COMMENTS ON *MODEL PENAL CODE: SENTENCING, COUNCIL DRAFT NO. 1*

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I applaud the scholarly work of the Reporter, and I am grateful that the Council will have an occasion to consider issues I believe crucial to the value of this project to criminal law and to the significance of ALI's role in this arena.[1]

I will address the "Issues for the Council" presented by the Reporter and offer some additional comments. Respectfully, the amendments and discussions proposed for the Council's consideration do not correctly present the issues the Council and ALI must face: This is not about semantics, and it is not about terms of art or what may be in vogue. It is not about whether proportionality should limit all sentencing – I have always agreed with the Reporter that it must provide at least an upper limit on all sentencing (and I have never suggested that utilitarian purposes could justify exceeding such a limit).[2]

Ultimately, the issues before ALI collectively raise the single most important question to arise since the 1962 Model Penal Code: What should be the social function of sentencing in society.

Specifically, these are the propositions that - by their distance from the present draft - define the real issues for the Council and ALI:

- All sentences should represent evidence-based best practices to allocate applicable options within the limits of proportionality, law, risk, priority and resource, in responsible pursuit of some significant public purpose;
- That purpose should be achieving public safety, unless and only to the extent that other appropriate purposes of sentencing demonstrably require an adjustment to a sentence designed solely to serve public safety;
- This focus is more likely than merely ordered just deserts moderated by a sentencing commission both to result in harm reduction and to resist punitivism; and
- This focus is more likely than the present direction of the *Draft* to afford ALI the leadership role and beneficial influence that the existing Model Penal Code achieved.

Before addressing the issues as now presented by the Reporter, let me offer this reflection: The *Preliminary Draft No. 1* (August 2002) correctly argued that the unprioritized laundry list of sentencing purposes encouraged by the 1962 Code, and adopted by so many jurisdictions, left sentencing largely unguided. Judges and advocates were free to use any combination of "purposes" to justify widely disparate results, without any coherent or consistent pursuit of any useful social purpose. One response of the earliest drafts of the proposed revision was to insist on ordered (and proportional) punishment as the ubiquitous, sufficient and overriding purpose for all sentences, while relegating utilitarian objectives to a narrow "layer" of cases. The other response – one that continues through this draft – was to address disparity and punitivism through a guideline system that serves to establish sub-constitutional sentencing limits through a commission process that intended to insulate the establishment of sentencing ranges from punitive influences. But, in responding in successive drafts to criticisms of the

narrow purview initially contemplated for utilitarian objectives, the revision has essentially returned to the *status quo* in terms of sentencing purposes: a laundry list of sentencing objectives with no prioritization, and a continuing insistence that proportional *punishment* is by itself an adequate accomplishment of any sentence.

One result is that the *Draft* now offers states essentially only guidelines and commissions. At least when guidelines are designed merely to order just deserts and encourage consistency, and commissions are assembled to manage them for such purposes, the *Draft*'s offer to the states pales in comparison with the value and impact of the 1962 Code – if for no other reason than it is now obvious that states are not uniformly attracted to guidelines, notwithstanding the Reporter's able and workable attention to *Blakely* and *Booker*.

The other result is that the *Draft* would fail to advance the improvement of sentencing as measured by the service of any socially useful purpose, with the minor exception of some reduction in disparity – an achievement unlikely to win or merit for the revised Code anything like the role and influence earned by the 1962 Code. What commentators[3] and states[4] are recognizing in growing number is that a profound advance in sentencing law and culture requires evidence-based harm reduction as the focus of reform. Such a focus requires no sacrifice of the limiting role of proportionality nor of meaningful consistency; it would more productively task guidelines (or their functional equivalent),[5] sentencing commissions, and appellate review than managerial pursuit of ordered just deserts; it would more effectively resist punitivism; and it would more significantly respond to ALI's responsibility to provide leadership in law improvement.

Properly framed, those are the real issues before the Council and the ALI. Of course sentences should not exceed limits of proportionality, but heeding those limits is not itself sufficient to fulfill the social responsibilities of sentencing. Rather, claiming that limited punishment alone *fulfills* those responsibilities teaches the fallacies that punishment alone is the measure of responsible sentencing, and that severity is the measure of public safety. Worse, it insulates sentencing from accountability for its social functions, reduces its effectiveness at harm reduction, and, ironically, foments punitivism and attacks on judicial independence which the Reporter surely opposes.

