

MPC—THE ROOT OF THE PROBLEM: JUST DESERTS AND RISK ASSESSMENT

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I. INTRODUCTION

The Reporter has reluctantly conceded that risk assessment may properly divert those who commit less serious crimes from prison to lesser punishments, and may properly increase the duration of imprisonment for some of the most serious offenders. The source of this reluctance is the single most daunting impediment to meaningful sentencing improvement: our wholesale surrender to undifferentiated just deserts as *mainstream* sentencing’s only responsibility. That surrender explains our demonstrably dysfunctional, cruel, and wasteful allocation of the bulk of corrections resources—jail and prison included. Our use of jail and prison under the

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resulting paradigm frequently does more harm than good. The harm consists of accelerated recidivism by offenders whose criminality would be better addressed with wiser sentencing choices, of victimizations that smarter sentencing would have avoided, of excessive punishments that serve neither society nor the offender, of an enormous waste of public resources, and of continuing corrosion of public trust and confidence.

Just deserts has legitimate social functions, but the role it plays in mainstream sentencing theory and practice betrays both those functions and public safety by allowing criminal justice actors to avoid accountability for any outcome. By serving as an unmeasured talisman of sentencing, typically displacing any responsible pursuit of utilitarian functions such as crime reduction, just deserts has enabled our persistent failure to seek, let alone to achieve, satisfactory crime reduction. Further, just deserts currently drives the bulk of sentencing as an empty slogan that subverts our ability to achieve its legitimate social functions: obviating vigilantism and private retribution; promoting pro-social values such as respect for the property, persons, and rights of others; serving the legitimate needs of crime victims; and promoting respect for legitimate authority (“public trust and confidence”).<sup>1</sup>

In Part II of this Article, I argue that the Reporter’s reluctance to endorse risk assessment is the result of profound thinking errors, and sanctions a status quo far more vulnerable to his concerns than is responsible risk assessment. In Part III, I argue that by anchoring guidelines to ordered just deserts rather than the pursuit of social purposes, the Reporter weakens guidelines even for pursuit of the modest objectives of reducing sentencing disparity and prison growth. In Part IV, I focus on the Reporter’s misguided discomfort with the role of static factors, and argue that such factors are properly considered in sentencing when assessing offender responsivity. In Part V, I argue that the legitimate social purposes obscured behind “just deserts” are usually served by sentencing that responsibly pursues public safety, and discuss how sentencing should

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1. See, e.g., Michael H. Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S. CAL. INTERDISC. L.J. 67, 134 (2007) [hereinafter *Early Adopters and Power Users*] (advocating that sentencing should promote public safety and public values); Michael Marcus, *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 WHITTIER L. REV. 295, 296 (2007) [hereinafter *Limiting Retributivism*] (advocating that sentencing focus primarily on crime reduction); Michael Marcus, *Justitia’s Bandage: Blind Sentencing*, 1 INT’L J. PUNISHMENT & SENT. 1 (2005) [hereinafter *Justitia’s Bandage*] (advocating responsible pursuit of crime reduction); Michael Marcus, *Comments on the Model Penal Code: Sentencing, Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135, 324 (2003) (advocating that the first objective of sentencing be crime reduction); Michael Marcus, *Comments on Preliminary Draft #6* (Apr. 19, 2008), available at <http://www.smartsentencing.info/CommOn6thPD.pdf> [hereinafter *Comments on Preliminary Draft #6*] (arguing in favor of the use of risk assessment); see generally Michael Marcus, *Smart Sentencing: Sentencing for Public Safety and Harm Reduction*, <http://www.smartsentencing.com> (last visited June 29, 2009) [hereinafter *Smart Sentencing*] (discussing “sentencing for public safety and harm reduction.”).

address any conflicts between those purposes and crime-reduction objectives.

## II. THE REPORTER'S RELUCTANT TOLERANCE OF RISK ASSESSMENT

The Reporter's slow progress toward acceptance of risk and needs assessment<sup>2</sup> is positive change. He is surely correct that we must be vigilant in pursuing validation of such instruments, as both continue to improve and neither is likely to reach perfection. I agree with the Reporter that research and funding ought to be encouraged, and that risk and needs assessment must not trump proportionality.

The pain with which the Reporter struggles to accept a limited role for risk assessment is palpable. He expresses his lament for "any human being" when "false positives . . . result in . . . extended incarceration . . . imposed for crimes [offenders] will never commit."<sup>3</sup> He overcomes that concern only by conceding that forgoing reasonably accurate risk assessment "knowingly permits victimizations in the community" that represent "human suffering," that "is both terrible and, in statistical terms, ineluctable" and "that could have been avoided."<sup>4</sup> The Reporter explains his resolution of this tension:

In short, we can avoid the unneeded incarceration of those incorrectly identified as dangerous offenders (whom we cannot separate in advance from the truly dangerous) only by accepting the cost of serious victimizations of innocent parties (whom we cannot identify in advance). There is no wholly acceptable alternative in either direction—indeed, both options approach the intolerable. The proper allocation of risk, as between convicted offenders and potential crime victims, is a policy question as difficult as any faced by criminal law in a civilized society.<sup>5</sup>

Allocating risk and needs assessment only to the fringes of sentencing—diverting lower risk offenders from prison and increasing

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2. This Article addresses the iteration of risk assessment in MODEL PENAL CODE: SENTENCING § 6B.09, at 62–72 (Council Draft No. 2, 2008). The progression of the Reporter's position on risk assessment is reflected in comparison with the many previous drafts of the MPC revision. Earlier drafts are listed in Michael Marcus, *Limiting Retributivism*, *supra* note 1, at 295 n.2. The debate regarding risk assessment has continued at least since 2003. Michael Marcus, *Comments on Preliminary Draft No. 1*, *supra* note 1, at 142, 146–47. From the outset, the Reporter was particularly suspicious of attempts to allocate prison sentences based on notions of risk management, which he dubbed "selective incapacitation," while he embraced "retributive theory" as susceptible to "a proportional ordering of the severity of sanctions." Kevin Reitz, *Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 552, 556 (2002).

3. MODEL PENAL CODE: SENTENCING § 6B.09 cmts. 64–65 (Council Draft No. 2, 2008).

4. *Id.*

5. *Id.* at 65.

prison terms for the highest risk offenders—is the result of profound thinking errors. Those thinking errors yield mainstream sentencing entirely to just deserts and result in the allocation of the bulk of prison and other resources through means wholly divorced from risk and need, and accountable for no social function. By avoiding the difficult choice required for harm reduction, the Reporter has relegated the bulk of sentencing to the worst of both worlds: brutality to victims whose crimes should have been prevented, and brutality to offenders punished only in the name of proportional severity with no benefit to anyone. His solution hardly reduces the suffering of victims of crimes that more rational sentencing would have prevented, or the suffering of offenders imprisoned under his paradigm of proportional severity. Their suffering, after all, is not diminished by altering its rationale.

*A. Thinking Error #1: When Assessing the Accuracy of Risk Assessment, Future Crimes an Offender does not Commit are not “False Positives”; A Sentence Informed by Risk Assessment is not “Punishment for Future Crime”*

The first thinking error about risk assessment is succumbing to skeptics’ misguided assertions that risk assessment ensures “false positives” and amounts to punishment for crimes the offender has not yet committed.

The notion that a “false positive” arises when a high-risk offender does not commit a future crime is woefully off target. It undoubtedly emanates from understandable and laudable bias against incarceration as a deprivation of liberty—the same source that labels using prison for public safety as “preventive detention.”

