multnomah County data).

98. E.g. Corp. for J. Mgt., *Agency Mission*, [http://www.partnersforcommunity.org/corporation\\_for\\_Justice\\_managemen.htm](http://www.partnersforcommunity.org/corporation_for_Justice_managemen.htm) (last accessed Dec. 31, 2007).



recidivism—and repeated punishment—would otherwise be more likely.

Guidelines are often defended as lending predictability, even-handedness and normalcy to sentencing. Their primary accomplishment is a substantial reduction in the range of disparity reflected in sentences imposed by judges with widely varying ideologies and philosophies guided only by an unprioritized shopping list of sentencing purposes. The authors of typical sentencing guidelines I have met during, and now more than a decade after, their work, acknowledge that guidelines were never intended to achieve crime reduction, but rather to tie prison resources to sentences based on crime seriousness and criminal history.<sup>99</sup> Conceding further that they have failed to stem the rise of mandatory sentences and other punitive changes, the authors pride themselves on having served interests in even-handed and predictable sentencing. Although this obsession with normalizing sentencing through guideline systems seems the driving engine for the revision, the value of achieving normalization of sentencing *per se* is dubious; normalization constructed around smart sentencing within proportional limits is a far more convincing justification for guidelines.

Most guidelines (most dramatically those in the United Kingdom)<sup>100</sup> essentially attempt to normalize sentencing behaviors around the most common results for similar sentences imposed by judges in the past for similar cases under similar circumstances. The problem is that those sentences were imposed by judges with no clear direction to seek crime reduction, who were supplied with no information with which responsibly to seek crime reduction, and before whom no advocates were likely even to broach the subject of crime reduction—let alone provide any useful analysis or data with which to seek it. Accordingly, the recidivism rates that characterize our systematic failure at crime reduction is the outcome around which guidelines have normalized sentences. A consistency which produces so much harm is hardly entitled to any loyalty—particularly when

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99. I concede encountering one author who disagreed, and suggested that guidelines were indeed intended to capture the most significant variables of risk assessment—crime seriousness and criminal history. His contemporaries in the effort emphatically rejected this as wishful thinking, and research soon demonstrated that as risk assessment instruments, at least one example of such guidelines is wrong roughly two times out of three. See Bellatty, *supra* n. 67.

100. See Senten. Advisory Panel, *Annual Report*, *supra* n. 90, at 12-13.

consistency is in no way inherently hostile to a different organizing principle such as public safety.

Moreover, the consistency promoted by guidelines is often chimerical. Guidelines construct categories with gross divisions, and accomplish equal sentences for similarly situated offenders only by ignoring differences among crimes and offenders—for to acknowledge those differences is to depart, not to conform. Hence the revision's laudable promotion of judicial discretion. But this very flexibility undermines the objective of consistency. For example, typical guidelines do not distinguish among offenders based on their degree of involvement (mastermind vs. lackey, leader vs. follower, all are accomplices) or susceptibility to "rehabilitation" (psychopathy is not an issue).<sup>101</sup> To reach these issues, one must adopt the limiting notions of "aggravation" or "mitigation"<sup>102</sup> and consider a departure. The guidelines have some worthy regularizing influence on extreme "outliers," but they pursue consistency largely as charade.<sup>103</sup>

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101. An exception that proves the rule is provided by 3 out of Oregon's 99 grid blocks which provide for "optional probationary sentences" when an available treatment program is more likely than the presumptive prison sentence to reduce recidivism. Or. Admin. R. 213-005-0006 (2007).

102. "Aggravation and mitigation" are, of course, terms of desert, not public safety and not science. A serious attempt at crime reduction would understand that these concepts may have a proper role in determining the moral upper and lower limits of punishment in a given case, but that rigorous pursuit of crime reduction requires concepts of a more scientific perspective: criminogenic factors, risk assessment, state of denial, psychological evaluation, and so forth.