Reporter's Issue No. 1: Should 1.02(2)(a)(ii) be revised to include express reference to the goals of "public safety" and "offender reintegration"?

Though the Reporter has combined these suggestions, they are surely appropriate for separate consideration. All of the Reporter's arguments (as stated in the *Council Draft* discussion) play out quite differently with "public safety" than they do with "offender reintegration." In any event "public safety" certainly must be a stated purpose of sentencing or ALI will be choosing to ignore what most policy makers and the public think sentencing is all about (and this cohort also appreciates that rehabilitation is often a meaningful means of pursuing public safety).[6]

As to both suggestions, the Reporter contends that they "would lengthen [the section], yet would not add meaningful content." *Council Draft at xiv*. Putting aside Judge Burt Griffin's persuasive contention that "Safety" is a purpose, while words such as "rehabilitation, general deterrence, and incapacitation" are but *means of pursuing purposes* which could be deleted from a "purposes" provision, of course adding words adds length. And it may be reasonably

contended that adding "reintegration" does not add content because it is a subset of "rehabilitation." But to suggest that the revision would not change meaning with respect to "public safety" is a profoundly different matter. The present code is literally and intentionally satisfied with pursuit of public safety only in a subset of cases, as long as punishment is pursued in all cases. The Reporter's arguments do *not* include a suggestion that public safety is already an objective for all sentences in the existing language. This revision would expressly state what ought to be an obvious purpose of all sentencing: to further public safety by use of the devices of sentencing that are available, appropriate, and proportionate. Without the equivalent of such a change, the prevailing purpose is punishment alone, while attempting any "utilitarian" purpose requires overcoming substantial qualifications. I developed this analysis of the existing language in a paper distributed at the 2006 Annual Meeting.[7]

The only other argument the Reporter expresses against the inclusion of "public safety" is that "it may not be equally in vogue in a few years" as "truth-in-sentencing" has (apparently) fallen into disuse. Although the hardiness of the term "reintegration" may be subject to reasonable conjecture,[8] the same cannot be said of "public safety." An all-state search of criminal cases on WestLaw (excluding "public safety officer" and "department of public safety") exceeded the application's 10,000 record limit for "public safety"[9] – with cases dating from at least as early as 1900 to the present – and for "rehabilitation." "Crime control," the Reporter's common label for this function of sentencing, amassed 1,050 "hits" in the same cohort; "incapacitation" produced 689. And the existing and unquestioned "restoration of crime victims and communities" is a usage of far more recent vintage. Surely, the staying power of the phrase "public safety" is no argument for its avoidance.

The real fear many have of "public safety" as an express objective is that it encourages incarceration; many of these voices argue that it is inappropriate to use jail or prison to protect against future criminal behavior – arguing that it is unfair or insufficiently precise a justification for imprisonment. This is a lurking issue that demands direct resolution if ALI is to perform a leadership function.[10] I pursue "smart sentencing" in large part out of a firm conviction that it is a far more likely means by which to reduce inappropriate punishment and mass incarceration than pretending that punishment is *per se* the reason for sentencing. I detest unnecessary incarceration, and the brutalization of human beings that it so commonly accomplishes – especially when the legitimate goals of sentencing can be better accomplished without prison for some cohorts of offenders, and when there are cohorts for which public safety is not infrequently *sacrificed* when we use prison instead of other dispositions.

But as a sentencing judge and a student of criminology, penology, and corrections, I surely know that there are crimes and offenders that demand incapacitation as a proportional and essential means of risk management, public protection and harm reduction and, fairly rarely, as just desert regardless of public safety. If we aren't using incapacitation for public safety, we really should at least offer offenders the alternative of caning – it's cheaper, probably less criminogenic, more consistent with the goal of restitution, and usually sufficient to satisfy any demand for punishment *per se*.