Assume, for example, identical serious assaults by offenders whose criminal histories are also identical. Assume further that by analyzing additional variables, a validated risk assessment instrument accurately identifies one of the offenders as presenting a 1% risk of violent recidivism, and the other as presenting a 30% risk of violent recidivism. That only three of ten such identical higher risk offenders will, in fact, commit a new violent crime within the contemplated period does not yield seven “false positives.” The assessment of risk is by definition (in this hypothetical) precisely accurate. Of course, this disparity in risk ought to inform the choice whether to use scarce custody resources on the higher risk offender, while using community-based supervision and appropriately vetted programs on the lower risk offender. Assuming our purpose includes public safety, this much should be obvious to any rational person. Considering real disparity in risk does not mean that we are “punishing offenders for future crimes,” but rather that we are managing the risk these offenders represent by fashioning a sentence in response to a present conviction for a past crime. An offender’s dangerousness is not dispelled

by the circumstance that—whether or not because of our intervention—he does not reoffend, any more than a landmine is only dangerous if it explodes. Dangerous offenders incarcerated because of that danger will not victimize others outside their prison during that incarceration. That they may not offend when they get out does not mean they were incorrectly incarcerated as dangerous—regardless of whether their avoidance of recidivism was a matter of chance or successful rehabilitation. As this hypothetical illustrates, an offender can be thirty times more likely than another to commit violent crime, yet well short of certain to do so.

As long as the underlying conviction is just and the resulting disposition not unlawful, disproportionate, or disparate without good cause, there is no unfairness in allocating correctional restraints to those at highest risk of reoffending. Further, substantial variations in risk (as well as in susceptibility to rehabilitation—“responsivity”) are good causes for disparity in disposition. After all, allocating restraints is much more rational, fair, and transparent than allocating custody based on a wholly untested, undifferentiated façade of just deserts and far less brutal in its consequences to victims and to offenders. Those skeptical of risk assessment such as the Reporter inherently defend terms of incarceration based upon crudely ordered just deserts. The argument against risk assessment, after all, is not that we do a better job of protecting potential victims and avoiding unnecessary imprisonment without risk assessment than with it. The argument instead ultimately reduces to the proposition that we should not use prisons for public safety—regardless of the harm *that choice* inflicts on victims and offenders. Thus, for example, the Reporter’s sentencing revisions would not mention public safety as a purpose. They would allow the pursuit of “utilitarian objectives” such as crime reduction, through risk assessment or otherwise, only if that pursuit achieves some validation beyond what the Reporter would require for pursuit of retribution. He demands no validation whatever for requiring *all* sentencing to achieve “severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of the offender.”<sup>6</sup> The Reporter thus advocates distribution of the bulk of correctional resources, including prison, based entirely upon just deserts *with no requirement of any demonstration that this distribution serves any purpose at all*. If we actually agree that the only legitimate purpose of prison is punishment in this sense, we should at least allow offenders the option of caning in lieu of incarceration.

The notion of a “false positive,” like “preventive detention” and “punishment for a future crime” in this context<sup>7</sup> is propaganda seeking to

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6. MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i), at 8 (Council Draft No. 1, 2006); *see supra* note 1.

7. I am addressing the use of “preventive detention” to describe using incarceration to serve public safety, rather than its more proper use to describe incarceration of dangerous mentally ill

disparage the use of prison for the one thing it is best at: protecting people on the outside from people on the inside—while they are inside. Risk and needs assessments should be as accurate as we can make them, but the office of risk assessment is to assess *risk*, and the office of rational sentencing is to *manage* that risk.

Perhaps this dedication to managing risk is why 89.3% of judges responding to a recent poll commissioned by the Oregon Criminal Justice Commission agreed that risk assessment would be useful in sentencing *all* crimes.<sup>8</sup> Needs and risk assessment should be considered throughout the realm of sentencing, not just at the fringes, and should inform both individual sentences and policy decisions prescribing presumptive ranges of sentences for categories of criminal behavior. I hope Oregon will continue<sup>9</sup> its exploration of incorporating risk assessment in its guidelines, and will learn from Missouri, Virginia, Wisconsin, and other states exploring the issue.<sup>10</sup>

There is substantial irony in the fact that risk assessment is controversial within criminal justice only when invoked to guide sentencing decisions. As almost noted by the Reporter,<sup>11</sup> the use of risk assessment in sentencing would be the one occasion on which counsel for the offender and for the state could advocate and perform a quality assurance role. There is little opportunity for such a role in the rapidly expanding (and appropriate) use of risk and need assessment to guide pretrial release decisions, probation conditions, prison programming, and post-prison supervision.<sup>12</sup>

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persons outside the criminal justice system. *See, e.g.*, Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 317–19 (2006).

8. LESLIE TABLEMAN ET AL., OREGON CRIMINAL JUSTICE COMMISSION, SURVEY RESULTS ANALYSIS REPORT ON RISK ASSESSMENT AND SENTENCING GUIDELINE PERCEPTIONS AMONG JUDGES AND LAWYERS IN OREGON, app. A (2008).

9. Senate Bill 191 directed the Oregon Criminal Justice Commission to study “whether it is possible to incorporate consideration of reducing criminal conduct” into Oregon’s sentencing guidelines. 2005 Or. Laws 474. The Commission offered a bill in 2007 that would have begun to incorporate risk assessment, but the bill did not survive the legislative process. *See* S.B. 276, 74th Legis. Assem., Reg. Sess. (Or. 2007). The Commission is continuing the exploration; the poll cited in the text, *supra*, is one manifestation.

10. BRIAN J. OSTROM ET AL., NAT’L CTR. FOR STATE COURTS & THE VA. CRIMINAL SENTENCING COMM’N, OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION: PROCESS OF SENTENCING REFORM EMPIRICAL STUDY OF DIVERSION & RECIDIVISM BENEFIT-COST ANALYSIS 1-8 (2002), [http://www.vcsc.state.va.us/risk\\_off\\_rpt.pdf](http://www.vcsc.state.va.us/risk_off_rpt.pdf); MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: BIENNIAL REPORT 2007, at 31, 40 (2007), <http://www.mosac.mo.gov/file/MOSAC%20Commission%20Report%202007%20Final.pdf>; MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 4–5 (2005), <http://www.mosac.mo.gov/file/final%20report21June%202005.pdf>; Wisconsin Court System, Assess, Inform and Measure (AIM) Pilot Project, <http://www.wicourts.gov/about/organization/programs/altaim.htm> (last visited June 18, 2009).

11. MODEL PENAL CODE: SENTENCING 63 (Council Draft No. 2, 2008) (referring to the “protections of the courtroom”).

12. As to sentencing “enhancement” based on risk assessment, although predicting United

*B. Thinking Error #2: Sentencing Informed by Risk and Need Assessment is not Competing with Sentencing that is Accurate, Free of False Positives, Fair, Responsibly in Pursuit of Public Purposes, Kind to Offenders or to Victims, or Rational*

The second thinking error of risk assessment opponents is the assumption that considering risk assessment would somehow undermine the fairness or effectiveness of sentencing. In fact, sentencing unguided by risk assessment is profoundly more unfair and ineffective—by any responsible measure—than sentencing properly cognizant of risk and need.

The Reporter continues to stress that assessment must be used with great caution, although he is increasingly cognizant of the growing conclusion that it is far more reliable than “clinical judgments.”<sup>13</sup> That cognizance is consistent with abundant recent research about modern instruments. But the Reporter invokes no such caution regarding mainstream sentencing. He is willing to entrust the vast expanse of sentencing between the lowest and highest levels of crime to clinical judgment, albeit bounded by guidelines. That vast expanse is where we presently send most offenders to prison, spend most of our money for corrections, compete with such social purposes as higher education,<sup>14</sup> and do terrible harm. As the Reporter seems to acknowledge, mainstream sentencing is “notoriously imperfect.”<sup>15</sup> “[W]hole categories of inmates” are probably “confined without adequate policy justification.”<sup>16</sup> The Reporter nowhere explains why we should be sensitive to the loss of liberty, and to the terrible suffering of avoidable victimizations, only at the fringes of sentencing occasions.

To whatever extent some may consider typical sentencing guidelines to function as risk assessment, Oregon’s exploration of the issue yielded research to the effect that, for the population most at issue (those released from prison), under its guidelines, Oregon over-incarcerates about one-third of its population, under-incarcerates one-third, and gets it right roughly one time out of three.<sup>17</sup> Apart from the oppression inflicted on

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States Supreme Court decisions carries some risk of error, the *Blakely—Apprendi* line surely means that when a finding of risk is necessary to increase the sentence above that otherwise available (as with some dangerous offender schemes), a jury trial right attaches. When risk assessment merely informs but does not control discretion within a range already available as a result of a conviction (by plea, or trial subject to a jury trial right), there is no additional jury trial right. The jury trial right should be applauded, not assailed; it surely imposes no risk of unfairness or of error that does not exist without that jury trial right.

