

Comments on the MODEL PENAL CODE: SENTENCING PRELIMINARY DRAFT NO. 1

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Introduction

Prevailing sentencing practices have yielded excessive recidivism and fueled legislative and public assaults on judicial discretion. The roots of this failure reside in our allegiance to just deserts and our refusal as judges and policy makers to accept responsibility for rigorous and effective pursuit of crime reduction.

The American Law Institute's PRELIMINARY DRAFT NO. 1 proposes to abandon the present version's focus on crime reduction² by reintroducing just deserts as the primary purpose of sentencing. The DRAFT would perpetuate the misdirection of sentencing practices, endorse our ongoing refusal to accept accountability for public safety, and enlist sentencing commissions in the same misdirection.

The rationale³ offered for this regression is wholly unpersuasive. Statutes declaring the purposes of sentencing have not focused on crime reduction. Sentencing practices have never been data-driven or otherwise responsibly aimed at crime reduction. And sentences have included many dispositions that are neither "rehabilitation" nor "incapacitation." Yet the DRAFT's rationale rests entirely on the crime reduction failures of some dispositions labeled "rehabilitation" and failures of incapacitation to accomplish crime reduction *other than that occasioned by incapacitation itself*. The rationale thus rests on the failure of a small portion of existing practices to accomplish something they never meaningfully attempted.

Although the relevant debates posit "rehabilitation" as competing with "punishment" in the form of jail or prison, *all* sentencing dispositions – including but not limited to those labeled "rehabilitation" or "incapacitation" – have public safety outcomes in the sense that some correlate better than others with crime reduction. Particularly is this so with respect to the most numerous and less serious crimes that are below the radar of the great debates, but that figure so prominently in the quality of life of communities affected by crime and in the early careers of

¹ I have been a trial judge in Oregon since 1990, past chair (and present member) of the Oregon Judicial Conference Criminal Law Committee and present chair of the OJD Technology in the Courts Committee, and author of 1997 Or Laws Ch 433 (<http://ourworld.compuserve.com/homepages/SMMarcus/ch433.htm>). I maintain a web site promoting the exploitation of technology to focus sentencing on public safety outcomes, and collecting presentations and articles I have produced in that effort. <http://www.smartsentencing.com>.

I am grateful for the feedback of several of my Oregon colleagues in this effort. I particularly benefited as well from the thoughtful suggestions of United States District Judge Nancy Gertner (District of Massachusetts).

² See page 6, *infra*.

³ Kevin R. Reitz, *Reporter*, MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION 16-28 (January 2002)[hereinafter cited as PLAN]. Were ALI to accept the proposed changes, it would add evidence to arguments that western civilization peaked in the 20th century – after all, we progressed from retribution to crime reduction (albeit in theory only) when ALI adopted the existing version, and the DRAFT proposes that we retreat from crime reduction to just deserts, albeit a purportedly ordered just deserts. See pages 5 - 13, *infra*.

many persistent offenders. Over the full range of sentencing occasions, different dispositions work or not on different offenders. We know that many treatment programs work very well on some offenders,⁴ and we now have the technology with which to deliver into sentencing hearings data showing correlations with crime reduction for all dispositions imposed on similar defendants for similar crimes.⁵

Yet the DRAFT proposes “in all cases” to prioritize just deserts, and even to consider public safety only in the relatively small range of cases for which there is “realistic prospect of success.” The American Law Institute should reject this invitation to retreat. It is not required by the modern politics of public frustration with crime. Indeed, the public more enthusiastically supports crime reduction than punishment.⁶

ALI should instead lend its prestige to a revision of the Model Penal Code Sentencing provisions to pursue the following objectives:

- promote crime reduction as the primary function of sentencing “in all cases”
- articulate that rehabilitation, incapacitation, community supervision, alternative sanctions and all other potential sentencing dispositions are all to be assessed in view of their potential contribution to crime reduction
- acknowledge victim restoration and restitution as appropriate additional functions
- declare that legal maxima in general and notions of proportionality in specific applications limit the severity of sentences
- (perhaps) allow that in rare cases, sentences responsibly aimed at crime reduction and the restorative needs of victims may be increased to serve some perceived need for a minimum of “retribution” or “denunciation.”
- insist that judicial sentencing discretion be based on data about which dispositions – including but not limited to “rehabilitative” and “incapacitative” sanctions – seem to work best on which offenders
- direct sentencing commissions to research what works to reduce criminal behaviors by which offenders, and to inject what works into individual sentencing decisions, sentencing guidelines, and policy analysis affecting deployment of criminal justice and corrections resources.

Prevailing Sentencing Have Yielded Excessive Recidivism:

It became apparent to me early in my career as a trial judge that the first offender is a rarity, the persistent offender the norm.⁷ A now discontinued Portland Police monthly report tabulated which people in jail for any given month had been also been in the same jail within the

⁴ See notes [17-18](#) and accompanying text, *infra*.

⁵ See page [29](#), *infra*.

⁶ See notes [29-31](#) and accompanying text, *infra*.

⁷ Exceptions are first offender drunk drivers and prospective customers of prostitutes apprehended by police “decoy” missions.

last year. The last full month report – typical of those I’d followed for years – had these figures: of the 2,395 people jailed during July, 2000,⁸ 1,246 had been jailed in Portland on some other occasion within the previous 12 months. Twenty-two of the 32 jailed for Burglary in July, 2000, had been jailed in Portland on some other occasion within the previous 12 months – as had 22 of the 23 jailed for Robbery, 20 of the 26 jailed for Theft in the First Degree, 304 of the 372 jailed on drug charges, and 32 of the 39 jailed for vehicle theft. A more recent Multnomah County project, made possible by our “DSS-Justice” data warehouse, revealed that “4% of our offenders accounted for 23% of [s]tandard bookings between 1995 and 1999.”⁹

National figures paint a similar picture. Bureau of Justice Statistics figures for jails in the United States reflect that “[m]ore than 7 of every 10 jail inmates had prior sentences to probation or incarceration,” and that “[o]f the 108,580 persons released from prisons in 11 States in 1983, an estimated 62.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.8% were reconvicted, and 41.4% returned to prison or jail¹⁰.” A more recent study released in June, 2002, reported: “Sixty-seven percent of former inmates released from state prisons in 1994 committed at least one serious new crime within the following three years,” and “272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release¹¹.” From what I have been able to determine, figures are similar in most Western countries.¹²

⁸ Portland Police Bureau Data Processing, August 25, 2000. The Portland Bureau of Police stopped producing these statistics in mid-2000; I am still waiting for their successor. An extract of the statistics is available at <http://www.smartsentencing.com>.

⁹ *The Booking Frequency Pilot Project In Multnomah County, Oregon: A Focus On Process And Frequencies*, at i (The Multnomah County Sheriff’s Office, Dan Noelle, Sheriff, In collaboration with the Multnomah County Department of Community and Family Services, Department of Community Justice, Health Department, and Corrections Health Division (January 2002)). “DSS-Justice” is a data-warehouse based criminal justice tool which also supports the sentencing support tools discussed later in this paper. See page 29, *infra*. See generally <http://www.co.multnomah.or.us/dss/info/initiatives/DSSProjectOverview.shtml>; http://www.lpscc.org/dss_justice.htm; http://www.lpscc.org/docs/evaluation_capacity.pdf; <http://ourworld.compuserve.com/homepages/SMMarcus/SentSuptTools.htm>.

¹⁰ Bureau of Justice Statistics Criminal Offenders Statistics, <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.

¹¹ Bureau of Justice Statistics Criminal Offenders Statistics, <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>.

¹² Previous incarceration rates are equivalent in Australia. “More than 60% of offenders in prison at the time of the 1994 Census had been imprisoned at some time previously” with a high of 78% for “break and enter” offenders. <http://www.abs.gov.au/Ausstats/ABS@.nsf/94713ad445ff1425ca25682000192af2/a47fa7f4931f2bf3ca2569bb00164f7e!OpenDocument> New South Wales has adopted technology which is similar to ours in appearance, but quite different in function: rather than inform and encourage judges to do that which is most likely to prevent recidivism by the offender in question, these tools – and similar ones developed in Scotland – encourage judges to do what other judges have most commonly done in similar cases with similar offenders. See <http://www.judcom.nsw.gov.au/dublin.htm>. A recent English study found that of nearly 10,000 prisoners, 84% had prior convictions. <http://www.crimereduction.gov.uk/drugsalcohol25.htm>. The report is summarized on the “Crime Reduction” website, which is described as follows: “The website was developed by the Home Office in partnership with the Association of Chief Police Officers (ACPO), the Local Government Association, Crime Concern and NACRO. It is managed on behalf of the UK crime reduction community by the Home Office Crime Reduction College.” <http://www.crimereduction.gov.uk/help/index.htm>. The full report is at

This record of abysmal outcomes for sentencing practices has had a major role in the success of campaigns to restrict the sentencing discretion of courts. Sentencing guidelines (though also driven by the talisman of uniformity), mandatory minimum sentences, and “three-strikes” laws are all rooted in the public’s understandable frustration with recidivism (as are most or all recent local attempts to erode or diminish the role of the courts).

Some argue that there is exaggeration and exploitation involved in the “crime victims” movement to increase the severity of sentences and to reduce the ability of judges to be “lenient.” But by refusing to focus sentencing on crime reduction, by wholly separating sentencing from research and data about what works on which offenders, and by engulfing the process instead in the liturgy of just deserts and, occasionally, general deterrence, we in criminal justice communities have undoubtedly allowed countless victimizations that would have been prevented by insisting on a sentencing process responsibly and rigorously focused on what works on which offenders to reduce criminal behavior.¹³

When a judge who tries “to explain what goes into a ‘just’ sentence to a courtroom full of family members from both sides”¹⁴ launches into a discussion of aggravation, mitigation, and general deterrence, the clear impression and undoubted result is that public safety through crime reduction is not foremost in what passes for analysis.¹⁵ We have continued to encourage the notion that sentencing is instead about punishment *per se*; we should not be surprised that the public reacts to recidivism by demanding more severe punishment.

Whatever the various motivations for embarking upon a revision of the Code, improved public safety performance must count for something. In its present form, however, the DRAFT will surely not improve the public safety results of sentencing practices.

<http://www.drugs.gov.uk/ReportsandPublications/Publications/arms.pdf>. The National Crime Prevention Centre of the Department of Justice of Canada reports “approximately 75% to 80% of incarcerated adults were persistent offenders in their youth.” <http://www.crime-prevention.org/english/publications/children/profil.html#history> A 1996 study for the Canadian Solicitor General concluded that the overall recidivism of imprisoned child molesters was 61% as compared with 83.2% for other prisoners. Hanson, R. K., Scott, H., & Steffy, R. A. (1995), *A comparison of child molesters and nonsexual criminals: Risk predictors and long-term recidivism*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY, 32(3), 325-337.