Oregon's statutes, dating from a revision based on the existing Model Penal Code, recognize that sentencing should "permit recognition of differences in rehabilitation possibilities among individual offenders." Or. Rev. Stat. § 161.025(1)(f) (2007).

103. For instance:

Consistency is overrated in such endeavors. It is largely accomplished only by adamant refusal to acknowledge differences so that we can claim that we are treating like offenders alike. The charade occasionally forces absurd outcomes—for example, when the presumptive sentence under guidelines depends on the dollar value of damage caused by an arson – when that value was suppressed by the accident that the homeowner was a firefighter. And we seem ready to abandon common notions of right and wrong to pretend we have achieved equal treatment—as when we punish more severely the car thief who takes a valued toy from a stable of collector cars than the one who steals the sole means of transportation from a single mother struggling to get by. Finally, the outcome of such efforts continues to be overwhelming failure as measured by recidivism. If we generally do more harm than good, consistency in our pursuit is hardly a virtue.

In any event, as Professor Reitz clearly recognizes, the regularizing impact of guidelines is in tension with the revision's pursuit of individualized sentencing.<sup>104</sup> More importantly, there is no "empirical dilemma" in this obvious proposition: if the definition of consistency is treating like alike, we could pursue consistency with more social benefit (in crime reduction and public satisfaction) and as great a chance of success (measured by regularization of sentences) by discerning and categorizing offenders by those circumstances and attributes that reflect their need for or susceptibility to modalities of crime reduction.

In short, ordered and rigorous crime reduction efforts can as well serve as the basis for consistent treatment as can crime seriousness and criminal history—indeed, they substantially overlap.<sup>105</sup> The pursuit of consistency is no excuse for abandonment of public safety as an objective.

The subset of consistency that seeks to avoid compounding oppression of minorities that are persistently over represented on our dockets and in our prisons is likewise no excuse for abandoning crime reduction. Smarter sentencing (driven by a demand for the best data we can obtain on what works on which offenders) would go a long way toward reducing the racism of disparate incarceration, as smarter sentencing would have a better chance of preventing the escalation of

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*Comments on the Model Penal Code*, *supra* n. 1, at 155, n. 66. It is worth adding that *Limiting Retributivism*, or at least its author, would not sacrifice public safety merely to achieve consistency:

Treating like cases alike is by no means a categorical imperative of justice; it is merely one of several interacting, guiding principles of justice to be accorded respect up to the point that it decreases community protection or increases individual suffering without sufficiently compensating social advantage.

*Madness and the Criminal Law*, *supra* n. 40, at 209.

104. *E.g.* Preliminary Draft No. 1, *supra* n. 2, at 20-21.

105. However resolutely some may claim that crime seriousness and criminal history merely order desert within available prison resources, the public that pays the bill and most policy makers surely understand that worse crimes by more persistent offenders justify extended prison terms because they protect us longer from offenders most likely to commit new crimes if released. The public and most criminal justice practitioners are confident that past convictions are predictive of future behavior. That the *Third Draft* leaves to the discretion of sentencing commissions whether to include criminal history in the calculation of presumptive sentences, *Third Draft*, *supra* n. 2, at 190-91, is further testament to the *Draft's* state of denial with regard to predicting future dangerousness and the incapacitative function of incarceration.

criminal careers. As Professor Reitz acknowledges,<sup>106</sup> once the crime is committed, the sentence must be imposed notwithstanding the inequities that preceded or even generated it. Indeed, Oregon's guideline system, very much like that proposed by Professor Reitz, has certainly not cured the racial disparity of incarceration.<sup>107</sup> By encouraging the increasing divergence of criminal sentencing from crime reduction, the revision would at best do nothing to stem the racism of our results, and quite likely—if implemented—would further exacerbate that racism.