13. MODEL PENAL CODE: SENTENCING § 6B.09 cmts., at 62–65 (Council Draft No. 2, 2008).

14. See THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 4, 14–15, 31–32 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> [hereinafter PEW CENTER: ONE IN 100].

15. MODEL PENAL CODE: SENTENCING § 6B.09 cmts., at 62 (Council Draft No. 2, 2008).

16. *Id.* at 14 n.39.

17. These were the findings of a Department of Corrections researcher working with the

offenders imprisoned without social benefit, using prison imprecisely on low- and medium-risk offenders is demonstrably likely to *increase* the recidivism of many of them,<sup>18</sup> leading to victimizations that a more precise allocation of prison would have avoided.

The Reporter's de facto refuge is ordered just deserts (i.e., guidelines-limited retributivism) whose supposed relative precision is held up against the risk of error in risk assessment. He makes no argument that guidelines precisely pursue public safety. Instead, the Reporter tasks sentencing with punishment in pursuit of "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of the offender."<sup>19</sup>

The Reporter's designation of severity as the purpose of all sentencing explains distributing prison beds "adequately to punish" offenders in order to meet the expectations of "responsible officials" and the public.<sup>20</sup> Public expectations have a legitimate role in sentencing, but conspicuously absent from the Reporter's precision-based critique of risk assessment is any attempt to specify the components of that legitimate role and to hold sentencing accountable for serving them. It is additionally absurd to invoke public expectations while rejecting public safety as the primary purpose of prison, as the public wants public safety above all as the product of criminal justice.<sup>21</sup>

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Senate Bill 919 work group studying whether guidelines might be adjusted to serve public safety. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 76.

18. See OR. DEP'T OF CORR., THE EFFECTIVENESS OF COMMUNITY-BASED SANCTIONS IN REDUCING RECIDIVISM 2, 18, 22, 25, tbl. 3 (2002) (reporting results of Oregon study and review of national literature), available at [http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness\\_of\\_sanctions\\_version2.pdf](http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf); PAULA SMITH ET AL., CTR. FOR CRIMINAL JUSTICE STUDIES, UNIV. OF NEW BRUNSWICK, THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES, 2002-01, at ii, 4-5 (2002), available at <http://www.dsp-psd.communication.gc.ca/Collection/JS42-103-2002E.doc>; LIN SONG & ROXANNE LIEB, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED 1 (1993), available at <http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf>; Todd R. Clear, *Backfire: When Incarceration Increases Crime*, OKLA. CRIM. JUST. RES. CONSORTIUM J., 1996, at 1, 2; Tomislav V. Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates, 1975-1999*, 15 CRIM. JUST. POL'Y REV. 212, 213-14 (2004); James Bonta, Solicitor Gen. of Can., *The Effects of Punishment on Recidivism*, 7 RES. SUMMARY 3, 1-2 (2002), available at [http://www.publicsafety.gc.ca/res/cor/sum/cprs200205\\_1-eng.aspx](http://www.publicsafety.gc.ca/res/cor/sum/cprs200205_1-eng.aspx) (reporting meta analysis of 111 studies).

19. MODEL PENAL CODE: SENTENCING §1.02(2)(a)(i), at 8 (Council Draft No. 1, 2006). Punishment in pursuit of severity is hardly precise. See text accompanying notes 35-39, *infra*.

20. See MODEL PENAL CODE: SENTENCING 9 (Preliminary Draft No. 3, 2004).

21. See, e.g., BELDEN, RUSSONELLO & STEWART, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION 3 (2001); JUDITH GREENE & VINCENT SCHIRALDI, CTR. ON JUVENILE & CRIMINAL JUSTICE, CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 4-8 (2002), available at [http://www.cjcrj.org/files/cut\\_cor.pdf](http://www.cjcrj.org/files/cut_cor.pdf); PETER D. HART RESEARCH ASSOCS., INC., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 1 (2002), available at [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/)

If any given range of punishment within guidelines is per se “accurately” measured by just deserts, why the caution about informing the concurrent discretion (*within* that range) with less than perfect assessment instruments?<sup>22</sup> “There are compelling reasons for an attitude of caution”<sup>23</sup> for all uses of prison, not just when pursuing public safety. Yet the only caution the Reporter offers outside utilitarian objectives is the unpacked and unguided ordering of just deserts subject to appellate review for aggravation and mitigation.<sup>24</sup>

There are finite purposes to be served by sentencing—either utilitarian or public values. The means of pursuing utilitarian purposes include specific<sup>25</sup> and general deterrence, rehabilitation, and incapacitation. In essence, this set of tactics pursues public safety through crime reduction. For this analysis, I categorize the remaining objectives of sentencing as the pursuit of public values. These include obviating vigilantism and private retribution; promoting pro-social values such as respect for the property, persons, and rights of others; serving the legitimate needs of crime victims; and promoting respect for legitimate authority (“public trust and confidence”).<sup>26</sup> It is irresponsible for any policymaker or sentencing judge

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publications/hartpoll\_20020201/Hart-Poll.pdf; U.S. DEP’T OF JUST., NAT’L INST. OF CORR., PROMOTING PUBLIC SAFETY USING EFFECTIVE INTERVENTIONS WITH OFFENDERS § 1, at 4–16 (2000), available at <http://www.nicic.org/Downloads/PDF/2000/016296.pdf> (citing Brandon K. Applegate et al., *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 PRISON J. 237, 237–58 (1997)).

When it examined the issue of public opinion through empirical means in the United Kingdom, the *Halliday Report* found that when respondents were asked unprompted what the purpose of sentencing should be, the most common response was that it should aim to stop re-offending, reduce crime or create a safer community. The next most frequently mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation. JOHN HALLIDAY ET AL., MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES 8 (2001), available at <http://www.homeoffice.gov.uk/documents/312280/>; see also PRINCETON SURVEY RESEARCH ASSOCS. INT’L FOR THE NAT’L CTR. FOR STATE COURTS, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 20 (2006), available at [http://www.ncsconline.org/D\\_RESEARCH/Documents/NCSC\\_SentencingSurvey\\_Report\\_Final\\_060720.pdf](http://www.ncsconline.org/D_RESEARCH/Documents/NCSC_SentencingSurvey_Report_Final_060720.pdf).

22. Class and minority disparity are good reasons to avoid unbounded discretion, but it cannot be logically argued that a given range of discretion is made more susceptible to improper disparity by including consideration of imperfect assessment tools, assuming the tools themselves do not exacerbate discrimination.

23. MODEL PENAL CODE: SENTENCING § 6B.09 cmts., at 64 (Council Draft No. 2, 2008).

24. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 72–75.

25. The Reporter continues his silence as to the role of specific deterrence.

26. See Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 88–95.

Proportionality restraints, the classic function of denunciation of prohibited conduct, and more recent notions of restorative justice, are derivative of one or more of the listed purposes, and means to their ends. *Id.* I recognize that these concepts often overlap—for example, a punishment that must be severe to retain public trust and confidence will typically serve public safety through extended incapacitation. And, it may be argued that pursuing public values achieves crime reduction and to that extent is itself “utilitarian.” See *infra* note 44 and accompanying text. But the

merely to *assume* that any sentence serves any purpose. It is irresponsible merely to assume that any purpose justifies a departure from the lawful and proportional sentence best aimed at public safety through careful attention to risk and need. There is no persuasive basis for exempting any sentencing tactic from the same construct that requires validation for risk and need assessment. This is particularly so when public trust and confidence are so dependent upon our impact on public safety.<sup>27</sup>

The Reporter's lengthy, but diffusive, sojourn through the purposes provision of the revision leaves his conclusions about those purposes somewhat blurred. His original and persuasive critique of the existing Model Penal Code sentencing (*MPCS*) provisions was that by providing an unprioritized laundry list of potentially conflicting purposes, the provisions give no meaningful direction at all.<sup>28</sup> But he has now settled on a purposes provision that stubbornly rejects public safety<sup>29</sup> as a pervasive purpose of sentencing in favor of an essentially retributive goal for mainstream sentencing—proportional severity.<sup>30</sup> This proportional severity affords

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distinctions in the text are significant for analytical purposes in establishing that there is no sufficient excuse to be careless in pursuing one purpose simply because another can be invoked.