¹³ By enabling and celebrating the supposed substance of our just deserts pontifications, academia has been (and the present version of the DRAFT suggests that ALI should become) our accomplice in this persistent transgression. See Marcus, *Thoughts on Strathclyde, processing the Second Sentencing and Society Conference*, August 20, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm.

¹⁴ Kevin R. Reitz, MODEL PENAL CODE: SENTENCING PRELIMINARY DRAFT NO. 1, *Reporter’s Introduction* at 11, note 10 (comments of Judge Benjamin Lerner).

¹⁵ For what it may be worth, when I explain to such a full courtroom that what I am after is public safety within the limits of excessive punishment, and go through the analysis of what my data shows and how I think individual circumstances militate in favor of incapacitation or community based treatment, I have uniformly encountered acceptance – and not uncommonly, consensus from the defendant himself, even when imprisonment is the result.

How the First Draft Falters

Particularly in three respects, the DRAFT continues to encourage the prominence of deontological and similarly ephemeral notions in sentencing analysis and argument to the exclusion of public safety.

1. The DRAFT Wrongly Abandons Public Safety While Perpetuating the Primacy of Just Deserts

Revised Section 1.02(2)(a) would start every discussion with the notion that “in all cases” we should “render punishment within a range of severity sufficient to reflect the gravity of offenses and the blameworthiness of offenders” while not inflicting “punishment that is excessively severe¹⁶.” What “severity” is “sufficient to reflect . . . gravity” and what would be “excessively severe” are unavoidably questions of just deserts. Adopting the modern notion of

¹⁶ Revised Section 1.02(2) provides

- (2) The general purposes of the provisions governing sentencing and corrections are:
- (a) in all cases, to render punishment within a range of severity sufficient to reflect the gravity of offenses and the blameworthiness of offenders, but in no case to inflict punishment that is excessively severe in light of those considerations;
 - (b) when possible with realistic prospect of success, to serve goals of offender rehabilitation and reentry into law-abiding society, general deterrence of prospective offenders, incapacitation of dangerous offenders, and restoration of crime victims and communities, but only when these goals can be pursued within the boundaries of sentence severity permitted in subsection (a);
 - (c) to render the least severe sentences necessary to achieve the purposes in subsections (a) and (b);
 - (d) to produce sentences that are reasonably uniform and proportionate in their neutral application of the purposes in subsections (a) through (c), to provide certainty and fairness in sentencing, and to avoid unjustified disparities in sentencing, while recognizing the need for substantial judicial sentencing discretion within a framework of law;
 - (e) to ensure that unjustified racial and ethnic disparities in sentencing are reduced or eliminated, and that reasonable steps are taken to forecast and prevent such unjustified disparities when laws and guidelines affecting sentencing are proposed, revised, or enacted;
 - (f) to encourage innovation in the use of intermediate punishments;
 - (g) to promote research on sentencing policy and practices, including the development and use of databases concerning sentences imposed and served, crimes and victimizations, characteristics of sentenced offenders, the makeup of correctional populations, recidivism rates among offenders, and analysis of all these factors to assess the effectiveness of criminal sanctions as measured against their purposes;
 - (h) to ensure that adequate resources and facilities are available for carrying out sentences imposed on offenders, correctional resources are allocated according to rational priorities, resources are distributed as between state and local governments to best serve the purposes of sentencing and corrections, and, in particular, prison and jail populations are not allowed to exceed the facilities and services provided for their proper execution;
 - (i) to ensure that all criminal sanctions are administered in a humane fashion and incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental health care, and opportunities to rehabilitate themselves and improve their life chances following their release, with attention to the circumstances of sentenced female offenders whose needs may not adequately be addressed by programming designed for male offenders; and
 - (j) to increase the transparency of the sentencing and corrections system and its accountability to the public, and to enhance the legitimacy of its operations as perceived by all affected communities.

limiting retributivism may or may not be a theoretical advance,¹⁷ but retaining emphasis on what remains a just deserts analysis advances the cause of public safety not one iota. The present language of the Code pays less deference to the role of just deserts than the proposed revision, more directly promotes public safety, and adequately proscribes unduly harsh sentences:

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

* * * *

MODEL PENAL CODE: SENTENCING § 1.02(2)

– **The arguments for abandoning public safety are unpersuasive**

The DRAFT’s articulations of purpose are a major retreat from those of the original provision from the perspective of public safety. The PLAN FOR REVISION provides this explanation for this regression:¹⁸

- Although “rehabilitation theory” has recovered somewhat from Robert Martinson’s 1974 “nothing works” meta-analysis, the “science of rehabilitation has produced few robust findings to unseat” his view, and our slowly growing knowledge supports the notion only that some things work occasionally. Most treatment regimes, though well intended, could not withstand “rigorous assessment.” “Rehabilitation theory can no longer serve as the general justificatory goal of criminal punishment, nor should it be a major pillar of the legal structure for sentencing. *Caveat Emptor* must be the watchword . . . to avoid useless investments and to bolster the credibility of those efforts that can be shown to produce worthwhile results.”
- The proponents of *selective* incapacitation were wrong in believing that judges and others could accurately select especially dangerous offenders for longer terms than those imposed on the typical criminal. Risk assessments have a high false positive rate, so “the level of care surrounding such decisions should be great.” Yet the original Code’s “machinery for selective incapacitation decisions was too amorphous, informal, discretionary, error-prone, and non-self-correcting.” Thus any selective incarceration ought to be based on rigorous factfinding, filtered

¹⁷ *Lex talionis*, or the principle of equivalency, finds expression in Exodus 21:23. Although “eye for an eye” in modern terms is the slogan of severe punishment, in its origins it implied moderation, and was intended to condemn excessive retaliation or retribution for injuries or wrongs. A similar concept runs through the Code of Hammurabi (c. 2500 B.C.). See, e.g., *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglia of Eighth Amendment Prisoners’ Rights Standards*, 1992 UTAH L. REV. 565, 567.

¹⁸ I submit that this is a fair synopsis of the argument of Kevin R. Reitz, *Reporter*, PLAN at 16-28 (January 2002)].

through the best available risk assessment instruments, and perhaps subject to the full due process protections of a jury trial.”

- General incapacitation may have its “crime-reduction benefits,” but the researchers have found them “disappointingly small, especially in the realm of serious violent crime.” “Mass incarceration” has appealed to popular mentality in light of the failure of rehabilitation and reintegration, but needs a ceiling to counter the obvious trend toward excessive incarceration.
- Limiting retribution affords that ceiling, and also would correct the original Code’s failure to make “room for retribution,” which “[r]eflection suggests” will be present in any punishment system. “One of the chief benefits of retributive theory is that it suggests a proportional ordering of the severity of sanctions.” When coupled with “layered” sentencing purposes, sentencing guidelines, and the feedback loop of trial judge, appellate, and sentencing commission adjustments, the proposed revisions would produce a satisfactory structure that would allow for judicial discretion within a “discipline” imposed “upon the thought processes of sentencing courts.”

With respect, this is an abundantly unpersuasive justification for the regression urged by the DRAFT. The same arguments would as persuasively establish that *law enforcement* should not be assessed by its effect on criminal behavior.¹⁹ It is at least ironic to reject crime reduction for want of rigorous assessment in favor of retribution supported essentially by “reflection.” Overall, the argument distorts legitimate criticism of the crime reduction impact of past strategies into a justification for abandoning crime reduction as a primary objective of sentencing; it properly faults those past strategies for their lack of rigorous assessment, then urges adoption of objectives inherently insusceptible to rigorous assessment. It erects a façade behind which it claims order and rationality that cannot be attained and would accomplish no public benefit. Worst of all, it responds to public safety failures by abandoning public safety, with continuing avoidable victimizations as a necessary result.

First, it is hardly a surprise that neither rehabilitation nor prison would produce public safety results. Although the original Code articulated crime reduction as the first object of sentencing, actual state and federal sentencing provisions have rarely followed suit. Federal and state sentencing statutes usually articulate the purposes of sentences in terms of morally appropriate punishment; if they even mention a public safety objective, it is in the context of an unprioritized laundry list.²⁰ Actual sentencing practices have never made any competent attempt

¹⁹ Conviction and sentence are, after all, the ultimate objective of most successful law enforcement efforts. Many of the “what works” investigations have assessed the whole range of crime prevention, law enforcement, and corrections within the inquiry. *See, e.g.*, Lawrence W. Sherman, Denise Gottfredson, Doris MacKenzie, John Eck, Peter Reuter, Shawn Bushway, *Preventing Crime: What Works, What Doesn’t, What’s Promising, a Report to the United States Congress*, (National Institute of Justice 1997), <http://www.ojp.usdoj.gov/nij/pubs-sum/165366.htm>. Law enforcement, because of its proximity to criminal behaviors, at least has a better claim to a general deterrent effect than do sentencing strategies.

²⁰ Federal law provides that a sentence should “reflect the seriousness . . . and . . . provide just punishment for the offense.” 18 USC § 3553(a)(2)(A). Oregon law directs that one purpose of the criminal law is to “prescribe penalties which are proportionate to the seriousness of offenses” ORS 161.025(1)(f). *See also* the provisions quoted in notes [59-62](#),

to achieve crime reduction. Our persisting conundrum is captured in these excerpts from a National Institute of Justice research project:²¹

The judges' diverse selection purposes for sentencing individuals support the need for greater clarity and consistency in sentencing aims. The conflict between utilitarian and retributive perspectives was apparent in this study, despite a general preference on the part of judges for utilitarian crime control. Clarity could be increased if there were an internally consistent sentencing theory and if it were consistently applied. Despite their modest validity, the judges' subjective risk judgments substantially influenced their sentencing choices. The use of more formal, empirically derived methods would enhance sentencing rationality when sentencing theory incorporates risk as a relevant and justifiable consideration.

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[I]f considerations of general deterrence and deserved punishment are set aside, it must be concluded that confinement or increased length of incarceration served the crime control purpose of incapacitation but had little or no effect as a "treatment" with rehabilitative or specific deterrent effects.

[T]here is little or no effect of sentences on crime control objectives — other than by incapacitation — as measured in this study.

The research as to the success or failure of rehabilitation and general incapacitation upon which the DRAFT posits its proposals studied the effect of programs *which never competed for clients based on their relative success in crime reduction*, and were selected by courts for purposes of just deserts and symmetry²² rather than anything approaching responsible assessment of offenders, incapacitation and other sentencing dispositions in terms of crime reduction. Likewise, the studies of the impact of prison on recidivism followed offenders whose sentence was not driven by any rigorous or responsible attempt to select that disposition most likely to divert a particular offender from a criminal career — that has never been the protocol for sentencing, so why should crime reduction be the result? And why abandon the most obvious purpose of criminal justice by assessing the success of a mission it has never made a responsible effort to accomplish?

infra, and the accompanying text.