Finally, the single most startling instance of the revision's "insufficiently critical optimism," and its most glaring evasion of the empirical scrutiny it counsels for objectives it derogates as "utilitarian," is its proposal for championing judicial discretion. The revision repeatedly endorses the trial courts' role in the art of individualizing sentences in light of subtle variations in each case.<sup>108</sup> It would temper any administrative review of trial court sentencing behavior—in a laudable rejection of the federal approach—by the notion that a departure sentence *is* compliant. It would subject sentences to review but require appellate deference except in cases of "extreme" departure, and would create the latter category as a substitute for all mandatory sentencing provisions.

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106. "[T]he criminal justice system cannot ignore high rates of serious violent offending or the victims of those offenses once they have occurred." *Id.* at 120. Instead of accepting our responsibility to do a better job with our sentences to divert offenders from criminal careers, Professor Reitz would assign *all* responsibility for reducing the occasions on which we sentence minorities to "[t]he nation's efforts [that] should surely be turned to the social, economic, and cultural conditions that produce high levels of homicide in specific communities." *Id.* Those efforts should be made, but why are we in the criminal justice system somehow exempt? After all, we see the repeaters repeatedly. By insisting on doing our best to reduce recidivism within the limits of proportionality and resource with each sentence, we would be more of the solution and less of the problem than by following the path of the *Third Draft*.

107. For example, US Census figures show African Americans at 1.8% of Oregon's population, Native Americans at 1.4%, Asian at 3%, and Hispanics at 9.9%. U.S. Census Bureau, *State & County QuickFacts: Oregon*, <http://quickfacts.census.gov/qfd/states/41000.html> (last revised Aug. 31, 2007). Oregon Department of Corrections figures show African Americans at 9.6% of the prison population, Native Americans at 3.2%, Asians at 1.4%, and Hispanics at 15.8%. Or. Dept. of Correcs., *Post-Prison Population with Measure 11 Convictions as of October 1, 2007*, <http://www.oregon.gov/DOC/RESRCH/docs/mlpost.pdf> (last accessed Dec. 31, 2007).

108. *E.g.* Discussion Draft, *supra* n. 2, at 136-37.

What is hopelessly optimistic about all of this is that the legislative bodies—and public pluralities—that rebelled against judicial discretion did not rebel because no sufficiently august authority told them they should applaud sentencing discretion, but because current sentencing was demonstrably dysfunctional as measured by public safety, and because this reality almost always comes to public attention through publicity of the system's response to heinous crime. Legislatures are not going to discard mandatory minimum sentences or otherwise broadly restore lost sentencing discretion because the ALI adopts something like the *Tentative Draft*. Voters have repeatedly rejected attempts to roll back mandatory minimum sentencing provisions,<sup>109</sup> and legislators well know that such a task is forbidden territory.

Again, we cannot hope to solve the problem unless we understand its source. Its source is public expectation that we are charged with crime reduction, public perception that we have done an inadequate job of crime reduction, and public conclusion that we need to be stripped of our discretion and told what to do to accomplish crime reduction since we are apparently unable to figure it out by ourselves. The only path to restored discretion is to earn it back by accepting responsibility for public safety and demonstrating a capacity to pursue it effectively.

### III. CONCLUSION

The revision obviously reflects great scholarship and hard work. If modified to prioritize crime reduction within the limits of proportionality in our purposes and behaviors, it could represent a great step forward in criminal law, worthy of adoption throughout the states and in the federal jurisdiction. But in its persistent rejection of crime reduction as an organizing priority and purpose, its response to empirical challenge by retreat to myth and ceremony, and its denial of responsibility for the public safety outcomes of our sentencing decisions, it can only serve to exacerbate all of the problems it seeks to address: mass incarceration, loss of judicial discretion, and disparate impact of the cruelty of our results on both the victims of avoidable

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109. E.g. Partn. for Safety and J., *Proposition 66 Fails in California*, <http://safetyandjustice.org/info/nation/story/143> (Nov 14, 2004); Crime Victims United, *Oregon Voters Reject Measure 94*, <http://www.crimevictimsunited.org/measure94/voters.htm> (Nov. 7, 2000).

crimes and the offenders whose punishment serves no demonstrable beneficial purpose for society or for them.