In any event, if the argument against "public safety" is that it is consistent with using jail and prison to protect the public, the argument must be rejected. Reducing inappropriate use of prison and jail is better accomplished by accepting their appropriate applications and rigorously pursuing best practices at crime reduction – practices which often call for shorter lengths of incarceration or avoiding incarceration altogether, and which also call for wise allocation of

programs (treatment and otherwise) within prisons and as part of reintegration efforts. Just deserts as the eclipsing justification of all sentencing teaches the public that severity increases crime reduction; evidence-based pursuit of public safety teaches that severity is frequently not the best path to public safety. The public, which dependably articulates "rehabilitation" and "public safety" ahead of "punishment" as the objective of sentencing, is actually ahead of us.[11]

Reporter's Issue No. 2: Should 1.02(2)(a)(i) and (ii) be revised "so that the goal of proportionality of sentencing does not operate as a constraint in every case"?

The issue as presented by the Reporter would

> 1) qualify the goal of "sentences within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" by limiting that goal to "appropriate cases," and
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> 2) eliminate from the pursuit of rehabilitation, deterrence, incapacitation and restoration in "appropriate cases" the qualification that we do so "within the boundaries of proportionality in subsection (a)(i) . . ."

Again, these issues are properly considered separately. Sentences should be within the limits of proportionality in *all* cases. But they need to include a punitive impact in only "appropriate cases" – a distinction the Reporter's formulation of this "Issue" obscures. It is not necessary that all sentences have a "severity" impact, though all should be within the limits set by proportionality. If forced to the Reporter's formulation, I would insert "in appropriate cases" in both (i) and (ii), but *not* remove the proviso that utilitarian objectives be pursued only within the bounds of proportionality.

The Reporter says that this "formulation is offered by Jack Weinstein" and would also be "responsive" to my criticisms. *Council Draft at xiv.* The Reporter analyzes these two changes as if they are intended to eliminate proportionality as a cap on the severity of punishment. I haven't seen Judge Weinstein's comments, but – given his interest in offender reintegration – it would surprise me if eliminating a cap on severity were his intention. It certainly is not mine; I have never proposed or suggested that "utilitarian purposes [might] trump proportionality."

This issue may be "responsive" to my criticisms in the sense of cause and effect, but it surely is not responsive to contentions I believe critical. In my written submission distributed at the 2006 Annual Meeting,[12] I criticized pursuing proportionate severity in all cases, while pursuing utilitarian goals only "in appropriate cases" – ultimately defined as those for which there "is realistic prospect for success"[13] – not to suggest that the limit of proportionality should ever be trumped, and not to avoid the necessity for validation for any sentencing purpose, but for these reasons:

- Pervasive focus on punishment is archaic, out of touch with modern criminology and corrections, and unnecessary for public support
- Though the *Draft* seeks to mitigate punitivism, a harm reduction model is far more likely to further that objective than attempting to distribute punishment for its own sake

- Eschewing empiricism for punishment is the worst strategy for addressing the undersupply of useful data
- Meaningful reform requires rational assessment of all levels and means of sentencing
- Avoiding disparity does not require abandoning empiricism

More specifically, I argued:

> There is no good or sufficient reason to require less empirical support for punishment *per se* than for any of the listed utilitarian objectives. While the prospects of empirical support for each varies, there is no greater prospect of evidence to support punishment than, say, general deterrence. Indeed, the *Draft*'s rationale for its pervasive pursuit of punishment is the need to resonate with social values.[14] But the functions of punishment are themselves ultimately utilitarian – preventing vigilantism and private retribution, while encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others. There is no logical or functional justification for allocating sentencing resources (anywhere along the spectrum of crime and sentence) to "punish" without empirical support than to deter, rehabilitate, incarcerate, reform, or restore.
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> Second, the result of the pursuit of punishment *a priori* is to punish many whose punishment does not advance any social purpose, is not required to satisfy the public or any "responsible official," and is self-defeating as to the objective of crime reduction.
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> Third, allowing the culture of criminal justice to evade responsibility for empirical support as to punishment endorses its persistent failure to pursue empirical answers to all issues of sentencing, and its failure to integrate effectiveness data into the protocols and rituals of sentencing.