²¹ Don M. Gottfredson, *Effects of Judges' Sentencing Decisions on Criminal Careers*, RESEARCH IN BRIEF, (National Institute of Justice November 1999), <http://www.ncjrs.org/pdffiles1/nij/178889.pdf>

²² Symmetry in the sense of merely sentencing thieves to theft talk, drunk drivers to alcohol treatment, sex offenders to sex offender treatment; fitting the sentence to the *crime* as opposed to the *offender* — and with no attempt to assess crime reduction outcomes.

Second, the PLAN understates the extent to which experience has repudiated the position that “nothing works,”²³ understates what we have learned about what “rehabilitation” does and does not work,²⁴ and understates what we know about the impact of punishment, including incarceration, on crime.²⁵

Third, by centering its proposals around punishment that, while not “excessively severe” and free of “unjustified disparities,” is “sufficient to reflect the gravity of offenses and the blameworthiness of offenders” and, perhaps, accomplish “general deterrence,” the PLAN presents objectives that are far less susceptible to “rigorous assessment” and inherently more “amorphous, informal, discretionary, error-prone, and non-self-correcting” than the crime reduction objectives the PLAN would displace. After all, recidivism can be measured.

Fourth, any expectation that limiting recidivism will combat excessive incarceration is likely to be disappointed. Legislatures and electorates have adopted sentencing guidelines and ballot measures that have swollen prison populations. The PLAN does not make a persuasive case that sentencing commissions and appellate review will moderate incarceration policies and practices. Indeed, legislatures and the electorate have made clear their ability to increase the use of prison during the tenure of sentencing commissions,²⁶ and there is no evidence that the iteration proposed by the PLAN will be any more effective in limiting the use of incarceration than existing state and federal constitutional proscriptions against excessive punishment.²⁷

Fifth, to the extent that the PLAN contends that the primacy of retribution in sentencing is inevitable,²⁸ it again ironically condemns utilitarian objectives for want of empirical rigor, yet embraces regression *a priori*. Assessment, however, reveals substantial public support for crime

²³ See, e.g., Harland, A. T. (ed), CHOOSING CORRECTIONAL OPTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY, (Sage Publications (1996)); McGuire, J. (ed), What Works: REDUCING RE-OFFENDING: GUIDELINES FROM RESEARCH AND PRACTICE, Chichester: John Wiley & Sons (1995) ; Palmer, T., THE RE-EMERGENCE OF CORRECTIONAL INTERVENTION. (Sage Publications 1992); Lawrence W. Sherman, Denise C. Gottfredson, Doris L. MacKenzie, John Eck, Peter Reuter, and Shawn D. Bushway, *Preventing Crime: What Works, What Doesn't, What's Promising*. (Office of Justice Programs 1997). See also McGuire, James, WHAT WORKS IN REDUCING CRIMINALITY (2000), <http://www.aic.gov.au/conferences/criminality/mcguire.pdf>.

²⁴ See notes [47](#), [48](#) and [51](#), and accompanying text, *infra*.

²⁵ See notes [49-50](#) and accompanying text, *infra*.

²⁶ For example, Oregon has had a commission since 1989, originally the Sentencing Guidelines Board (1989 Or Laws Ch. 790), superseded as too lenient by the Oregon Criminal Justice Commission (1995 Or Laws Ch 420). During its tenure, Oregon voters adopted a mandatory minimum measure to override guidelines in a range of crimes (See 1995 Or Laws Ch 2 (Measure 11)) and the legislature has added amendments tending to increase the use of prison (though also expanding discretion at the lower end of mandatory minimum crimes to avoid those minima). See ORS 137.717; 1993 Or Laws Ch 692.

²⁷ See, e.g., *State v. Ferman-Velasco*, 333 Or 422, 41 P3d 404 (2002), and authorities cited.

²⁸ PLAN at 21: “Reflection suggests that moral bases for punishment will be present in any punishment system . . . ,” citing Michael S. Moore, *The Moral Worth of Retribution*, in Ferdinand Schoeman Ed., RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PHILOSOPHY (New York: Cambridge University Press, 1987).

reduction ahead of retribution. When it recently examined the issue of public opinion through empirical means in the United Kingdom, the HALLIDAY REPORT²⁹ found:

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.³⁰

To the same effect are studies cited by the United States Department of Justice National Institute of Corrections, which adds that policy-makers consistently overestimate the punitiveness of the public, and underestimate the public's interest in rehabilitation.³¹

Clearly, that punishment may be inherent in sentencing does not imply or require rejecting the primacy of crime reduction.

²⁹ 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), <http://www.homeoffice.gov.uk/docs/halliday.html>. For an analysis of the HALLIDAY REPORT, See Marcus, *Thoughts on Strathclyde, processing the Second Sentencing and Society Conference*, pages 31-38 (notes 101-131, and accompanying text), August 20, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm.

³⁰ *Id.*, App. 5 (at 108).

³¹ US Department of Justice, National Institute of Corrections, "Promoting Public 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).

When I presented the Oregon legislature with what became 1997 Or Laws Ch 433 (see text accompanying notes 61 and 75, *supra*), I was approaching a conservative body that was enormously receptive to "get tough on crime" measures. Because the proponents of those measures seek above all to prevent future victimizations at the hands of convicted offenders, they became my allies in the effort. Because the primary fuel for public anger around crime and punishment is recidivism, this was a successful alliance and the bill became law with negligible opposition. Sentencing responsibly directed at crime reduction has broad and deep support. It would be most ironic to fail to build on that support for fear of public punitivism.

Sixth, the PLAN assaults “false positives” in “selective incapacitation”³² practices without holding its own proposals for ordered just deserts to a fairly comparable standard. Measured by public safety standards, I doubt that the PLAN’s author would dispute that excessive incarceration accomplished without risk assessment includes substantial “false positives” in the form of offenders incapacitated without public safety justification. The PLAN avoids false positives even for its vision of ordered deserts not by any attempt to correlate incapacitation with public safety, but by making ordered deserts the new objective: as long as a sentence falls within some range, and is accompanied by the ephemeral discussion of aggravation, mitigation, and appropriate punishment we’ve come to expect (and the PLAN would encourage), there can be no falsity. If everything is permitted, nothing is false.³³ If changing the objective is legitimate, then making our best effort to avoid future victimizations by offenders whose resulting enhanced sentence is not “morally” excessive is more justification for “selective incapacitation” than the PLAN offers for virtually abandoning public safety. After all, “selective incapacitation” has far fewer “false positives” than would using incapacitation *without* risk assessment.

Compared to existing sentencing practices, selective incapacitation probably would prevail in terms of fewer *false negatives* – *i.e.*, incapacitating truly dangerous offenders insufficiently to prevent them from causing future victimizations. Those who assail “false positives” generally avoid two critical issues: whether selective incapacitation produces a net public safety benefit, and whether and why any public safety benefit is or is not adequate justification for selective incapacitation notwithstanding false positives. After all, it is both fair and responsible to incapacitate violent offenders who have already committed a violent crime to reduce the *risk* that they may commit another, even if we are not *certain* that they will do so.

Moreover, wholly apart from dangerous offender schemes that impose incapacitation beyond the maximum prescribed for the predicate crime, the issue is whether using better

³² The PLAN by this phrase invokes statutory schemes for enhancing prison sentences for certain categories of offenders who for some category of reasons are supposedly more dangerous than others convicted for the same offense. My experience with dangerous offender laws (ORS 161.725, *et seq*) makes me welcome this unusual approach: we start with someone convicted of a violent crime, and we invite competing experts to do careful analysis (albeit under imperfect legislative classifications) of whether the offender is likely to remain dangerous enough and long enough to justify an extended period of incapacitation. Yes, this is an imperfect prediction, but it is far more careful and far more precisely aimed at the legitimate objective of public safety than the usual sentencing analysis. It is also virtually unique in enlisting those with relevant expertise in the exercise, and subjecting them to the same crucible we use when dealing with other expert testimony in our courts: cross examination and the opportunity to respond with conflicting expert evidence that will be put to the same challenge. It makes no sense to deride the exercise as imperfect when the default we defend is overwhelming less informed, less careful, less analytical, and routinely productive of astoundingly high recidivism rates. While incapacitation is the most tangible public safety tool in our arsenal in the short run (while the offender is in custody), opponents would discredit attempting to serve public safety by separation by designating the entire process “preventive detention” – a fairly transparent effort to discredit incapacitation after trial with the same connotations appropriate for detention *without trial*. See Marcus, *Thoughts on Strathclyde, processing the Second Sentencing and Society Conference*, pages 10-14, August 20, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm.

³³ With due respect to BARDO THÖDOL (THE TIBETAN BOOK OF THE DEAD).

information and direction in deciding whether, for how long and under what conditions³⁴ to incarcerate which offenders is reasonably likely to improve our public safety performance, or is so hopeless an effort as to warrant wholesale retreat from public safety responsibility. The PLAN does not begin to make its case by its assault on “selective incapacitation.”

Seventh, the PLAN’s analysis rests on the absence of rigorous public safety assessment of incapacitation and “rehabilitation,” yet urges that we devote the considerable data-gathering resources of sentencing commissions entirely to other pursuits: tracking sentencing patterns, exploring connections between sentencing practices and correctional resources, ferreting out disparities, and monitoring tensions between sentencing guidelines and departures.³⁵ A rational and socially productive response to the absence of rigorous assessment would be to allocate the research and analysis resources of such commissions to rigorous assessment of how sentencing can more effectively serve public safety.

Eighth, before abandoning public safety as a primary objective, more should be required than examining the shortcomings of theories of rehabilitation, selective incapacitation, and general incapacitation. After all, we do much more than send offenders to jail or to treatment; we supervise them through various modalities, subject some to intermediate sanctions that are neither custody nor treatment, and merely fine others. Exposing the failures of treatment and custody alone does not even purport to assess the crime reduction impact of sentencing as a whole. And criticizing the impact of incarceration on crime rates generally or recidivism *after release* fails to assess the existing or potential use of incapacitation to reduce crime by an offender *over the course of a potential criminal career*. More importantly, the issue is whether sentencing laws, guidelines, and practices can be meaningfully productive of public safety objectives, or whether, as the PLAN suggests, those objectives are so unlikely of accomplishment as properly to be displaced by what amounts to the prevailing state religion of punishment. At the very least, the argument for displacement cannot even be credibly raised until we have made a responsible and rigorous effort to achieve public safety through sentencing laws, guidelines, and practices.