27. See *supra* note 21 and accompanying text.

28. Reitz, *Plan for Revision*, *supra* note 2, at 71; Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 68.

29. *Id.* at 72–73.

30. The Purposes provision of the revision, now set in place by the vote of those present at the 2007 annual meeting of the American Law Institute, sets the stage for this analysis:

§ 1.02(2). Purposes; Principles of Construction.

(2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

(a) in decisions affecting the sentencing of individual offenders:

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii) . . . .

imprecise direction, requiring the Reporter to expend enormous effort promoting a sentencing scheme that relies on guidelines rather than purposes to pursue consistency. The Reporter has certainly conceded the imprecision of desert-based sentencing,<sup>31</sup> and his vision of guidelines is obviously designed to provide the guidance that the sentencing purposes he embraces are themselves insufficient to provide.

The Reporter's recent critique of parole release authority again reveals that his acceptance of just deserts avoids precision instead of pursuing it. The Reporter disparages the "disappointing" performance of parole boards.<sup>32</sup> Noticeably absent from his critique, however, is any discussion of exactly what it is about parole release that has been unsatisfactory. Surely the most persistent criticism (whether or not earned) has been that parole boards were not adequately serving public safety because the people they released committed new crimes.<sup>33</sup> However, by the same metric, judicial sentencing decisions—with or without guidelines—fully merit the same disappointment. If we measure our performance by the subsequent criminal behavior of those we have sentenced, judges are in no position to contend that they compare favorably with the performance of parole boards.<sup>34</sup> For judges, there are only two ways to escape scrutiny for these outcomes: to

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MODEL PENAL CODE: SENTENCING § 1.02(2), at 1–2 (Tentative Draft No.1, 2007).

31. For example, the Reporter explained his need to constrain deserts in part with this analysis of Norval Morris:

The distinctive claim of Norval Morris's theory is that moral intuitions about doing justice in specific cases are almost always "rough and approximate"—and that most people experience them as such. Even if a decisionmaker is well acquainted with all the circumstances of a particular crime, and has depth of knowledge about the offender, it is seldom possible (except in an extreme case) for her to say that the deserved penalty is exactly x. In Morris's phrase, the "moral calipers" possessed by human beings are not sufficiently fine-tuned to reach such judgments. He postulates instead that most people's moral sensibilities, for most crimes, will orient them toward a rough ballpark of permissible sanctions that are "not undeserved." Some imagined punishments will appear clearly excessive to do justice, and some will appear clearly too lenient—but there will almost always be room between the two extremes.

MODEL PENAL CODE: SENTENCING 15 & n.22 (Preliminary Draft No. 1, 2002).

32. See, e.g., MODEL PENAL CODE: SENTENCING, *Reporter's Study 2* (Council Draft No. 2, 2008) (citing Kenneth Culp Davis); *id.* at 52 (claiming "more than a century of demonstrated failure"); *id.* at 60 (noting "a resounding failure").

33. See, e.g., George Allen, *The Courage of Our Convictions: The Abolition of Parole Will Save Lives and Money*, 72 POL'Y REV. 4, 4–7 (1995), available at <http://www.hoover.org/publications/policyreview/3566617.html>.

34. See, e.g., Michael Marcus, *Justitia's Bandage*, *supra* note 1, at 2–4 (2005). Although many departments of corrections include only felony convictions in recidivism measures, when misdemeanors—which constitute upwards of 75% of crimes—are included, the recidivism rate of those we sentence is in the neighborhood of 62% to 75% for most crimes. *Id.*

blame recidivism on the supervision or correctional authority down the line from our sentencing choices, or to invoke, as might parole board critics, “appropriate severity” as adequate sentencing performance instead of the accomplishment of any social goals. But if we truly measure our performance by the same standard as those who assail the performance of parole authorities, we are not demonstrably superior just because we are better placed to conceal our responsibilities for public safety.

Ultimately, the Reporter assails risk assessment as imprecise and unfair, and parole as disappointing, but he refrains from competing with either on the same terms on which he assails them. The Reporter clearly does not suggest that his paradigm—desert ordered by guidelines and appellate review—offers a better device for achieving public safety than sentencing guided by risk and need assessment or as defined by “back end” release authorities. Instead, he joins forces with the critics of parole who (correctly) assailed indeterminate sentences as lacking “transparency,” and voices his

preference for visible, regulated, and accountable forums for the exercise of sentencing discretion. [Parole abolition] also reflects a policy judgment that, ordinarily, actual durations of prison terms should be determined by courts at the time of sentencing, subject only to marginal adjustments based on an inmate’s behavior while institutionalized.<sup>35</sup>

But, this begs the question: by what measure are we to hold sentencing “accountable”? Again, the Reporter does not suggest holding guidelines accountable for achieving any affirmative social purpose, but only for constraining administrative flaws he perceives in sentencing without them.<sup>36</sup> Guidelines per se arguably serve interests in reducing disparity and regulating prison resources. However, they do so with great imprecision and unreliability; they treat the psychopath and the drunk as identical when in the same grid block,<sup>37</sup> and they are frequently overcome by draconian ballot measures and legislation imposing mandatory minimums, increasing presumptive sentences, or otherwise raising the floor of sentencing.<sup>38</sup> And,

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35. MODEL PENAL CODE: SENTENCING, *Reporter’s Study 2* (Council Draft No. 2, 2008).

36. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 72–83.

37. *Id.* at 77.

38. 1989 Or. Laws 1, §§ 2, 3 and 1989 Or. Laws 790, § 82 enacted contemporaneously with Oregon’s sentencing guidelines, required previous mandatory “gun” minimum sentences to trump guideline sentences, and required “determinate” sentences without reduction, leave, or parole for certain felonies if committed by offenders with similar prior convictions (“Denny Smith” sentences). In 1995, Oregon voters adopted mandatory minimum sentences for a similar range of serious felonies (“Ballot Measure 11”). 1995 Or. Laws 2, 421. In 1996, effective July, 1997, Oregon legislated thirteen and nineteen month presumptive sentences (to override lower presumptive sentences in the guidelines) for certain “repeat property offenders.” OR. REV. STAT. § 137.717 (2007); 1996 Or. Laws 3, § 1. And, in Oregon’s 2008 general election (and

since proportionality in the sense purportedly served by guidelines is both opaque<sup>39</sup> and maintained primarily by ignoring differences that matter among offenders and offenses,<sup>40</sup> even proportionality is accomplished with appalling imprecision. As to all of their purported functions—achieving proportionality, restraining disparity, and preserving prison resources—guidelines per se impose constraints, but they pursue no significant affirmative social purpose.

Until and unless guidelines are responsibly aimed at public safety (via risk and needs assessment and concomitant evidence-based sentencing) or at other social purposes properly included in “just deserts,” they surely raise no bar against which to compare the validity of risk and needs assessment.