The most pernicious impact of the ubiquitous role of punishment, and the limited role of rational pursuit of utilitarian purposes, is that "just punishment" remains a performance measure that *in theory and in practice wholly excuses sentencing from best efforts at crime reduction – or from any other measurable beneficial performance.* I agree and have never disputed that all sentences must be within whatever maximum limit proportionality imposes.[15] I submit that rigorously pursuing reduction in an offender's future criminal conduct, within that limit and the limits imposed by risk, resource, and the law, will almost always satisfy all other interests legitimately served by sentencing. In the great bulk of cases coming through the criminal justice system, a responsibly crafted, evidence-based disposition that best seeks crime reduction will *also* serve the interests in preventing vigilantism and private retribution, while encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others. Yet the *form* of sanction chosen merely to punish might be very different – and would likely do a worse job of preventing future criminal behavior – while, for that reason, undermining the interests purportedly served by punitive measures in the long run.

In a fairly wide swath of common crimes, there really is no social purpose in punishment

per se. Preventing vigilantism and private retribution, encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others in such cases are often best furthered by requiring the offender to submit to effective treatment, cognitive restructuring, or a sentence of discharge – with no necessarily *punitive* element whatsoever. Even in the rare cases in which some other legitimate sentencing objective demands modification of the result dictated by best efforts at crime reduction, it will not always be necessary to compromise those efforts completely. Yes, in some cases, vindicating social values or serving an actual victim's needs may call for a sentence that is wholly unnecessary for public safety – such as in the case of a non-recidivist social drinker who kills someone while driving drunk, or in a subset of opportunistic sex offenses in which recidivism is adequately prevented by close supervision, but the victim (child or adult) needs to see tangible punishment for therapeutic purposes.

But allowing "just punishment" to be enough in itself will encourage the continued avoidance of best practices; will continue to visit cruelty upon offenders for whom a responsible attempt at crime reduction would do more good for them and for us with less dehumanization, and will continue to generate victimizations that smarter sentencing would have avoided. For all these reasons, ironically, allowing "just punishment" to be a sufficient accomplishment of sentencing will only tend to increase the appeal of punitivism and measures that limit judicial discretion.

In my view, the purposes of sentencing should be stated simply and separately from the means of seeking those purposes, much as suggested by Judge Burt Griffin; punitivism should not be allowed *cart blanche*, as it is in the present *Draft*, just because it is capped by proportionality; all social purposes of sentencing (including those performed by punitive measures) should be evidence-based and responsibly selected in pursuit of reduction of criminal behavior – to be modified only as necessary to serve other purposes. For an example of how this approach might look, consult the "harm reduction draft" that provides one example of such an approach.[16]

Reporter's Issue No. 3: Should 1.02(2)(a)(ii) be revised to return "when possible with realistic prospect of success" instead of "in appropriate cases" as the threshold for seeking utilitarian objectives?

As discussed with regard to the previous "Issue," the Reporter's formulation misses at least my point. I don't disagree that we should craft a sentence as "appropriate" to each case, and attempt outcomes only when and how they are reasonably to be achieved – meaning, for me, some basis responsibly to conclude that what we are claiming to seek is reasonably sought in the manner in which we are seeking it. This comes down to "evidence-based practices," but, as spelled out in more detail in the "*Harm Reduction Sentencing Code*,"[17] the nature and extent of evidence is likely to vary with the objective.

The reason I assail either qualification ("appropriate cases" or "realistic prospect")[18] is that its function <u>in the *Draft*</u> is to qualify pursuit of utilitarian objectives while deeming all punitive measures legitimate *regardless* of their rational utility as long as they fit limits of ordered just deserts. The reason I assail either qualification is that the *Draft* discriminates in favor of punitivism as long as it is limited, while holding utilitarian measures at the gate until they present their papers.

All sentences should be based in reason and crafted responsibly to achieve some objective; allowing that objective to be mere punishment, however proportional, enables avoidance of responsibility for best practices at public safety – including, by the way, best practices at employing punitive as well as other dispositions to further the objectives of preventing vigilantism and private retribution, encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others.