Finally, and most importantly, nothing in the PLAN’s rationale changes the fact that our sentencing decisions unavoidably have public safety outcomes. Some of the things we do to offenders have better and some have worse public safety outcomes than other things we could have done to the same offenders; some things work better on some offenders than on others; and decisions about how long and under what conditions to incapacitate offenders work for better or for worse as measured by their continuation or not in criminal careers.³⁶ All of the dispositions

³⁴ A responsible assessment would include measurement of the impact of treatment, education, and other variables *within* prison.

³⁵ I do not deny that these efforts have value (and in the case of disparities, great importance), but insist that they are dwarfed in their social importance by – and dependent for their meaningful success upon – the need more accurately to aim sentencing at crime reduction.

³⁶ Multnomah County’s sentencing support tools, discussed at page 29, *infra*, display correlations with recidivism for different dispositions used in the past for similar offenders sentenced for similar crimes. Those tools show that even slight variations in the age or extent or flavor of criminal history of the cohort correlate with quite different relative outcomes of programs, terms of incarceration, forms and duration of supervision., and other dispositions.

we impose on offenders have outcomes, at least in the sense that all correlate with the presence or absence of future criminal behavior. The raging debate between “rehabilitation” and “incapacitation” is profoundly flawed. Treatment and other programs; jail, prison, and other forms of “incapacitation;” and all of the many other things we do to offenders potentially reduce, increase, or have no effect upon their subsequent criminal behavior, and all ought to be assessed by how well they are likely to work on which offenders and under which circumstances. While it is premised on criticism of the rigor with which we have assessed the public safety outcomes of only portions of a system that has never been responsibly directed at public safety, the PLAN suggests not that we achieve rigorous assessment and data-driven sentencing, but that we direct our attention away from public safety (apart from the small portion of offenders for whom “rehabilitation” might be “realistic”³⁷) and instead devote our resources to moderating discretion, general deterrence, and retributive limits for purposes unrelated to public safety.³⁸ The unavoidable consequence of accepting this proposal is that any public safety accomplishments will continue to be accidental; recidivism will continue to be excessive; ALI would be complicit in encouraging the persistence of avoidable victimizations and the enormous waste and misdirection of public resources; ALI would miss an opportunity “to avoid useless investments and to bolster the credibility of those efforts that can be shown to produce worthwhile results.”

– Rather than abandoning public safety, we must pursue it responsibly

I submit that the first objective of sentencing ought to be crime reduction, not “punishment . . . sufficient” to “reflect the gravity of the offense[] and the blameworthiness of [the] offender[].” I fully accept that deontological considerations must pose a limit,³⁹ and accept *arguendo* that there are some relatively rare situations in which utilitarian considerations

³⁷ The PLAN seems to concede that general deterrence may not be “realistic.” *See* DRAFT at 13, note 18; PLAN at 21.

³⁸ An analogy: as elders of a primitive society, we are called upon to assess the need for revision in the practices by which our spiritual healers address illness and injury among the people. After rigorous study, we conclude that the styles and energy by which healers address common maladies vary disturbingly, and that only occasionally do their potions and ceremonies seem to do any real healing. Instead of sending us on the path to modern medicine by encouraging the tracking and emulation of what seems to work on which ailments (measuring our success in terms of reduced mortality and morbidity of patients), we instead decide that the purpose should to celebrate the ceremony, and that our task is to study ceremonies and establish commissions intended to encourage the use of similar ceremonies for similar maladies (measuring our success in terms of the extent of learned satisfaction with ceremonies). We give up on curing more people, and decide our job is to regulate the dance.

³⁹ A long prison sentence would serve public safety for a recidivist shoplifter, but should be precluded by notions of proportionality. For what is may be worth, I submit that the proper role of “limiting retributivism” in imposing an upper limit on the appropriate sentence depends upon the present crime, temporally related criminal conduct, and the attendant harm, and *not* upon the criminal history of the defendant. That history is quite relevant for the utilitarian purpose of predicting the likely success of any rehabilitative (or, for that matter, incapacitative) disposition, but should not move the upper limit upward. The validity of my primary arguments about the primacy of public safety outcomes does not depend upon the validity of my position on this point.

(including victim interests in restitution and otherwise⁴⁰) alone produce a sentence that is somehow “unjustly lenient⁴¹.” But the approach of the DRAFT wags the dog. Any improvement in criminal sentencing must make crime reduction the primary focus of sentencing. Properly implemented, that approach would make the role of morally based limits (maximum and minimum) secondary in the sense that they would only rarely need to override the outcome generated by responsible consideration of utilitarian factors – primarily crime reduction – which would usually generate a disposition within any such limits. Every sentencing discussion should start with responsible consideration of public safety outcomes.

After the sentencing ceremony depletes itself in the ephemeral realm of just punishment, the DRAFT would contemplate consideration of utilitarian objectives within this rubric:

[W]hen possible with realistic prospect of success, [sentencing provisions should] serve goals of offender rehabilitation and reentry into law-abiding society, general deterrence of prospective offenders, incapacitation of dangerous offenders, and restoration of crime victims and communities . . .

Revised Section 1.02(2)(b)

I would enthusiastically agree that judges should not impose light sentences because of an unrealistic assessment of the likely success of community based treatment, and would add that they should not impose a maximum of a year of prison solely on the unrealistic assumption that offenders so sentenced “will sit and think about how to make better decisions when they get out.” But coupling the qualifier “realistic prospect of success” with the notion of general deterrence deprives that qualifier of all credibility, and the *Introduction*’s examples of how this is all supposed to work confirms the fear that the DRAFT would continue to smother public safety concerns with just deserts.⁴²

⁴⁰ The utilitarian interests of victims most commonly include restitution for economic loss. Victims of “person crimes,” particularly sexual assaults, and most dramatically child victims of sexual crimes, commonly (but not universally) have therapeutic interests in a level of punishment for the offender which fixes fault exclusively on the perpetrator and helps resolve the trauma for the victim or the victim’s survivors. Retribution arguably serves utilitarian goals when it avoids private revenge through vigilantism, but eclipses utilitarianism when it serves only to satisfy a victim’s desire for revenge. For my purposes, the categorization of retribution is trivial; the important concept is that a sentence that responsibly serves the interests of crime reduction and any relevant victim interest in restitution or in psychological recovery will only rarely be “unjustly lenient.”)

⁴¹ MODEL PENAL CODE: SENTENCING PRELIMINARY DRAFT NO. 1, *Reporter’s Introduction* at 15, note 21.

⁴² There are other nits to pick with the DRAFT’s summation of the elements of crime reduction in Revised Section 1.02(2)(b). The existing language is preferable to the extent that it expressly articulates crime reduction; this version is open to the somewhat imprecise notion that rehabilitation and successful reentry are objectives independent of crime reduction. For purposes of articulating the policy and guiding its implementation, this section should state that the purpose is to seek crime reduction through the listed devices. It should not restrict incapacitation to “dangerous offenders” in the usual sense, as some persistent and extreme property offenders warrant incapacitation as a means of crime reduction. And it should be abundantly clear that “rehabilitation” and “incapacitation” do not compete by benefitting the offender and promoting public safety, respectively; rather, they are both means by which to achieve public safety. And, yes, judges should assess predictions about what is most likely to work or not based on “realistic prospect[s]

Thus, for example, in a hypothetical barroom assault case, a judge might be persuaded that the goals of offender rehabilitation and victim restoration can best be pursued through a combination of intermediate punishments tailored to supervise the defendant in the community (perhaps a period of home confinement with electronic monitoring will enter the judge's thinking), address the defendant's alcohol problem (if he has one and appears amenable to an outpatient treatment program), and keep the defendant employed so there is a good chance that financial reparation to the victim will be forthcoming. If the judge is also persuaded that such a package of sanctions would be "sufficient to reflect the gravity of [the offense] and the blameworthiness of [the offender]," as stated in subsection (2)(a), LR [limiting retributivism] would allow the judge to be influenced by utilitarian objectives and to impose such an order.

The LR framework also allows decisionmakers to move upward within the retributive range where appropriate on utilitarian grounds. For example, our hypothetical barroom-brawl defendant might be unmistakably remorseless and combative; he might have a prior history of convictions for violent offenses; he might refuse to acknowledge his serious alcohol addiction and evince no willingness to participate in a treatment regime; he might even suffer from a mental illness that places him at high risk of future violent offending. If a judge has solid grounds to conclude that the defendant poses a continuing danger to the community, LR would allow a sentence at the top of the retributive range for purposes of incapacitation.⁴³

It bears emphasis that posing all of this against the presumption of a "retributive range" is wholly unnecessary and internally inconsistent. Proportionality should provide a cap and, *arguendo*, a floor for a sentence in any given case, but it does not follow that every sentence needs to be placed on a retributive continuum. The primary issue ought to be which available disposition or combination of dispositions will most likely to reduce future criminal behavior by the offender. If restitution to or restoration of a victim is realistic, that should also be part of the mix. But if the judge is able to make sense of these objectives in spite of our "dim knowledge"⁴⁴ about them, why make the judge's task so much more elusive, and judicial performance so less accountable, by giving such prominent credence to the immeasurable relationship between a workable sentence and the "gravity of the offense"? It may be appropriate to choose among sanctions which are similarly likely (or not) to prevent recidivism in light of the circumstance that the victim in this hypothetical brawl suffered a broken nose, but we should not lightly discard dispositions likely to reduce recidivism in order to pursue reflection of the "gravity of the

of success."

⁴³ DRAFT at 16.

⁴⁴ DRAFT at 18. I propose later that our knowledge of what works can be substantially enlightened, in part by enlisting technology to that end.

offense.” In almost all cases, if we adequately and responsibly consider the best route to crime reduction and any actual interests of victims, we will have nothing to gain by pondering “gravity.” *A fortiori*, we should not further burden this delicate but critical calculus with a quixotic search for a sufficient “general deterrent” effect.⁴⁵

The second phase of the hypothetical illustrates a good deal of the confusion typical of sentencing rhetoric. While the attitude of the offender (“remorseless and combative”) along with his rejection of treatment could certainly be part of a rational calculus about what is likely to work to reduce recidivism, the grave risk – particularly in light of the reference to the “retributive range” – is that this DRAFT would encourage judges to persist in the common error of allowing moral judgments about “remorse” and anger at inappropriate “attitude” to displace responsible consideration of how best to reduce this offender’s likelihood of victimizing someone in the future.

The reference to mental illness surely illustrates that this analysis is misplaced if situated on a “retributive range” – mental illness is a mitigating rather than an aggravating circumstance in deontological terms, yet it quite properly militates in favor of incapacitative dispositions in this context when it undermines any “realistic prospect[s] of success” of rehabilitative measures. The same might often be said of addiction, though it is probably less sympathetic under prevailing social morés.