To aim guidelines at the social purposes properly included within “just deserts,” those purposes must be identified, and the causal links between sentence and purpose must be held at least to the “realistic prospect of success” test to which the Reporter would hold “utilitarian or restorative” purposes of sentencing.<sup>41</sup>

### III. THE INADEQUACY OF EVEN ORDERED JUST DESERTS AS A SENTENCING LODESTAR

The Reporter’s pervasive embrace of retributivism is based on its propensity for “a proportional ordering of the severity of sanctions,” due to supposed advances in retributive theory.<sup>42</sup> The proportional ordering under the Reporter’s paradigm is to be accomplished by sentencing commissions promulgating guidelines that prescribe relatively narrow ranges of sentences based on sentencing purposes—most pervasively “the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”<sup>43</sup>

The most prestigious argument that just deserts lends itself to ordering is the body of work contending that imposing the sentence the public

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notwithstanding steadily declining related crime rates), voters adopted yet another provision designed to require judges to impose more and longer prison sentences than guidelines otherwise prescribe on various nonviolent offenders. “Ballot Measure 57” was approved by the voters on November 4, 2008. S.B. 1087, 74th Legis. Assem., Spec. Sess. (Or. 2008), *available at* <http://www.leg.state.or.us/08ss1/measpdf/sb1000.dir/sb1087.b.pdf>.

39. See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1327–34 (2006).

40. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 77 & n.31.

41. MODEL PENAL CODE: SENTENCING § 6B.03(3), at 68 (Council Draft No. 1, 2006); *see generally* Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 67. “Realistic prospect of success” is now formulated as “when reasonably feasible” in § 1.102(2). MODEL PENAL CODE: SENTENCING § 1.102(2) (Preliminary Draft No. 1, 2002).

42. Reitz, *Plan for Revision*, *supra* note 2, at 20–21; *see also supra* note 2 and accompanying text.

43. MODEL PENAL CODE: SENTENCING § 1.02(2), at 1 (Tentative Draft No. 1, 2007).

accepts as “just” has a series of consequences for public safety, such as achieving public confidence in the courts and their role in promoting law and values and encouraging citizens to accept and act in accordance with those laws and values.<sup>44</sup> While I agree that just deserts can and should serve public purposes,<sup>45</sup> this clamor towards condoning undifferentiated just deserts is fatally flawed.

First, most people pay no attention to criminal justice unless they are victims of crime, they (or a close family member or associate) are accused of crime, or they get bombarded during election season by proponents and opponents of crime-related ballot measures or candidates who choose the crime card as a campaign platform. The notion that mainstream sentencing below the radar of mass media has any generalized impact on public lawfulness is fanciful for this reason alone.

Second, the evidence precludes any empirical conclusion that punishment can serve public safety by ignoring public safety as a measure of sentencing. In the meager attempts by these legal philosophers to enlist the support of science in their campaign for retributivism, they celebrate research findings that people seem to agree on the ordinal ranking of crime seriousness yet disagree about what punishment is “just” for a given crime.<sup>46</sup> But general agreement that rape should be punished more severely than theft and theft more severely than jaywalking hardly demonstrates the likelihood of raising public trust and confidence simply because sentencing guidelines distribute punishments without offending mere ordinal ranking. Public outrage at leniency in the sentencing of the perpetrator of a heinous crime is not assuaged by a consensus that more serious crimes are punished more harshly than less serious crimes. For example, the public outrage at sending a first-time juvenile shoplifter to prison for five years would not be assuaged by news that a more serious theft would result in seven years and jaywalking would yield a fine.

To the extent the public pays any attention to sentencing, it is far more likely to react to sentences perceived as too severe or too lenient long before it recognizes any ordinal ranking—particularly if we evidence no purpose other than severity. Further, the ordinal rank of such an excessive or inadequate sentence is hardly likely to solve the public relations problem.

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44. This is a synopsis of views most prominently and persistently expressed by Professor Paul Robinson. See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 135–212, 247–60 (2008); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 149–55 (2008); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. CAL. L. REV.* 1, 28–29 (2007); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *NW. U. L. REV.* 453, 471–78 (1997); Paul H. Robinson, *Why Does the Criminal Law Care What the Lay Person Thinks is Just? Coercive vs. Normative Crime Control*, 86 *VA. L. REV.* 1839, 1866–69 (2000).

45. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 88–91, 93–95.

46. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 *MINN. L. REV.* 1829, 1831–33 & n.6 (2007).

Third, and most importantly, the overwhelming evidence is that the public is concerned, most of all, with how successfully we prevent recidivism.<sup>47</sup> It is preposterous to posit public satisfaction sufficient to reduce criminal behavior through a sentencing system that not only eschews responsibility for public safety but is demonstrably ineffective at achieving it.<sup>48</sup>

To be fair, the Reporter does not rely on the retributivists' contention that meeting the public's notion of fair punishment will itself serve the utilitarian function of crime reduction. Rather, from the beginning, he has sought quietly to steer sentencing away from public safety in order to combat excessive use of prison,<sup>49</sup> to reduce disparity, to increase "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."<sup>50</sup>

Even by these standards, sentencing guidelines that fail to incorporate responsible efforts to achieve public safety *across the entire range of sentencing* are demonstrably inadequate to respond to prison growth or disparity.<sup>51</sup> Basing a sentencing structure on retributivism, however "limited," inherently promotes the notion that the purpose of sentencing is to exact retribution, as well as the fallacy that severity is the measure of crime control effectiveness and of just deserts.<sup>52</sup> Such a system can never compete with those that appeal (or pander) to public fears of crime for two related reasons. First, since the public will always assume public safety is a purpose of sentencing,<sup>53</sup> however valiantly some academics strive to distract us from that purpose, our persistently poor performance in reducing recidivism will always appear (correctly, at least in part) to be the fault of sentencing. As long as we accept undifferentiated just deserts as sufficient sentencing performance, the public easily will be misled to conclude that our poor public safety results will be cured by increased mandatory minimum sentences.

Second, since our present use of just deserts effectively reduces or eliminates any responsible attention to public safety on the part of those

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47. See *supra* note 21 and accompanying text.

48. See, e.g., Michael Marcus, *Justitia's Bandage*, *supra* note 1, at 2–4 (2005).

49. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 74–76; see also MODEL PENAL CODE: SENTENCING 21 (Preliminary Draft No. 1, 2002).

50. MODEL PENAL CODE: SENTENCING § 1.02(2)(j), at 5–6 (Preliminary Draft No. 1, 2002).

51. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 68–78; see also Michael Marcus, *Limiting Retributivism*, *supra* note 1, at 329–30 & n.107.

52. See generally Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1293–95 (2006) (arguing that the principle of desert as a limiting principle should be treated with more skepticism); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 17–19 (2003); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 85–89 (2003).

53. See *supra* note 21 and accompanying text.

who impose sentences and the advocates who might inform sentencing, it allows us to claim success without even addressing public safety in imposing sentences. We inevitably then do a far worse job of preventing future criminal behavior by those we sentence than we would were we to make a responsible attempt to achieve the best public safety outcome. Because the result is avoidable crime, we are fueling the arguments that produce more severe sentences,<sup>54</sup> which, in turn, increasingly burdens those minorities already disparately burdened by incarcerationism and thereby exacerbate the most corrosive form of disparity.

In short, avoiding responsibility for public safety and constructing guidelines that direct attention away from the impact of sentencing on social well-being inherently fails to reduce prison growth and its disparate impact on minorities.

#### IV. THE STATIC FACTOR ISSUE AND DISPARATE IMPACTS

In the lexicon of risk and needs assessment, “criminogenic” factors are those circumstances or characteristics of an offender that sufficiently correlate with criminal conduct to allow an assessment of the risk that an offender presents of criminal behavior.<sup>55</sup> Among these are “static” factors that we cannot change. Some are matters of birth and genetics, such as age,<sup>56</sup> gender, and ethnicity. Other factors such as criminal history, age at first entry into the criminal (or juvenile) justice system, or childhood circumstances are unchangeable only because they were accumulated in the past.<sup>57</sup> “Dynamic” factors are those that are prospectively changeable.<sup>58</sup> Most significant among the dynamic factors are those designated as “criminogenic needs” because they identify concomitants of criminal behavior that correctional or other interventions can alter in the hopes of reducing future criminal behavior.<sup>59</sup> The criminogenic factors list typically includes criminal history and childhood abuse (static), antisocial values (“criminal thinking”), pro-criminal associates, substance abuse, unemployment and educational deficits (dynamic).<sup>60</sup>

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54. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 69.