One aspect of this "Issue" - whether to return "realistic prospect of success" in lieu of the recent "appropriate cases" qualification – is how it plays out in terms of incapacitation. As the Reporter repeatedly and correctly implies, the United States incarceration rate is woefully out of control, consuming enormous resources, and ensnaring many whose brutalization during incarceration and recidivism after release undermine rather than serve social interests. It is apparently for this reason that the *Draft* very dramatically, although obliquely, resists the notion that prison should be used for purposes of incapacitating people on the basis that society needs to be protected from the risk of future harm that they represent.[19] The Reporter explains his favored qualification for utilitarian objectives ("realistic prospect of success") in this fashion:

> Many utilitarian innovations fail to produce their desired effects. Just as many of these failures are built upon deterrence or incapacitation theories as upon rehabilitative aims. Indeed, some utilitarian sanctions backfire by increasing overall rates of future offending. The Reporter's language was intended to bolster the use of successful or promising utilitarian sanctions by insisting that there be, at a minimum, a realistic basis for thinking they will succeed. Wheat gains a better reputation if separated from chaff.[20]

Perhaps this is the starkest proof of the nature of the real issue before the Council and ALI. For the Reporter proposes a guideline system that essentially *mandates* imprisonment for wide categories of crimes and offenders – with no requirement of any justification other than proportional severity – while deeming "incapacitation" a utilitarian aim that may backfire by *increasing* overall rates of future offending. Apparently, the Reporter is seeing prison justified as a punitive measure in a wide swath of crimes, but he is correctly concerned that prison as a means of *reducing post-release recidivism* is often counter productive.

I enthusiastically agree that some cohorts show markedly increased recidivism following lengthy incarceration as compared with like offenders processed through community-based sanctions.[21] *But by sparing prison for the purpose of punishment any need for evidentiary support, the Draft enables us to continue to avoid responsible exploration of which terms and conditions of incarceration and post-prison supervision best reduce criminal behavior.* This is the great irony of the *Draft*'s endorsement of proportional punishment in every sentence to resist punitivism and mass incarceration: it works to defeat those objectives by sparing routine use of prison any need for validation *as long as it is used merely to punish* within limits of proportionality.

I agree that incarceration is out of control and punitivism has entirely too much sway in sentencing policy and practice. I am as opposed to unnecessary incarceration, and in search of a parsimonious and effective alternative, as any judge or commentator. Yet I also am responsible to and concerned for victims and to those to whom offenders I sentence pose a risk.

I insist that to be part of the necessary dialogue, the *Draft*, the Council, and ALI must recognize that there is no issue about one unavoidable utilitarian impact of incarceration: offenders while incarcerated cannot commit crimes on the outside. This is not a theory that needs vetting for "realistic prospect of success," but a virtual tautology. There are offenders whose risk of future harm is so great, and whose reformation is so undependable, that we can and must incarcerate them to provide public safety. It is refusal to confront and quantify this most dependable (though usually temporary) means of crime reduction that cripples any hope of effective education of policy makers and the public. Fortunately, both are far more favorably inclined toward reformation and less demanding of punishment than we usually assume.[22] But it is our insistence that ordered just deserts is adequate accomplishment for any sentence that encourages the public and policy makers to retain the fallacy that severity and public safety are directly proportional for all offenders and for all crimes. And it is that insistence that retards any hope of rationalizing the use of incarceration by rigorously addressing this question:

> Given that incarceration may only be used within the limits of proportionality (including sub-constitutional proportionality), in what lengths and under what conditions, with what programs in custody and during reintegration, and followed by what form and length of supervision, is it best deployed on which offenders – measured by over all harm reduction, risk, priority, and resource, and in view of the combined but potentially countervailing impacts of incapacitation during incarceration, potential specific deterrence and potential criminogenic effect after incarceration.

At the very least, we should not qualify the pursuit of utilitarian goals with "realistic prospect of success" until and unless we similarly 1) qualify the pursuit of punitive measures (however proportional), and 2) measure "success" by reduction in criminal behavior (including *during* as well as after any incarceration), preventing vigilantism and private retribution, encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others.

Reporter's Issue No. 4: Should 1.02(2)(b)(vi) [declaration for humane sanctions] be deleted?

I agree with the Reporter that the revision effort should reach Parts III and IV, and that this provision belongs there. However, I would not otherwise be in favor of removing this codification of a commitment to humane sanctions.

Reporter's Issue No. 5: Should 7.07B(1) be self-contracting upon reversal of <u>Blakely/Booker</u>?