2. The DRAFT Presumes Judges Will Continue to Rely on Uninformed Discretion Instead of Data

It may well be that the persistence of such unmeasurable and elusive notions as “blameworthiness of the offender,” “gravity of the offense,” and “general deterrence” into the modern era is a function of their utility in sparing the criminal justice system any accountability for its public safety failures. As long as a sentencing decision is to be assessed by such standards, there is no accountability for public safety outcomes – and accountability is not an objective that institutions generally seek on their own initiative. Whether or not this is the reason for their subsistence, articulating these objectives as primary and allowing crime reduction objectives any role only “occasionally” ensures the continued irresponsibility and public safety failure of sentencing practices.

It is apparent from the examples just quoted from the *Introduction* that the DRAFT would continue to tolerate sentencing based on what amounts to uninformed judicial discretion – as long,

⁴⁵ Notably, there is no example of general deterrence in the DRAFT’s hypotheticals. General deterrence draws academic support (as opposed to the anecdotal support treasured by law enforcement and “tough on crime” advocates) almost entirely from the existence of numerous articles that construct models of fascinating sophistication that are premised on rather than supportive of an actual connection between the punishment of some offenders and the criminal conduct of others. I suspect that general deterrence does not work at all in most realms, although there are pockets of human activity that are indeed responsive to major changes in the existence (and likely imposition) of sanctions: illegal parking and corporate crime. The former lacks the passion (or at least lack of impulse control) that drives most crime; the latter is typically subject to logical and long range planning. The bulk of criminal behavior involves drives and defects for which abstract thinking (even if present) is no match – and the prospect of getting caught is abstract. I hasten to add that the validity of my notions about the importance of doing to offenders what is most likely in fact to divert them from criminal careers is entirely independent of whether I’m correct about general deterrence.

of course, as the result is within limits imposed by law and by our best efforts to capture the typical range of uninformed discretion in action. The picture is one of the judge holding forth with equal footing when assessing the likely success of attempts at rehabilitation and the necessity for and behavioral sequella of incapacitation as when quantifying the “gravity of the offense,” the “blameworthiness of the offender,” and the need for “general deterrence.” This is a continuing invitation for the decisive role of widely various philosophies, untested beliefs, sensitivities, idiosyncracies, personalities, politics and values of sentencing judges. To any responsible social scientist, this should be profoundly frightening – that a decision of such potential impact on the offender and on his prospective victims would turn on such sophistry.⁴⁶

The reality is that while notions of gravity, blameworthiness, and general deterrence are inherently ephemeral, we actually know quite a bit about what works and what does not – we just ignore it completely in sentencing. The potentially useful data⁴⁷ provide repeated support for some important propositions: Smaller sanctions, shorter sentences, and minimal supervision correlate with reduced criminal behavior for low risk offenders as compared with more intense responses to low risk offenders. Treatment programs that identify and responsibly address multiple criminogenic factors typically reduce recidivism by about thirty percent; they work far better than treatment programs that do something other than address criminogenic factors, and substantially better than programs that only address one or two criminogenic factors.⁴⁸

⁴⁶ The irony of our tolerance for sophistry in sentencing is nowhere more poignantly illustrated than by the context in which Morris and Miller (*Predictions of Dangerousness*, in Michael Tonry and Norval Moris, Editors, *Crime and Justice: An Annual Review of Research*, vol 6 (1985), pages 1-50) argue against judges using predictions of dangerousness to decide upon terms of imprisonment absent reliable evidence and meaningful cohort analysis. I agree that sentencing should be based on reliable evidence and meaningful cohort analysis, but I am astounded by arguments that appear to prefer imprisonment based on just desert and general deterrence sophistry to that based upon the logic that incapacitation at least prevents recidivism during the term of imprisonment. The most extreme disparagement of incapacitation deems it “preventative detention,” again oddly apparently preferring incapacitation based on retribution alone. Allan Manson, *SENTENCING AND PENAL POLICY IN CANADA* (Toronto: Emond Montgomery, 2000).

⁴⁷ See generally, Lawrence W. Sherman, Denise C. Gottfredson, Doris L. MacKenzie, John Eck, Peter Reuter, and Shawn D. Bushway, *Preventing Crime: What Works, What Doesn't, What's Promising*, Research in Brief, National Institute of Justice, July, 1998, and sources cited (<http://www.ncjrs.org/pdffiles/171676.pdf>); *Community Corrections: What Programs Work?*, Oregon Department of Corrections, and sources cited (http://www.doc.state.or.us/community_corrections/whatiscc/whatwork.shtml).

⁴⁸ See generally, *Treatment Works For Youth In The Juvenile Justice System*, National Mental Health Association, and sources cited (<http://www.nmha.org/children/justjuv/treatment.cfm>); Mark Gornik, *Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior*, U.S. Department of Justice, National Institute of Corrections, and sources cited (<http://www.nicic.org/pubs/2001/017624.pdf>). Gornik's meta-analysis of 154 studies found a 30% impact on recidivism for the 54 that assessed responsibly targeted and delivered treatment strategies. I hasten to add that I am no fan of meta-analysis to the extent that it derives numerical quantities from what is in essence a literature review, but this is a useful literature review. It is at least plausible to hope that the impact of good treatment programs on crime reduction could only improve were we to use our best efforts to send them the offenders most likely to benefit from those programs; “best efforts” hardly describes the process by which offenders are now selected for programs by sentencing courts.

Incapacitation works very well during the period of incapacitation. Measured by impact on recidivism (after release), though, anything longer than six months is probably counterproductive.⁴⁹

Shock incarceration, shock probation, scared straight, D.A.R.E., and boot camp programs do not work and commonly do more harm than good.⁵⁰

Sex offenders and sex offender treatment have often been the subject of research and publication. In general, we know that opportunistic intra-familial offenders are more susceptible to effective treatment than sexual offenders who seek out child victims with whom they are not acquainted, or who commit violent crimes against strangers, and that treatment competently aimed at risk factors is significantly effective at reducing recidivism.⁵¹

Although this vast body of data about what works or not on which offenders is accessible to us, and could substantially improve our choices in individual cases and on a policy level, sentencing practices and policy decisions overwhelmingly ignore it. Prosecutors stress the evil of the offender's deed and the extent of his record; defenders minimize the offender's misconduct or intent, quibble with his criminal record, or mine the offender's circumstances for sympathy. Once we settle any questions as to the legal limits that apply to the sentence as a result of guidelines or mandatory minimum sentences, and agree as to the range of any discretion,⁵² both sides accept that the issue is aggravation and mitigation, the liturgy of just deserts. I hear what an offender "deserves," and I am told to "send a message," apparently invoking general deterrence.

In recent years, either side is ready to mount an "equal treatment" contention whenever the offender can be painted into a category to which we usually assign a punishment acceptable to the momentary advocate of what masquerades as consistency.⁵³ Although the DRAFT at least

⁴⁹ Smith, P., Goggin, C., & Gendreau, P. (2002), *the Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, (http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf), cited in *The Effects of Punishment on Recidivism*, 7 RESEARCH SUMMARY No. 3 (May 2002), Office of the Solicitor General of Canada, (http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf).

⁵⁰ See sources cited note 47, *supra*.

⁵¹ See generally, *Recidivism of Sex Offenders*, Center for Sex Offender Management (Office of Justice Programs, U.S. Department of Justice) (May 2001), and sources cited (<http://www.csom.org/pubs/recidsexof.html>); *The Effectiveness of Treatment for Sexual Offenders*, 7 RESEARCH SUMMARY No. 4 (July 2002), Office of the Solicitor General of Canada, and sources cited (http://www.sgc.gc.ca/publications/corrections/200207_e.asp).

⁵² Although the range of actual discretion available in a sentencing decision varies from case to case and jurisdiction to jurisdiction, and although legislative and ballot measure responses to our public safety dysfunction have substantially limited discretion, enormous discretion remains. Where to sentence within guideline ranges, whether and when to run sentences consecutively or concurrently, whether and how far to depart when departure is legally available, and whether to revoke or modify probation all call for discretion that could be vastly improved by the means I advocate here – not to mention the vast number of crimes not subject to either guidelines or minimum sentences, such as virtually all Oregon misdemeanors.

⁵³ 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

recognizes that the need for consistency should be “balanced,” it weighs against consistency “judicial discretion to individualize sentences” without insisting that the discretion be informed and responsibly aimed at public safety.⁵⁴

Because the DRAFT would perpetuate reliance upon judicial speculation in pursuit of blameworthiness, gravity, and general deterrence, it cannot be expected to improve the public safety performance of sentencing judges.

3. The DRAFT Relegates Sentencing Commissions to the Accommodation of Sentencing Based upon Uninformed Discretion

Last of my primary⁵⁵ concerns with the DRAFT is its approach to the role of sentencing commissions. Because the DRAFT’s assumptions about what should drive sentencing decisions mire any public safety objective in just deserts clothed in limiting retributivism, its articulation of the purposes of a sentencing commission are similarly misdirected:

- (1) The purposes of the sentencing commission shall be:
 - (a) to provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects;
 - (b) to assemble and draw upon sources of wisdom, knowledge, and experience from all sectors of the criminal justice system, from the public at large, and from other jurisdictions;
 - (c) to work toward consensus positions of sentencing and corrections policy;
 - (d) to translate legislative policy into sentencing guidelines, providing certainty and fairness in sentencing and avoiding unjustified disparities, while recognizing and preserving substantial judicial discretion to tailor sentences to the circumstances of individual cases;
 - (e) to share responsibility with the trial and appellate courts over time in the collaborative development of a positive law of sentencing and corrections within the legislative framework;

to abandon common notions of right and wrong to pretend we’ve 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.

⁵⁴ DRAFT at 20-21.

⁵⁵ See note [42](#), *supra*.

- (f) to perform its work, and to provide rationales for its actions, consistent with the purposes of the sentencing and corrections system in Section 1.02(2); and
- (g) to ensure that all such efforts take place on a permanent and ongoing basis, with the expectation that the sentencing and corrections system must strive continually to evaluate itself, evolve, and improve.