55. The propositions in this paragraph are common knowledge to probation and corrections departments steeped in “evidence based practices,” but relatively new to the culture of sentencing. A concise history and description of risk and need assessment, and the related “responsivity principle,” is JAMES BONTA & D.A. ANDREWS, *RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION 2007–06* (Canada 2007), available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/Risk\\_Need\\_2007-06\\_e.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/Risk_Need_2007-06_e.pdf).

56. Age changes, but we have no control over it (putting aside capital punishment). It is treated as a static factor for these purposes, but its impact on risk is generally that most criminal behavior “ages out” as offenders get older. Exceptions include some species of sex offenders and many offenders with personality disorders.

57. BONTA & ANDREWS, *RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION 2007–06*, *supra* note 55, at 4.

58. *Id.*

59. *Id.* at 4–5.

60. For example, risk (and needs) assessment instruments vary considerably in their inclusion

Some of the resistance to risk assessment takes the form of protestation that it is “unfair” to consider static factors over which an offender has no control in determining a sentence. The Reporter voices objection primarily to static factors related to protected classes:

Judge Marcus’s software incorporates an offender’s gender and race as correlates of post-sentence recidivism. The consideration of race is disapproved in Tentative Draft No. 1, § 6B.06(2)(a) (2007), and is almost certainly unconstitutional, while consideration of gender for the narrow purpose of risk and needs assessments is expressly permitted by the revised Code, id. § 6B.06(4)(b).<sup>61</sup>

There are two reasons for allowing consideration of ethnicity. First, to the extent that discrimination has exaggerated the criminal history of some offenders, it is both fair and even arguably constitutionally required (and in any event responsible and hardly racist) to analyze them separately from cohorts whose history was not so exaggerated. The result may well be that an offender seems appropriate for a less severe sentence when compared with others subject to similar improper exaggeration, instead of as part of a cohort composed of many whose criminal history is the same without exaggeration. In other words, failing to separate the data may compound and exacerbate the impact of past racial bias in the administration of criminal justice.

Second, crucial to any rational approach to crime is that after we assess an offender’s risk and criminogenic needs, we respond in a manner likely to produce the intended result in light of the offender’s “responsivity”: “learning style, personality, motivation, and bio-social (e.g., gender or race) characteristics.”<sup>62</sup> Many programs, some custodial, are designed to target specific minorities. Without separating cohorts based on this kind of data, we may well lose opportunities for more effective and less punitive dispositions that are particularly useful because they more effectively

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or weighing of such factors, and the field is quickly generating new instruments and revisions of former versions that are thought to be best for various classes of offenders. What works well on general populations of offenders may not work as well on sex offenders, recidivist drunk drivers, domestic violence offenders, or juveniles. Instruments also vary as to what type of criminal behavior they predict. For example, some are designed to predict violence and some domestic violence in particular.

61. MODEL PENAL CODE: SENTENCING, *Reporter’s Note 70* (Council Draft No. 2, 2008). The “software” reference is to sentencing support tools we have developed to display outcomes measured by recidivism for similar offenders sentenced for similar crimes. Those tools do not purport to be risk assessment instruments. See Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice’s Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 673, 678 (2004); see generally Michael Marcus, *Smart Sentencing*, *supra* note 1 (discussing the flaws in the existing sentencing approach).

62. BONTA & ANDREWS, *supra* note 55, at 1, 5–7.

address criminogenic circumstances, learning styles, or life experiences commonly bundled in the groups they target.<sup>63</sup> We certainly know that some modalities of treatment work best if designed for such minorities. Medicine is full of examples of diagnostic and treatment protocols that reflect the varying prevalence of disease and disorder among patients by gender and ethnicity; effective public health measures often require adjustment of tactics to cope with minority cultures.<sup>64</sup>

To insist that we forgo the beneficial potential of the facility to separate data as described is to insist, in many applications, that we exacerbate racism and unnecessarily forgo opportunities to avoid harm. It is hardly constitutionally compelled.

Skeptics of risk assessment—many of the same voices that deem it “preventive detention” or “punishment for future crime”—condemn any reference to static factors whether or not related to protected classes.<sup>65</sup> The divide over static factors, similar to the Reporter’s qualms about risk assessment in general, reflects the dysfunctional impact of the archaic reign of just deserts. If the purpose of sentencing is punishment in the sense of imposing pain in some moral proportion to the heinousness of the offender’s violation of social norms—if it actually makes sense to define the goal of sentencing by concepts of aggravation and mitigation—then of course it is wrong to use many<sup>66</sup> static factors to “aggravate” a sentence by increasing its severity. It is also appropriate, however, under a just deserts paradigm, to use sympathetic static factors—such as childhood misfortune, youth, or mental disability—to “mitigate” a sentence by reducing its severity. Given the prevalence of references to aggravation and mitigation in sentencing schemes, many unsurprisingly shy away from consideration of circumstances over which an offender has no control when arguing for the harsher end of an available sentence.

At a recent conference,<sup>67</sup> a judge in the audience asked whether the

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63. Fortunate communities commonly have programs for: domestic violence victims who are mothers of infants or young children; at-risk Hispanic, Asian, or African American youth, or those attracted to gangs; gay teenagers; American Indians with alcoholism; and some sexual minorities such as transsexuals. Our sentencing support tools do not yet have access to all the data necessary to track all of these variables.

64. The ability to separate cohorts also permits us to detect improper disparity in sentencing, which probably explains much of the opposition to that ability; concealing racism is often the agenda of “color-blindness.”

65. See, e.g., LORETTA CAPEHEART & DRAGAN MILOVANOVIC, *SOCIAL JUSTICE* 53–55 (Rutgers University Press, 2007); David Rose, *Locked up to make us feel better*, *NEWSTATSMAN* (Mar. 19, 2007), available at <http://www.newstatesman.com/politics/2007/03/risk-prison-sex-act-life>; Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *HARV. L. REV.* 1429 (2001).

66. For purposes of this analysis, it does not matter whether we carve out past criminal history from those (static) factors legitimately considered in just desert sentencing, on the theory that accumulating the criminal history was the product of blameworthy past choices.

67. *Wisconsin AIM Site Visit Conference, Effective Justice Strategies Subcomm., Wis. Court Sys.* (Nov. 20, 2008).

Virginia risk assessment application, while counting youth as a factor enhancing risk, considered the brain development of adolescents. The presenter explained that the literature supported the notion that in general, younger offenders are at a higher risk of reoffending than older offenders, all other variables being equal.<sup>68</sup> The questioner was obviously unimpressed. It is, after all, entirely consistent with the dominant sentencing culture that when attempting to influence a judge's sentencing discretion, a prosecutor will emphasize what it is about the offender, his history, or the latest crime that should anger us at the offender, while the defense attorney will mine youth per se, childhood hardship, social or mental dysfunction, or addiction to invoke sympathy to influence sentencing discretion in favor of the offender.

Rational sentencing demands that we confront this contradiction. If the purpose of sentencing is public safety, many of the attributes that might make us feel sorry for an offender also suggest that the offender represents a higher risk than another offender who is similar but does not possess those attributes. In other words, the dominant sentencing culture is backwards from a public safety standpoint—the more dysfunctional an offender's childhood or intractable his addiction, the more likely the offender represents a risk to society. But recognizing relevant differences is also critical to discovering and vetting dispositions that reduce the criminal behavior of disparate cohorts. Youth may indicate increased risk, but may also increase responsivity to interventions that reduce that risk.

Just as we should consider gender, ethnicity, age, and disability when relevant to diagnosis and treatment in medicine, we should do so in sentencing when the result is a more effective disposition measured by reduced criminal behavior. For example, it is absurd to invoke "equal treatment" to insist that we imprison all repeat property offenders for thirty-six months, just because public safety may demand that sentence for the highest-risk offenders among them, when differences such as age and gender make alternate sanctions far more likely to be successful in terms of crime reduction for many members of the cohort. We are not treating like offenders alike if we insist on ignoring factors that make them quite unlike in risk and responsivity to treatment. Although we can and should insist that we do not use such distinctions further to disfavor a protected class, these factors otherwise may legitimately militate in favor of incapacitation at higher risk levels. This may help explain why many academics, refugees from last century's rehabilitation era, and defense attorneys want to avoid acknowledging public safety as the purpose of prison.