I agree with the reporter that the present formulation defining "penalty-ceiling enhancement facts" is superior to one that delegates the definition of jury rights for sentencing facts to the future evolution of *Blakely* progeny caselaw.

As an active participant in the Reporter's response to *Blakely* and in Oregon's statutory response,[23] which is essentially in the form suggested by Dan Meltzer (as described by the

Reporter), I nonetheless agree that a model code should provide the substance provided by the Reporter's formulation. It might be advisable, however, to apply this process to "facts . . . that expose the defendant to a greater punishment . . ." *and* "to any other facts related to sentencing that must be subject to a right to trial by jury under the federal or state constitution."

In any event, it is important to note that what is at stake is a *right* to jury determination of sentencing facts, not a requirement that such facts always be determined by a jury. Indeed, it is our experience, as predicted, that most offenders are anxious to have sentencing facts kept from the jury and determined by a judge and therefore waive this right – unless they have already been sentenced by a judge and are on remand following a *Blakely* reversal.

It is also important to keep in mind that, generally, determining enhancement facts in favor of the state merely increases upward the range of sentencing discretion available to the court – it does not require the imposition of the enhanced sentence.

I am also not driven to contract this provision whenever the Supreme Court might allow it because it is my experience that juries are every bit as capable of making these factual determinations as judges, and that although judges might well develop extraordinary sentencing skills were they directed and informed towards smart sentencing, recidivism statistics preclude any persuasive argument that judges are inherently better than jurors at making these determinations.

Reporter's Issue No. 6: Should 7.YY (and 7.ZZ) [Judicial Review of Guidelines] be deleted?

I agree with the Reporter that these should be deleted, for the reasons he states. I note in passing that in Great Britain and elsewhere in the UK where guidelines are promulgated by the highest court rather than by the legislative authority, they show no greater tendency for enlightenment than those promulgated by commissions subject to legislative control. Note also that guidelines that are promulgated by commissions are reviewable in the context of an appeal from a guideline sentence when the defendant contends that the guidelines conflict with law or are outside the authority vested in the commission.[24]

Other Issues

The focus of the purposes provision determines the worth of the entire project. My views on the role of commissions and appellate review, as distinguished from the Reporter's, flow from my insistence that harm reduction within limits of proportionality and resource should drive and measure sentencing except and only to the extent that some legitimate purpose requires deviation from that objective.

> [The *Draft*] would have us pursue crime reduction only rarely. Instead, [it] would base all sentencing first and foremost on just deserts within limits of proportionality, and allow only on occasion that it may be "realistic" 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.
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> [The *Draft*] 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 neutrality, and, optionally and occasionally, how well we accomplish deterrence, incapacitation, rehabilitation, and restorative justice.
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> 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 [the *Draft*] deems primary.
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> [The *Draft*] 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 [merely] the quixotic mission of securing "limited" just deserts. 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.[25]

I would also task commissions with developing standards and rules governing proof for the various propositions relevant to sentencing, and of which some demonstration is demanded by responsible allocation of resources – from rehabilitation and deterrence to reformation, risk assessment, and the social purposes bundled within desert.[26]

1. I hope and assume, however, that if these issues remain alive, they will not be resolved without equal opportunity for oral argument.

2. *See, e.g.,* Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM J CRIM LAW 135 (2003).

3. *See, e.g.,*Roger K. Warren, President Emeritus, National Center for State Courts, *Evidence-based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism,* (Presented at the National Association of Sentencing Commissions Conference, August 2006); Kristin L. Caballero, *Blended Sentencing: a Good Idea for Juvenile Sex Offenders?* 19 St John's Legal Comment 379 (2005); Steven L. Chanenson, *Sentencing and Data: the Not-so-odd Couple*, 16 Fed Sent Rptr 1 (2003); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me L Rev 569 (2005); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed Sent Rptr 76 (2003); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the next Generation of Reform*, 105 Colum L Rev 1351 (2005);Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand L Rev 121 (2005);Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw U L Rev 1 (2003); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal*, 17 St Thomas L Rev 743 (2005)