New Section 6A.03

Experience provides numerous cautions as to the success of this mission. First, without express direction that “information development, research, and planning concerning criminal sentences and their effects” be directed toward the crime reduction effects of criminal justice, the commissions will continue to focus on counting other beans: the distribution of departures, the frequency of local as opposed to state incarceration sentences, the relationship between probation revocation guidelines and prison populations, and so on. There is certainly much utility to understanding connections between sentencing practices and demands on correctional resources, and to uncovering disparities that raise issues of racism and other inequity. But there is no justification whatever for failing to articulate and to give primacy to the single most important question: how to make sentencing more effectively serve the goal of crime reduction. After all, it is deceptive to claim attention to cost containment in corrections while ignoring the budgetary consequences of recidivism. And the evil of class and race disparity in the distribution of punishment is compounded by its relative futility in producing the social benefit of crime reduction – particularly when otherwise avoidable victimizations by recidivists fall so commonly on other members of the disfavored class.⁵⁶

Second, it is irresponsible to use the notion of “wisdom, knowledge and experience” in conjunction with “the criminal justice system.” Given our abysmal recidivism rates, we should be inviting input from other sectors altogether – such as those who have studied what works and what does not, but seem as content as we are to continue sentencing without reference to what works. To emulate past practices is to invite continued failure.

Third, the notion of expending energy in pursuit of “consensus,” “certainty,” “judicial discretion” and “improve[ment]” is chimerical until we articulate and pursue the goal of improved public safety performance through crime reduction. Funding and encouraging a commission in pursuit of “consensus,” “certainty,” “judicial discretion” and “improve[ment]” in the realm of “blameworthiness” and “gravity” is tantamount to investing in the continued public safety failure and obsolescence of criminal justice.

⁵⁶ Minorities and the poor are more likely to be crime victims, and more likely to be victimized by minorities and the poor. See, e.g., Bureau of Justice Statistics, NATIONAL CRIME VICTIMIZATION 2001, *Criminal Victimization 2001* (NCJ 194610, September 2002) <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf>; Janet L. Lauritsen, Norman A. White, *Putting Violence in Its Place: The Influence of Race, Ethnicity, Gender, and Place on the Risk for Violence*, 1 CRIMINOLOGY & PUBLIC POLICY 37 (November 2001); U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, CRIMINAL VICTIMIZATION IN UNITED STATES, 1999 STATISTICAL TABLES, especially tables 20-23, 42, 55, (January 2001, NCJ 184938), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus99.pdf>.

That these inadequate outcomes are actually invited is implied by the DRAFT's articulation of the early tasks of the commission:

(1) In the first [two] years of its existence, the sentencing commission shall have the following responsibilities:

- (a) to conduct retrospective research into crime rates, criminal cases entering the court system each year, the processing of those cases, the charging and plea bargaining practices of prosecutors, sentences imposed and served for particular offenses, the effects of offender and victim characteristics upon sentences imposed and served, and sentencing patterns for the state as a whole and for geographic regions within the state;
- (b) to assemble all available retrospective information on the effectiveness of sentences imposed and served in meeting the purposes in Section 1.02(2);
- (c) to collect information on all correctional populations in the state;
- (d) to survey the correctional resources across state and local governments, including both infrastructure and human resources, and to assess the adequacy of existing resources to meet current and projected needs;
- (e) to identify and prioritize areas where necessary data and research are lacking concerning the subject matters in subsections (a) through (d), and to recommend to the legislature means by which the commission or other state agencies may be empowered to address such needs in the future;
- (f) to study the experiences of other jurisdictions with sentencing commissions, including the content and operation of guidelines promulgated by those commissions;
- (g) to promulgate and present to the legislature one or more proposed sets of sentencing guidelines, subject to the procedures and requirements of Sections 6A.06 and Article 6B, accompanying each proposal with impact projections as described in Section 6A.07;
- (h) to study the desirability and feasibility of guidelines to regulate the charging and plea bargaining practices of prosecutors, or alternative means to regulate such practices, and to make appropriate recommendations to the legislature;
- (i) to recommend to the legislature any changes needed in the criminal code, and to recommend to [the rulemaking authority] any changes needed in the rules of criminal procedure; and
- (j) to advise the legislature of any needed additions in correctional resources, and to suggest intergovernmental funding mechanisms to best coordinate correctional expenditures as between state and local governments; and

(k) to make and publish a report to the legislature and the public on all matters outlined in this section.

New Section 6A.04

What should be the obvious priority, given the recidivism realities noted above⁵⁷ is not how offender and victim characteristics affect sentencing, or how sentencing meets the purposes of “reflect[ing] the gravity of offenses and the blameworthiness of offenders,” but how sentencing affects crime reduction. That this obvious purpose is missing speaks profoundly to the misdirection of this effort.⁵⁸ That purpose is missing or hopelessly diluted by numerous precatory objectives in all of the sentencing commission legislation assembled in the Appendix to the DRAFT,⁵⁹ including the federal version, 28 USC §991, which directs the United States Sentencing Commission to assure that sentencing meet the purposes of sentencing as set forth in 18 USC §3553(a)(2)⁶⁰ – which, typically, perpetuate the sort of conundrum enshrined in Revised Section 1.02(2) of the DRAFT:

The court, in determining the particular sentence to be imposed, shall consider -

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed -
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant

18 USC §3553(a)(2)

Oregon’s statute is unique in requiring the commission to prepare a plan that includes crime reduction and

⁵⁷ See notes [7](#) - [12](#), *supra*, and accompanying text.

⁵⁸ I do not mean to derogate the need to uncover racial disparities and other inequities in sentencing, nor the legitimacy of exploring for administrative purposes the relationships among criminal justice policies and practices and the demand on scarce resources. But until the process meaningfully tackles the greatest single expense in our system – the high prevalence of recidivism – the effort is simply irresponsible.

⁵⁹ MODEL PENAL CODE: SENTENCING PRELIMINARY DRAFT No. 1, APPENDIX TO COMMENTS ON NEW SECTION 6A.03. PURPOSES OF SENTENCING COMMISSION; NEW SECTION 6A.04. INITIAL RESPONSIBILITIES OF SENTENCING COMMISSION; NEW SECTION 6A.05. ONGOING RESPONSIBILITIES OF SENTENCING COMMISSION [hereinafter cited as Appendix], pages 96-116.

⁶⁰ 28 USC §91(b)(1)(A).

- (f) Methods of assessing the effectiveness of juvenile and adult correctional programs, devices and sanctions in reducing future criminal conduct by juvenile and adult offenders; and
- (g) Methods of reducing the risk of future criminal conduct.

ORS 137.656(2)⁶¹

All of the versions in the Appendix,⁶² like the proposed language in the DRAFT, contemplate that sentencing commissions expend their research resources largely to generate data reflecting the enormous complexities of criminal justice systems erected without any meaningful

⁶¹ Subsection (f) was a product of 1997 Or Laws ch 433, which adjusted numerous statutes towards the end of sentencing based on data about what works best with which offenders. See note 1, *supra*.

⁶² Some of the examples from the Appendix make no mention whatsoever of public safety objectives. Arkansas Code §16-90-802; Revised Statutes of Missouri §558.019; Utah Code §63-25a-304. Many refer to public safety or crime or recidivism reduction only incidentally (Kansas would consider public safety only as it might be impacted by options for reducing prison populations (Kansas Statutes §94-9101(b)(15)); Ohio merely prescribes that a *structure* to control the use and duration of a “full range of sentencing options” be “consistent with public safety” (Ohio Revised Code §181.24(A), (B)(5)); Virginia touts the development of risk assessment instruments for the limited purpose of assessing the feasibility of attempts to use sanctions alternative to incarceration for a small portion of offenders (Virginia Code §14.1-803(2001))). Most share the DRAFT’s approach of merely listing public safety objectives as but an incidental ingredient of a mix dominated by just deserts and similarly ephemeral purposes: Massachusetts starts by “punish[ing] the offender justly” and “secur[ing public safety]” only by invoking the mantra of “swift and sure” punishment, listing protection against recidivism only after the need “to reflect the seriousness of the offense,” “promote respect,” “provide just punishment, and “afford adequate deterrence.” Massachusetts Laws, Ch. 211E, §2 (2002). North Carolina contemplates “protect[ing] the public” only by “restraining offenders” and only after imposing a “punishment commensurate with the injury” and factors of aggravation and mitigation. *Compare* North Carolina General Statutes §164-36 with 15A-1340.12. (North Carolina is commendable for considering collateral consequences of imprisonment - §164-42.1(a)(13)). Pennsylvania at least mentions public safety, but conditions that objective by calling for “confinement that is consistent with the protection of the public [and] the gravity of the offense.” *Compare* Pennsylvania Consolidated Statutes, Title 42, §153(A)(1), with §9721. Title 28, United States Code, section 991 directs the United States Sentencing Commission to establish policies and practices that “assure the meeting of the purposes of sentencing as set forth in” 18 USC §3553(a)(2), which in turn emphasizes “the nature and circumstances of the offense and the history and characteristics of the defendant” and the need to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” to “afford adequate deterrence” and only then to “protect the public from further crimes of the defendant.” The State of Washington similarly directs its commission to function with a view towards its statutory purposes of sentencing, which start with punishment “proportionate to the seriousness of the offense and the offender’s criminal history,” that “promote[s] respect for the law by providing punishment which is just,” and is “commensurate with the punishment imposed on others committing similar offenses,” and only then gets around to “protect[ing] the public” and reducing recidivism. *Compare* Revised Code of Washington §9.94A.850(2)(a)(i) with §9.94A.010.

Most of the provisions cited in the Appendix contemplate that commissions will conduct research, gather data, serve as the statistical analysis for the state – but *none* (other than Oregon’s – *e.g.*, ORS 181.715(1)(a), 423.478(1)(b)) move beyond the quantification of sentencing practices, correctional caseloads, sentencing disparity and the like to “analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct” (ORS 423.478(1)(b)) – in other words, to researching the effectiveness of sentences and corrections to serve public safety.

Oddly missing from the Appendix, perhaps because the inquiry stopped with the 1992 demise of the Texas Punishment Standards Commission (DRAFT at 48 & n. 80), is the Texas Criminal Justice Policy Council, which has direct mandates to focus on the impact of programs for juveniles and for adult inmates in reducing their recidivism. Texas Family Code Ann §59.012; Texas Gov’t Code Ann §§413.009, 413.016; 413.022. See page 31, *infra*.

focus on crime reduction. However useful it may be to uncover relationships within the criminal justice system that may be exploited for the sake of budgeting, efficiency, and planning, as long as we ignore the overriding need to reduce recidivism with more informed sentencing we are doomed to failure. There can be no efficiency as long as most sentenced offenders will repeatedly tax the system's resources by returning to the system after causing new victimizations.

The *Introduction* and the PLAN posit an iterative process whereby sentencing practices, appellate review, and commission research evolves essentially a common law of sentencing. Things will supposedly be better when the loop is closed, so that more and more sentences will similarly capture "blameworthiness," "gravity," and "general deterrence." Even assuming that this sort of gigantic feedback would generate agreement about what is "called for" in similar circumstances, the effort would be hopelessly misguided.