This tactic of avoidance, however, has been disastrous as a means of restraining overuse of prison. When research revealed that treatment was not actually delivering public safety, abandonment of the medical model

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68. *Id.*

ushered in the explosive growth of imprisonment rates that makes the United States ironically the world leader both in freedom and incarceration.<sup>69</sup> The guidelines movement has proved incapable of reversing that growth. As long as we continue to insist on the adequacy of retributive analysis to distribute prison beds, we will continue to generate avoidable victimizations that drive the demand for the only solution our misdirection teaches the public to seek: increased incarceration.

The only way out of this addictive relationship with retribution<sup>70</sup> is to recognize the public's right to demand that criminal justice in general, and prosecutors and judges in particular, be accountable for our impact on public safety.<sup>71</sup> When we accept that accountability, demonstrate competence at smarter sentencing, and produce some success at reducing recidivism by wisely allocating the entire realm of correctional resources, we will at least have standing to explain to the public the tragic error of our present paradigm. We would have standing to explain that measured by public safety, what works best varies with the offender—the offender's risk and needs—and the availability of dispositions that will reduce or restrain that risk, and that unwarranted severity and mindless use of prison often threatens, rather than protects, public safety.

In fact, prison is the rational and appropriate choice for some offenders, while it is wasteful, counterproductive, and not infrequently brutally cruel for others. We can hope to produce roughly a 30% reduction in recidivism among many common offenders if we demand that the programs to which we send them are properly designed and administered, and appropriate for each offender's criminogenic needs.<sup>72</sup> We can demonstrate that many of

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69. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 68; PEW CENTER: ONE IN 100, *supra* note 14, at 5.

70. Cyclical budget restraints mitigate prison growth, and guidelines may slow it. However, a way "out" is one that has potential to *reverse* it. Other methods that typically mitigate but do not reverse prison growth include manipulation of probation and post-prison supervision revocation standards, term-reduction schemes such as "alternative incarceration" and some reintegration schemes that shift prisoners into transitional placements. The relationship is addictive because retributive policy increasingly imprisons offenders whose criminality is increased by their imprisonment. *See supra* note 18 and accompanying text. The increased criminality fuels increased pressure to increase imprisonment. *See supra* note 54 and accompanying text. As with most addictions, increased consumption simply drives increased consumption and reduced satisfaction.

71. I speak as a judge, because judges make sentencing choices that inherently have an impact on public safety whether or not we intend or attempt to produce that impact. I include prosecutors because their plea bargaining policies and behaviors drive an enormous proportion of sentencing. Defense counsel have other obligations, of course, but their fealty to their clients requires that they be competent to recognize and exploit circumstances that render public safety concerns supportive of the outcome clients desire. *See* Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 113–18, 120–26.

72. *See, e.g.*, STEVE AOS ET AL., WASH. STATE INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES OLYMPIA 16 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>; Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce*

the lower-risk offenders swept into custody by our increasingly draconian approach to sentencing will ultimately produce more victimizations than would occur had we instead employed appropriate community-based dispositions.<sup>73</sup> And we can realistically entertain the hope that the public will respond to the need to fund effective programs—many of which are far more cost-effective than prison for many common cohorts of offenders<sup>74</sup>—when we begin to behave as if we believe sentencing is about public safety and that good programs can actually work on many offenders in and out of custody.

We do not behave as if we believe sentencing is about public safety if we maintain that evidence-based practices are only appropriate for lower-level crimes, or even if we accept the role of risk assessment at the highest and lower levels. This notion that most sentencing purposes are fully satisfied by proportional severity for the bulk of the criminal justice population—those beyond our comfort with the lessons of the evidence—is unfortunately popular with many self-proclaimed sentencing reformers. They shrink from recognizing the efficacy of incapacitation to reduce crime and therefore prefer “limiting” retributive theory to science for allocating prison terms among those who must be imprisoned.<sup>75</sup> This notion is ineffective because it has failed to reverse prison growth, counterproductive because it spawns avoidable victimizations that fuel increasingly draconian sentencing laws, and pernicious because it enables the public fallacy that increasing severity is the best answer to crime—a fallacy that retributivists are all too eager to exploit.

Surrendering mainstream sentencing to just deserts has obviously not assisted in achieving particularly humane limits on sentencing, and it has failed to achieve the sort of public and policy support necessary to obtain sufficient resources for effective treatment and programming. Instead, this surrender has profoundly sabotaged the credibility of evidence-based sentencing among the general public by supporting the charges of bias in favor of leniency. “Evidence-based practices” is a formulation that surfaces almost exclusively in arguments for treatment and alternative sanctions, but rarely appears to follow the evidence when it points to incapacitation. That apparent bias also deters acceptance of risk assessment and evidence-based practices among potential allies of reformers who genuinely seek

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*Recidivism*, 82 IND. L.J. 1307, 1308–09 (2007).

73. See *supra* note 18 and accompanying text.

74. See AOS ET AL., *supra* note 72, at 9–11 & ex. 4.

75. The Reporter’s opening announcement for the Model Penal Code sentencing revision relied substantially on the work of prominent academics who disparaged the use of prison as a crime-reduction tactic, deeming this strategy for deploying prison “selective incarceration.” Kevin Reitz, *Plan for Revision*, *supra* note 2, at 552–57, and authorities cited. See also Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 68–70. That the criminal justice system has been grossly inept in allocating prison resources to serve public safety does not mean that we should not use prisons for public safety—just that we must get much better at doing so, which necessarily implicates risk and needs assessment.

public safety rather than retributive justice.

None of this means that proportionality has no role. Moral restraints properly provide limits on the dispositions we should impose on a given offender or for categories of behavior and circumstances. Absent a sufficiently blameworthy criminal act, we have no business using the criminal justice system to force a minor offender into six months of custodial treatment merely because it is most likely to reduce his future criminal behavior—any more than we should convict someone accused of drunk driving because we would like to see him in treatment.

In fact, the public is way ahead of us on this issue, and far more supportive of rehabilitation than policymakers.<sup>76</sup> Public support for rehabilitation *and* public safety represents a potential resource which our addiction to retributivism has so far precluded us from exploiting. When we accept responsibility for public safety and acknowledge that incapacitation is the appropriate means to that end for some offenders, we will be far more likely to achieve meaningful sentencing reform—measured by reduced harm both to potential victims and to sentenced offenders. But we cannot make any progress as long as we allow judges, attorneys, and policymakers to invoke “just deserts,” a “just punishment,” or “a sentence that fits the crime” as an adequate performance measure. Instead, we must identify the legitimate components of desert and the public value purposes lurking within its curtilage, and then require that those purposes compete with best practices to achieve reduction in criminal behavior only when and to the extent demonstrably necessary.

## V. HOW TO CIVILIZE JUST DESERTS

Just as we were able to recover from the “nothing works” era with responsible attention to data about what does or does not work on which offenders,<sup>77</sup> we are fully capable of civilizing just deserts. Both efforts start with the same realization: that proclaiming, deciding, and pretending that we serve the public value purposes of sentencing is just as much magical thinking as the same approach to serving the public safety purposes of sentencing. Just as imprisonment does not produce penitence because we had hoped that it would (and a jail sentence is rarely likely to make many offenders think twice about their choices next time), attempting to fit the punishment to the crime does not accomplish the public value purposes of sentencing just because we wish that it would.

At least we have known all along that the public safety purposes of

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76. *See supra* note 21 and accompanying text.