4. Virginia, Missouri, and Oregon are examples. *See* 2005 Oregon Laws Ch 474 (SB 919), directing the Oregon Criminal Justice Commission to explore revising guidelines to serve public safety. Judge Warren also lists as "in various stages of adopting evidence-based corrections practices" Arizona, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Minnesota,
Montana, Ohio, Oklahoma, South Dakota, and Washington. *Written Testimony of Roger K. Warren, Scholar-in-Residence, Judicial Council of California, Administrative Office of the Courts, and Project Director, National Center for State Courts National Sentencing Reform Project*, *Public Hearing on Sentencing Reform* (June 22, 2006), available at
http://www.lhc.ca.gov/lhcdir/sentencing/WarrenJune06.pdf#search=%22EVIDENCE-BASED%20PRACTICES%20AND%20STATE%20SENTENCING%20POLICY%3A%22.

5. Guidelines in their present incarnation are but one way of normalizing the severity of sentences. Many states have approached the same objective through other means, and several have expressly avoided calling those schemes "guidelines." The social value of any of these schemes is measured by the value of the objective [most typically sentencing consistency and prison population control] and the degree to which a scheme actually accomplishes its objective. If ALI intends to provide real benefit to the criminal law, it should seek more than mere sentencing consistency. I submit that the benefit needs to be in the nature of harm reduction, and that guidelines, commissions, and appellate review which help to improve our ability to reduce future criminal behavior would be vastly more valuable than consistency and prison population control – while they would also far more meaningfully accomplish consistency and prison population control than guidelines with only those goals in mind.

6. Princeton Survey Research Associates International for the National Center for State Courts, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS (July 2006) at 36 (available at
http://www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf#search=%22Almost%2080%25%20of%20the%20public%20believes%20that%20given%20the%20right%20conditions%22);
US Department of Justice, National Institute of Corrections, "Promoting Pubic Safety Using Effective Interventions," Section 1 (February 2001), citing, *e.g.,* B.K. Applegate and F.T. Cullen, and B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 PRISON JOURNAL 237-58 (1997); Fairbank, Maslin, Maulin & Associates, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998); John Halliday, Director, Review Team, Cecilia French, Team Member, Christina Goodwin, Team Member, MAKING PUNISHMENTS WORK REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES (Home Office, July 2001), available at http://www.homeoffice.gov.uk/documents/halliday-report-sppu/.

7. Michael Marcus, *Model Penal Code Sentencing Revisions: ALI Faces Critical Issues* (April 22, 2006), available at
https://www.ali.org/ali/am2006/2006-Marcus-MPC.pdf#search=%22model%20penal%20code%20sentencing%20re

visions%3A%20ALI%20faces%22; also available at http://ourworld.compuserve.com/homepages/SMMarcus/MPC-ALI-2006AnnMeet.pdf; *See Also Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, *supra* note 2.

8. For the record, linguistic staying power is a red herring; the issue is whether the concept demands to be articulated in the code. If so, choosing the expression most likely to prevail into the future is a secondary concern that should not drive the first. Some have quibbled with "rehabilitation," arguing that it connotes the medical model for all offenders, while many have "character defects" and need "reformation" in the form of cognitive restructuring rather than treatment. *E.g.*, Stanton Samenow, INSIDE THE CRIMINAL MIND (1984). Samenow's contribution was to encourage what is now known as cognitive restructuring, which is far more useful for some cohorts than more "treatment" oriented forms of "rehabilitation." His error is failing to recognize the tremendous range of variables among offenders, and in assuming that *all* are manifestations of character defects – a generalization that plays well with those anxious to eschew sympathy for any offenders, but ignores the reality that there are some offenders for whom "character defect" is the wrong label and one that leads to the wrong disposition.

My position is that within the limits proportionality, law, risk, priority and resource, we should rigorously pursue evidence-based best practices on a given offender, that what works best varies with the offender and the risk, and that we should deviate from that pursuit only when and to the extent that some other legitimate purpose of sentencing requires that deviation.

Again, it is the concept that matters first, then the politics of gaining acceptance. I have no major interest in whether the words chosen are "public safety," "harm reduction," "reduction in future criminal behavior," "reduction in recidivism," or "crime reduction." My personal preference is for "harm reduction," as it includes avoiding cruelty and damage both to victims whose crimes smarter sentencing would avoid, and to offenders punished with no benefit to themselves or to society merely to maintain the facade of "appropriate punishment" as sufficient social purpose, or because we have not accepted full responsibility for rigorous best practices. "Public safety" and "crime reduction" more easily encompass general deterrence – for what that is worth; "reduction in criminal behavior" more directly implies "reduction in recidivism," which can be read as ignoring general deterrence.