New South Wales, and to some extent, Scotland and Israel, have developed data gathering and display technologies that give judges access to accurate data about what judges have done to similar offenders for similar crimes in the past – expressly on the premise that judges will produce "better" sentences to the extent that they adhere to the predominant practices of other judges in similar cases. To be fair, these jurisdictions allow appellate courts to revise a sentence for excessive severity or leniency, so reducing the range of sentences does serve the stated goal of reducing appeals. Technologies such as that in New South Wales would be the epitome of what the DRAFT envisions for a sentencing commission's role in the process, and, apparently, would represent the highest calling of "research." Yet they would continue to enshrine as "judicial wisdom" sentencing approaches that demonstrably fail to serve public safety (or, for that matter, efficient deployment of correctional and law enforcement resources) because they coexist with abysmally high recidivism rates.⁶³ If judges had generally produced good public safety results, it would make sense to emulate what judges have previously done. Since we judges have not produced acceptable public safety results, it does not make sense to encourage others to achieve results like ours. It is counterproductive of public safety, destructive of legitimacy, and corrosive of public respect for the criminal justice system.

How the Revision Could Help

Instead of rallying the resources of criminal justice in a wholesale retreat from the mission of public safety, the revision should take a very different path. It should:

⁶³ For a description of the New South Wales technology, See Schmatt, *The Role & Functions of the Judicial Commission of New South Wales*, May 6, 2000, <http://www.judcom.nsw.gov.au/dublin.htm>. For a critique of this approach and some descriptions of the Scottish and Israeli approaches, See Marcus, *Thoughts on Strathclyde, processing the Second Sentencing and Society Conference* 18-19, August 20, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm; Marcus, *Sentencing Support Technology and Accountability for Public Safety Outcomes* n.6, June 3, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Glasgow_Paper.htm; Marcus,, *Sentencing Support Technology in Oregon* 6-8, March 3, 2001, <http://home.attbi.com/~smmarcus1/CTC7paper.pdf>; Marcus, *Sentencing Support Technology in Australia*, July 12, 2000, http://ourworld.compuserve.com/homepages/SMMarcus/NSWsent_techn.htm.

1. Promote Crime Reduction as the Primary Function of Sentencing

The Original version, now in place, beings by declaring that sentencing should “prevent the commission of offenses” and “promote the correction and rehabilitation of offenders.” As the DRAFT and PLAN suggest, rigorous assessment has not been any sustaining part of this effort. Rather, we have apparently proceeded on the *a priori* notion that punishment prevents crime by separation (which it does), by specific deterrence (which it may or may not, but recidivism rates demonstrate the general failure of this effect), and by general deterrence (for which rigorous support is virtually nonexistent). We have also generally proceeded as if the notion of “rehabilitation” is a separate path altogether⁶⁴ – a path that the PLAN correctly criticizes as largely devoid of empirical assessment or guidance. Yet if we focus on public safety, the correct response to all of this is rigor, not abandonment. The reason to pursue rehabilitation in the criminal justice system (as opposed to social welfare systems) *is* public safety. The question should be which dispositions best accomplish public safety for which offenders. For some, that will be separation, for others community based treatment or other attempts to address the criminogenic factors contributing to an offender’s criminality, and for still others, separation coupled with such attempts. The Revision ought to build on the current version, and insist that we pursue public safety with *all* of our sentencing tools, ensuring that our direction is continually improved by responsible assessment of our results.

If we are successful in increasing the prominence of “what works” in this process, we should be more successful in deploying the resources of our criminal justice and correctional systems where they will do the most good.⁶⁵ Success should also make it easier to obtain resources for those strategies that do reduce crime than when they have to compete with the primacy of punitive measures whose efficacy is based either on “reflection” or what amounts to a state religion of punishment.

2. Articulate That Rehabilitation, Incapacitation, Community Supervision, and Alternative Sanctions Are All to Be Employed Where Appropriate to the End of Crime Reduction

Given the tendency of a just deserts-based ideology to assign competing roles to rehabilitation and incarceration,⁶⁶ the Revision could accomplish much by articulating that *every*

⁶⁴ See, e.g., the analysis in *State v. Kinkel*, 184 Or App 277, 56 P3d 463 (2002), which proceeds on the unfortunate assumption that “reformation” and “public safety” are *competing* objectives.

⁶⁵ An issue of some sensitivity is the enormous extent to which the drug war has distorted criminal justice and rendered even the most responsible criticism of that war essentially blasphemous. Making what works matter might just allow sober reassessment of that war and its alternatives.

⁶⁶ See, e.g., *State v. Kinkel*, *supra* note [64](#).

criminal disposition – from sentence of discharge⁶⁷ through life imprisonment (and, for that matter, the death penalty) has an “outcome” in terms of public safety, and that any dispositions that are available within limits imposed by statute and deontological proportionality may be preferable to others in terms of crime reduction in any given case. Further, to the extent that incapacitation is required by considerations of public safety because of the relationship between the offender’s likelihood of reoffending (and the likely seriousness of future victimizations) and the uncertainty of the success of rehabilitative measures, the Revision should declare that the length and conditions of incarceration also ought to be selected in reference to our best information about 1) which would most likely correlate with crime reduction over the course of the offender’s potential criminal career, and 2) how the risk (and severity) of harm at the hands of the offender compares with others competing for incapacitation resources.

3. Acknowledge Victim Restoration and Restitution as Appropriate Additional Functions

Because the PLAN would abandon any pervasive role for public safety in sentencing, it progresses from its justifiable criticism of disjointed objectives in state sentencing laws to a proposal that sentencing seek different objectives at different levels of risk:

[L]egislatures have retained the “multiple choice” or “laundry list” approach of the original Code, albeit with greater emphases upon retribution and public safety than the Code’s recommendations. No current legislative statement of punishment goals embraces a theory of layered purposes, which would allow for different combinations of concerns to come to the fore for different crime categories. This is one area in which a revised Code could spur meaningful advances in the law, building upon the experience of guideline states.

PLAN at 37, footnote omitted

The DRAFT would direct sentencing commission resources and the iterative process⁶⁸ to the task of ordering objectives within those “layers.” DRAFT at 30. While the multiplicity of directives in most sentencing laws subverts effectiveness by confusing guidance and avoiding accountability for sentencing decisions, the notion that public safety is relevant to only a narrow range of sentencing decisions is preposterous. Public safety is potentially affected by every sentencing decision. Our task must be to enlist our best efforts to make those sentencing decisions that are most likely to divert offenders from criminal careers.

⁶⁷ This disposition imposes no sanction but retains the conviction on an offender’s record. *E.g.*, ORS 161.715. There is ample literature supporting the notion that crime reduction is best served for some low-risk offenders by doing as little as possible to them. *E.g.*, Bonta, J., S. Wallace-Capretta, and Jennifer Rooney, *A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program*, 27 CRIMINAL JUSTICE AND BEHAVIOR 312-329 (2002).

⁶⁸ See page 24, *supra*.

Nonetheless, victim restoration and restitution are appropriate additional and often compatible objectives of sentencing. In some cases, restorative justice in the form of victim-offender mediation may well serve the interest in reducing recidivism while also serving the interest in victim satisfaction.⁶⁹ Financial restitution may compete with or further interests in diverting offenders from criminal careers.⁷⁰ In more serious cases, punishment may have a substantial role in serving a victim's interest in psychological resolution or recovery from the psychic harm inflicted by a crime.⁷¹ All of these objectives are legitimate considerations, and might properly dictate a sentence more burdensome on the defendant than one crafted in light of crime reduction alone. But the first objective must remain crime reduction – preventing further victimization at the hands of the offender.

4. Declare That Legal Maxima in General and Notions of Proportionality in Specific Applications Limit the Severity of Sentences

Of course it is legitimate for the Revision to articulate the role of legal maxima and deontological restrictions on the severity of punishment. Though the iterative process contemplated by the DRAFT is unlikely to moderate prison use as anticipated,⁷² any appropriate lodestar for criminal sentencing must recognize both limits.

5. (Perhaps) Allow That in Rare Cases, Sentences Responsibly Aimed at Crime Reduction and the Restorative Needs of Victims May Be Increased to Serve Some Perceived Need for a Minimum of “Retribution” or “Denunciation”

I submit that responsible pursuit of public safety and any substantial interests of identifiable victims (within applicable legal limits) will almost always produce a sentence that also adequately serves any additional articulable legitimate purposes of criminal sentences. On the assumption that exceptions will occasionally arise,⁷³ it may be appropriate to articulate that

⁶⁹ Compare Bradshaw, W., and M.S. Umbreit, *Crime Victims Meet Juvenile Offenders: Contributing Factors to Victim Satisfaction With Mediated Dialogue in Minneapolis*, 49(3) JUVENILE AND FAMILY COURT JOURNAL 17-25 (1998), with Nugent, W.R., and J. Paddock, *Evaluation of the Effects of a Victim-Offender Reconciliation Program on Reoffense*, 6(2) RESEARCH ON SOCIAL WORK PRACTICE 155-178 (1996)

⁷⁰ ORS 137.106, provides that in deciding whether or in what amount to order restitution, judges should “take into account * * * The rehabilitative effect on the defendant of the payment of restitution and the method of payment.” I have had more than one probationer who paid past restitution amounts by stealing from new victims.

⁷¹ “Victim” certainly may include family members. A severe punishment may (or may not) serve a child sex abuse victim's therapeutic interests.

⁷² See page 9, *supra*.

⁷³ The usual example is the first offender social drinker who kills someone on the way home from a party, and is at very low risk of reoffending. I would argue that the death has raised the ceiling of disproportionality, and that public safety plus the interests of the surviving family members in psychic resolution are likely to be sufficient to require a substantial term of *secure* inpatient alcohol treatment. It may also be that the legitimacy of a criminal justice system in a society we have so accustomed to just deserts depends on punishing that first offender substantially even if there is no

some additional sanction may be justified.

6. Insist That Judicial Sentencing Discretion Be Based on Data about Which Dispositions Work on Which Offenders

Logically, the want of rigorous assessment and the inevitability of outcomes for every sentence should lead to proposing a very different iterative process than that envisioned by the DRAFT. Instead of seeking to impose “discipline”⁷⁴ upon the relatively aimless struggles of judges with just deserts, we should track the correlations among the variations among offenders, their crimes, all of the things we do to them (*not* limited to “rehabilitation”), and their future criminal conduct. Then we should deliver that information to judges and encourage them (and corrections workers) to do that which seems most likely to work on the offenders upon whom it is most likely to work.