77. The era was inaugurated in 1974 by Robert Martinson, who soon recognized that he overstated his case. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 68 & nn. 4–5. That we were *able* to recover does not mean that we have recovered from the notion that nothing works, or that we have become generally responsible in vetting programs. *Id.* Indeed, we generally insist on assigning programs by symmetry with the offender’s charge rather than responsiveness to his needs. *Id.* at 104 n.75.

sentencing have to do with crime reduction, and the only quibble connected to identifying these purposes has concerned to what extent, whether, or when general deterrence competes with recidivism reduction as the most realistic tactic to employ to the end of crime reduction. Recidivism reduction and incapacitation are usually far more realistic objectives than general deterrence, and general deterrence—to whatever extent it is a viable expectation—depends far more on certainty and celerity than on severity for its impact, and thus rarely assists in the selection of a particular sentence in most cases.<sup>78</sup>

The legitimate public values purposes bundled behind “just deserts” are, I submit, these:<sup>79</sup> obviating vigilantism and private retribution; promoting pro-social values, such as respect for the property, persons, and rights of others; serving the legitimate needs of crime victims; and promoting respect for legitimate authority (“public trust and confidence”).<sup>80</sup> Proportionality, denunciation, and restorative justice are among the means by which we seek to promote pro-social values.

It is, of course, true that quantifying the impact of sentencing on these components of public values is more challenging than merely detecting the recidivism of those we sentence. But this is no excuse for using a slogan in their stead, let alone for forgoing measurement of our performance in its name. After all, the Reporter would have sentencing commissions base their promulgation of desert-ordering guidelines on research concerning the extent to which sentences serve their purposes, which in his paradigm includes “appropriate severity.”<sup>81</sup> The Reporter’s nod toward research is insufficient. First, while encouraging research, he imposes no requirement that the service of any purpose related to “appropriate severity” be plausibly promoted by sentencing, while forbidding the pursuit of any other sentencing purpose absent a finding of reasonable feasibility.<sup>82</sup> In other words, he would have commissions survey society for notions of

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78. See, e.g., Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 81–82 n.43, and accompanying text; Michael Marcus, *Limiting Retributivism*, *supra* note 1, at 315 n.65. “Celerity” is swiftness, apparently selected for its alliterative contribution to “certainty, celerity and severity” in general deterrence lexicon. See, e.g., RONALD L. AKERS, *CRIMINOLOGICAL THEORIES* 16–33 (1999).

79. I believe that the text captures all legitimate purposes of sentencing that are not utilitarian, but if there be more, the proposed analysis still demands that they, too, not compete with evidence-based purposes unless themselves evidence-based.

80. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 88–95.

81. Compare MODEL PENAL CODE: SENTENCING § 1.02(2)(a), at 1 (Tentative Draft No.1, 2007) (sentencing purposes include proportionate severity), with MODEL PENAL CODE: SENTENCING § 1.02(2)(b)(vii), at 2 (Tentative Draft No.1, 2007) (intending to encourage research on effectiveness of sentences in achieving sentencing purposes), and MODEL PENAL CODE: SENTENCING § 6A.01(2)(d), at 46 (Tentative Draft No.1, 2007) (requiring commission to base promulgations on research).

82. MODEL PENAL CODE: SENTENCING § 1.02(2)(a), at 1 (Tentative Draft No.1, 2007); see Michael Marcus, *Early Adopters and Power Users*, *supra* note 1.

appropriate severity, but impose no requirement that any sentence serve any purpose if imposed within promulgated limits of severity. Second, he goes no further than “appropriate severity,” and utterly fails to acknowledge, articulate, or respond to the notion that “appropriate severity” is, along with other requirements in supposed furtherance of public values, but a means to ends that need to be identified.<sup>83</sup> Understandably, the result is that the Reporter does nothing to encourage, much less assure, that sentences serve any such purposes.

Although the impact of sentencing on public values is more difficult to assess than sentencing’s impact on recidivism, that assessment is hardly beyond the scope of social questions we routinely research and rely on in other fields. Many important human endeavors—including finance, marketing, politics, public health, and insurance—heavily rely upon analogous research to determine which means are most likely to produce the desired result.<sup>84</sup> Within the world of justice systems, the National Center for State Courts supports court performance measures to assess the level of public confidence in access to and the fairness of courts,<sup>85</sup> and researchers have produced substantial material about public attitudes toward sentencing<sup>86</sup> that would provide a firm basis for responsible inquiry into how sentences do, or do not, meet or affect public expectations. This sort of inquiry ought to be among the highest callings of sentencing commissions, second only to pursuing best evidence of what works on which offenders to reduce their future criminal behavior.<sup>87</sup>

Even before we have abundant resources that address how sentencing choices cover each of the means by which we might serve public values, there is much to be said for merely insisting on a rational articulation of when, to what extent, and with what assurance any concern for public values ought to influence a sentencing choice. In my experience, merely focusing on the question of general deterrence causes most prosecutors to disavow deterrence as a plausible outcome of any sentencing choice. “Send a message” advocates often retreat when asked for their actual understanding of how our sentencing actually impacts potential offenders or public trust and confidence. Just having this discussion may strip away nonsensical competitors for best outcomes when sentencing offenders

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83. The Reporter’s promulgation of sentencing purposes confuses means with ends served by those means. See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1, 7–8 (2002); Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 88–89.

84. See PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK 1* (1996).

85. NAT’L CTR. FOR STATE COURTS, *COURTOOLS: A COURT PERFORMANCE FRAMEWORK*, 5 (2005), available at [http://www.ncsconline.org/D\\_Research/CourTools/CourToolsWhitePages-v4.pdf](http://www.ncsconline.org/D_Research/CourTools/CourToolsWhitePages-v4.pdf).

86. See *supra* note 21 and accompanying text.

87. Michael Marcus, *Early Adopters and Power Users*, *supra* note 1, at 103, 133–36; Michael Marcus, *Limiting Retributivism*, *supra* note 1, at 296.

whose crimes are addiction driven with no actual victim. And, most victims who appear to exercise their emerging rights to be heard at sentencing actually focus their concerns on preventing future crimes, rather than on extracting retribution. When a victim explains the need for a sense of tangible justice because an identification theft crime has seriously disrupted her life, and when a victim of violent crime or her spokesperson conveys the impact of that crime on a life, a family, or a community, we can actually make an effort to consider what available sentencing choices might actually and properly respond. Victim input is an entirely legitimate (but not necessarily determinative) source of information about what it takes to promote the public values at stake at sentencing. Of course, that input also helps us assess and address the victim's own needs.

In the great majority of sentencing occasions, serving public values does not compete with serving crime reduction through best efforts to reduce recidivism. Even when there is some tension between those objectives of sentencing, adjusting the means by which to pursue crime reduction can usually accommodate public value purposes without compromising public safety or imposing any more severe sentence than that most likely to serve crime reduction. There are, of course, significant exceptions. Negligent homicide cases involving non-recidivist drunk drivers; some shaken baby tragedies involving youthful parental desperation rather than systemic violence; and some intrafamilial sexual child abuse cases often require a more severe sentence than crime reduction purposes alone would require. On such occasions, the need for tangible justice for survivors, the therapeutic needs of child victims who might otherwise believe themselves responsible, the requirement that we comport with public notions of right and wrong to maintain trust and confidence, and meaningful response to the social values implicated call for punishment beyond that sufficient to accomplish risk management and the prevention of future criminal behavior. At the highest levels of crime, and thus, usually, of risk, the length of incapacitation necessary for adequate social protection is concomitantly appropriate for serving the public values sentencing should serve.

What is critical, however, is that we must not continue to allow mere unreasoned invocation of proportional severity, "just punishment," or the pretense of treating like alike to excuse us from careful sentencing choices. Such excuses are the source of most sentencing dysfunction.

## VI. CONCLUSION

The Reporter's misgivings about risk assessment are ultimately unfounded, but they help explain his choice of ordered but opaque just deserts over public safety as the lodestar for mainstream sentencing. That choice allows those who negotiate or impose sentences to avoid accountability for achieving any social purpose. Sentencing so freed from

accountability subverts public safety, betrays public trust and confidence, brutalizes victims of avoidable crimes and offenders punished with no benefit to society, and squanders public resources. Rational and accountable sentencing occurs within the bounds of proportionality, but within those bounds exercises best efforts to serve public safety and public values. Best efforts require use of risk and needs assessment, and deliver sentencing responses with due regard as well to the circumstances that determine the offender's responsibility. Best efforts focus on preventing recidivism unless public values require some deviation from that focus.