9. Moreover, from close to the inception of our legal system in this country until the New Deal, it was common to speak of the "police power" of the states attending to public health, morals, and safety.

> If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.
> * * *
> Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.
>
> *Boston Beer Co. v. State of Massachusetts,* 97 U.S. 25, 32 (1877)

And, of course, courts have long recognized that protecting "public safety" is a major role of criminal law.

> There is no provision in the constitution demanding that murder and rape shall be so punished. Nor has the legislature, since the constitution was adopted, so declared by legislative enactment; and yet such is the law with us. So, too, in all other crimes and misdemeanors. They are not mentioned or defined in the constitution, yet they are punished by imprisonment in many cases. Thus, both life and liberty are interfered with. These laws look to the public safety.
>
> *Stehmeyer v. City Council of Charleston,* 53 S.C. 259, 31 S.E. 322, 330 (1898)

> Punishment was once deemed compensatory, the sentence being nicely

> graduated to the nature and circumstances of the offense; while the modern conception takes practically no account of compensation, and considers the offender as a sort of penitential ward, to be restrained as far as necessary for public safety, and, if possible, to be cured of his criminality.
>
> *State v. Wolfer*, 119 Minn. 368, 138 N.W. 315 (1912)

> Civil actions for damages, which are based upon charges of negligence, and criminal prosecution for negligent homicide have purposes which are materially different. The one generally seeks nothing but compensation; the other is intended to promote the public safety.
>
> *State v. Wojahn,* 204 Or. 84, 140, 282 P.2d 675, 702 (1955)

10. *E.g, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, *supra* note 2; Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 INT'L J OF PUNISHMENT AND SENTENCING 1, 15 (2005).

11. See authorities cited *supra* note 6.

12. *Model Penal Code Sentencing Revisions: ALI Faces Critical Issues*, *supra* note 7.

13. Although the next "Issue" addresses the presence of this language in the purposes section, the "realistic prospect of success" language remains in §6B.03 without present question, and the notion that punishment needs no validation while utilitarian attempts alone are subject to validation is common throughout the Reporter's commentary.

14. *See, e.g.,* Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing - Preliminary Draft No. 3*, at 3 (ALI 2004).

15. Whether proportionality also imposes a *minimum* limit in all cases is an interesting issue, which is worth discussing, but of much less importance than the issue addressed in the text. It is not necessarily or directly encompassed in the issues now raised by the Reporter.

16. Michael Marcus, A Harm Reduction Sentencing Code, available at http://www.smartsentencing.com. This version also illustrates how an evidence-based, harm reduction approach might task sentencing commissions and appellate review. Note that the discussion in the *Harm Reduction Sentencing Code* recognizes that different sorts of "evidence" might be required or available to validate different sorts of effect.

17. *Supra*, note 16.

18. Again, the phrase "realistic prospect of success" remains in §6B.03 regardless of this "issue."

19. *See* Kevin R. Reitz, *Reporter*, MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION 16-28 (January 2002)

20. *Council Draft* at xv.

21. I've cited the literature on the criminogenic effects of incarceration repeatedly during this debate, starting with *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, *supra* note 2, through *Justitia's Bandage: Blind Sentencing*, *supra* note 10.

22. See authorities cited *supra* note 6.

23. "(2) 'Enhancement fact' means a fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime."

24. *See, e.g., State v. Norris*, 188 Or.App. 318, 72 P.3d 103 (2003); *Heggs v. State,* 759 So.2d 620 (Fla.,2000).

25. Michael Marcus, *LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code*, available on line at http://www.smartsentencing.com. This piece was headed for publication in the Federal Sentencing Reporter, but displaced when *Blakely* commanded a special issue, by this piece: Michael Marcus, *Blakely, Booker, and the Future of Sentencing*, 17 Fed. Sent. Rptr., 243 (2005).

26. See A Harm Reduction Sentencing Code, *supra* note 16.