In 1996, Oregon voters amended the state constitution to proclaim:

Laws for the punishment of crime shall be founded on these principles:
protection of society, personal responsibility, accountability for one's
actions and reformation

Or. Const. Art. I, § 15

The Oregon Legislature has broadly established reducing future criminal conduct as a loadstar of juvenile and adult corrections.⁷⁵ It has charged the Oregon Department of Corrections with this function:

- (b) Provide central information and data services sufficient to:
 - (A) Allow tracking of offenders; and
 - (B) Permit analysis of correlations between sanctions, supervision, services and programs, and future criminal conduct

ORS 423.478

The Oregon Judicial Department has adopted this policy:

BE IT RESOLVED BY THE OREGON JUDICIAL CONFERENCE that in the

risk of recidivism and no survivors of the victim.

⁷⁴ “In the well-designed state systems that currently exist, reversals are few in number, but are sufficiently in prospect to impose discipline upon the thought processes of sentencing courts.” PLAN at 27. All that this can possibly mean is restraining judges from doing dramatically less or more to an offender than is commonly done – an objective very different from that of protecting the public from crime. See page 24, *supra*.

⁷⁵ 1997 Or Laws Ch 433 (<http://ourworld.compuserve.com/homepages/SMMarcus/ch433.htm>).

course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.

BE IT FURTHER RESOLVED that judges are encouraged to seek and obtain training, education and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct.⁷⁶

Multnomah County, Oregon, has constructed a data warehouse to pool data from multiple criminal justice agencies. In addition to serving other public safety information needs, that data warehouse, the “DSS-Justice” system, supports sentencing support tools that allow judges, attorneys, and others involved in sentencing arguments and decisions to view data showing, for each sentencing element used on such offenders for such crimes, what portion of offenders like the one before the court, sentenced for a crime like the one for which that offender is being sentenced, have been free of recidivism for similar crimes – or for any crime – after being sentenced to that element. The purpose and effect of these tools is not to dictate a sentence, nor to displace discretion, or even to preclude consideration of other sentencing objectives, but to inform and to encourage analysis about what disposition is most likely to reduce crime in the future by the offender before the court.⁷⁷ Users produce the first display by entering a case number and selecting a charge for sentencing. Thereafter, they can alter any of the variables (the charge or charge category for which sentences are compared, the criminal history and demographics of the offenders whose sentences are compared, and the flavor of recidivism by which outcomes are calculated) and promptly generate a new display based on those variables.⁷⁸

That Multnomah County’s tools are unique is a testament not to the difficulty or futility of providing such tools to judges, but to the pervasive misdirection of criminal justice – a misdirection that the DRAFT would exacerbate, but that the Revision could and should reverse.

7. Direct Sentencing Commissions to Research What Works to Reduce Criminal Behaviors by Which Offenders, and to Inject What Works into Individual Sentencing Decisions, Sentencing Guidelines, and Policy Analysis Affecting Deployment of Criminal Justice and Corrections Resources

The DRAFT declares the purposes of provisions governing sentencing and corrections as

⁷⁶ 1997 Oregon Judicial Department Resolution #1, <http://ourworld.compuserve.com/homepages/SMMarcus/JCRESNO1.htm>.

⁷⁷ For further information on the design, purpose, technical aspects, and development of these tools, consult <http://www.smartsentencing.com>.

⁷⁸ A user manual is accessible from the Multnomah County Courts homepage under the “Sentencing Support Tools” link: <http://www.ojd.state.or.us/MUL/home.nsf/>.

including “punishment . . . sufficient to reflect the gravity of offenses and the blameworthiness of offenders,” “general deterrence” and occasional rehabilitation, when “realistic,” uniformity (particularly so as to avoid disparate impacts on minorities), and innovation. Revised Section 1.02(2). The DRAFT would also articulate that such provisions have a purpose

to promote research on sentencing policy and practices, including the development and use of databases concerning sentences imposed and served, crimes and victimizations, characteristics of sentenced offenders, the makeup of correctional populations, recidivism rates among offenders, and analysis of all these factors to assess the effectiveness of criminal sanctions as measured against their purposes

Revised Section 1.02(2)(g)[*emphasis added*]

This research information technology proposal on first blush bears remarkable resemblance to what we have begun in Oregon. But, having essentially evicted public safety and crime reduction from the “purposes” of punishment, the DRAFT would send sentencing commissions on a quixotic search for boundaries and principles within this amorphous mix of purposes – boundaries and principles having nothing to do with public safety. Thus, in prescribing the “purposes of the sentencing commission,” the DRAFT would have commissions provide “statewide policy development, information development, research, and planning concerning criminal sentences and their effects” and “assemble and draw upon sources of wisdom, knowledge, and experience,” “with the expectation that the sentencing and corrections system must strive continually to evaluate itself, evolve, and improve.” Revised Section 1.02(2). What distinguishes all of this from Oregon’s budding efforts responsibly to aim the juggernaut of criminal justice at public safety is the DRAFT’s insistence that the commission

perform its work, and to provide rationales for its actions, *consistent* [sic.] with the purposes of the sentencing and corrections system in Section 1.02(2).

New Section 6A.03(f) [*emphasis added*]

It follows that the commission is to help its jurisdiction more efficiently serve purposes that do not expressly address public safety or crime reduction at all, but allude only incidentally to rehabilitation and general deterrence with equal doubt about their realistic chances of success. In short, the DRAFT would assign no pervasive purpose of crime reduction to provisions governing sentencing or corrections, and no accountability to sentencing commissions for improving the system with respect to its impact on crime reduction. In this context, the concurrent claim of a purpose to make the sentencing and corrections system “transparent” and “accountable to the public”⁷⁹ is hollow indeed.

All but one of the provisions governing sentencing commissions collected in the Appendix

⁷⁹ Revised Section 1.02(2)(j).

to the DRAFT are similarly blind to any real focus on public safety.⁸⁰ Oregon’s provisions, though they have much in common with many others, also charge the Oregon Criminal Justice Commission with the ongoing development of a “plan for a coordinated state criminal justice system” that must include:

- (f) Methods of assessing the effectiveness of juvenile and adult correctional programs, devices and sanctions in reducing future criminal conduct by juvenile and adult offenders; and
- (g) Methods of reducing the risk of future criminal conduct

ORS 137.656

In the context of Oregon’s legislative and judicial commitment to crime reduction as an objective of adult and juvenile sentencing, this is a profoundly preferable assignment for such a commission. Another example, for some reason missing from the Appendix, is the legislation governing the Texas Criminal Policy Council. That body

shall analyze trends related to juvenile referrals, compliance with the progressive sanctions guidelines, and the impact of the guidelines and related reforms on recidivism rates using standard scientific sampling or appropriate scientific methodologies to represent statewide patterns . . .

Texas Family Code §59.012(a)

The policy council shall develop methods for measuring the success of each program or service determined by the Texas Board of Criminal Justice under Section 493.0053 to be designed for the primary purpose of rehabilitating inmates . . . Not later than January 1 of each odd-numbered year, the policy council shall submit as part of the biennial plan required by Section 413.015 specific findings as to the success of each program or service. . . in reducing recidivism of inmates

Texas Government Code §413.022

To be sure, the commissions of Oregon and Texas are also saddled with a multitude of purposes, and are themselves insufficiently prioritized in the direction of improving the public safety performance of criminal justice and corrections systems. But by their example, these statutes demonstrate that the research and data collection activities and policy making functions of commissions can indeed be directed in a far more useful direction than those proposed by the DRAFT.

The Revision should unambiguously aim sentencing and corrections provisions at crime reduction as the overriding priority. Then it should make improving the public safety

⁸⁰ See notes [59](#) and [62](#), *supra*.

performance of sentencing and corrections the highest priority of sentencing commissions. The role of commissions in evolving sentencing guidelines ought to be to enlist their influence in directing sentencing towards dispositions that best serve public safety.⁸¹

As to data collection and analysis, the Revision should

promote research on sentencing policy and practices, including the development and use of databases concerning sentences imposed and served, crimes and victimizations, characteristics of sentenced offenders, recidivism rates among offenders, and analysis of all these factors to assess the effectiveness of criminal sanctions *as measured by their impact in reducing criminal behavior and diverting offenders from criminal careers.*⁸²

Two aspects are worthy of emphasis. First, it is not enough merely to add “crime reduction” back to a laundry list of purposes. Criminal justice systems are powerfully persistent in their adherence to anything but responsibility and accountability for crime reduction. Crime reduction must be prominent and emphatic in its priority to have any impact. As discussed above, all of the other interests acknowledged by the DRAFT are subverted by a system that continues to yield enormous recidivism rates. Seeking consistency without redirection furthers only the interest in more consistently subjecting victims to the cruelty of victimizations we should prevent and offenders to the cruelty of punishments that displace dispositions that might improve their lives along with their behavior towards others.

Second, it bears emphasis that prescriptions for data collection are not self-executing. Criminal justice agencies, particularly those involved in law enforcement or already charged with information system responsibilities, are unaccustomed to the free flow of information within the criminal justice community. They sometimes actively resist it. Texas reports unusual success on the part of its Criminal Policy Council in accessing data directly⁸³ pursuant to its statutory authority.⁸⁴ A comprehensive model provision on sentencing commissions would enable unfettered access by a sentencing commission to the requisite data from the full range of criminal justice agencies.

Sentencing commissions represent a tremendous potential for gathering data about which dispositions work best at crime reduction. We must not forfeit that potential.

⁸¹ In a rational system with appropriate priority for public safety, a presumptive sentence would bet one most likely to serve public safety, and departures should be justified by special circumstances making something other than the presumptive sentence more likely to produce crime reduction; departures for reasons other than public safety should be the ones that require articulation of a “substantial and compelling reason” for the departure.

⁸² This is my proposed change to Revised Section 1.02(2)(g).

⁸³ Conversation with Tony Fabelo, Executive Director of the Texas Criminal Policy Council, at the occasion of our presentations to the Oregon Legislature’s Interim Judiciary Committee at the University of Oregon School of Law, September 29, 2000.

⁸⁴ See, e.g., Texas Government Code §413.016(e): “The Texas Department of Criminal Justice on a monthly basis shall provide in computer format data required by the policy council to prepare reports under this section.”

Conclusion

The American Law Institute's PRELIMINARY DRAFT NO. 1 regarding sentencing would virtually abandon public safety as a guiding principle for sentencing and corrections practices. The arguments of the DRAFT and of the PLAN fall far short of providing justification for such a regression in public policy, and the demotion of crime reduction as a purpose surely subverts the DRAFT's laudable purposes other than crime reduction.

Instead of accepting defeat, the Revision should endorse crime reduction as the central purpose of sentencing and corrections provisions. It should answer past failures of rigorous performance assessment not by changing the test of success, but by adopting the principle that every aspect of sentencing and corrections be measured at least in predominant part by its impact on recidivism. The Revision should insist that those who make policy and individual decisions about sentences are provided with the best information about what does and does not work to reduce crime by which offenders.