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Introduction to the Symposium on the Model Penal Code's Sentencing Proposals

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INTRODUCTION TO THE SYMPOSIUM ON THE MODEL PENAL CODE'S SENTENCING PROPOSALS

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I. INTRODUCTION

Begun in the 1950s, the drafting of the *Model Penal Code* (the *Code*) differed from the typical American Law Institute (ALI) “restatement” of the law project because it was an explicit attempt to provide a model statute that would advance doctrine and practice rather than merely describe it.¹ Scores of lawyers, judges, academics and policymakers actively participated in the process of devising the *Code*. Their efforts paid off. As Gerard Lynch wrote in 1998, “[t]he Model Penal Code is among the most successful academic law reform projects ever attempted.”² During the 1960s and 1970s, well over half the states revamped their criminal statutes to conform them more closely to the *Code*.³

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1. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 466–67 (1961) (“Unlike the Restatements, we are not attempting to articulate prevailing law . . . we aim to build the source materials required for the reexamination and revision of our penal codes that is so badly needed throughout the country.”).

2. Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998).

3. Herbert Wechsler, *Foreword to MODEL PENAL CODE AND COMMENTARIES: PART I* §§ 6.01 to 7.09, at i, xi (1985).

The *Code*'s most popular innovations were the liability rules found in its so-called "general" provisions, which address overarching conduct and mental state requirements, attempt and conspiracy rules, imputation doctrines such as complicity, and the defenses.⁴ The *Code*'s definitions of "specific" offenses were not as influential.⁵ But they too were innovative and are still taught in American law schools as a coherent alternative to existing federal and state provisions.⁶

The *Code*'s sentencing provisions, in contrast, were hardly novel for the time and have received little academic attention. Those provisions adopted a relatively indeterminate approach to sentencing that relied on a non-prioritized list of dispositional goals, sentences with wide ranges, and release-decision-making by parole boards.⁷ Thus, the *Model Penal Code*'s sentencing provisions came much closer to a restatement of practices widely extant at the time than a fresh analytical look at how sentencing should be carried out.⁸ More importantly, the wave of sentencing reform that has taken place in the past three to four decades roundly rejected the *Code*'s rehabilitative focus. Instead, the federal government and more than twenty states have moved toward a more determinate sentencing framework that limits judicial discretion, reduces or eliminates parole board authority, and tends to place greater emphasis on sentences that implement a just deserts philosophy in which efforts to reform prisoners play a secondary role.⁹

Thus, in 1999 the ALI decided to revisit the sentencing provisions of the *Code* and appointed Professor Gerard Lynch as Reporter for the revision project, which was entitled *Model Penal Code: Sentencing (MPCS)*.¹⁰ In 2001, when Lynch joined the federal bench, Professor Kevin Reitz became the Reporter for the *MPCS*.¹¹ Reitz has since carried out the gargantuan task of drafting black letter revisions and commentary, providing research materials to the ALI's various consulting groups, and shepherding the revisions through the complicated ALI vetting process.

4. Lynch, *supra* note 2, at 297–98.

5. *Id.* at 299–300.

6. Most criminal law casebooks set out both the general and special parts of the *Model Penal Code* and include problems that require delving into the latter. *See, e.g.*, MARKUS D. DUBBER & MARK G. KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS A-55 to A-90* (2d ed. 2009); PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 1118–57 (2d ed. 2008).

7. *See* MODEL PENAL CODE § 6.10 (1962).

8. MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Memorandum* xxviii–xxix (Tentative Draft No. 1, 2007).

9. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1202–03 (2005).

10. Lance Liebman, MODEL PENAL CODE: SENTENCING REPORT, *Foreward* i, xi–xii (2003).

11. *Id.* at xii.

The revision process to date can be divided into three stages: (1) preliminary conceptual work by Professor Reitz; (2) the adoption of Tentative Draft No. 1 by the ALI; and (3) the drafting of Tentative Draft No. 2 (also called the Council Draft in this article). After discussing these three stages, this article summarizes the six articles that follow, each of which provides a unique glimpse into the substance and rationale of the *MPCS* project.

II. PRELIMINARY STEPS IN THE *MPCS* PROCESS

The prospectus prepared by Professor Reitz in 2001 when he began as *MPCS* Reporter laid out an ambitious agenda, organized under three categories: sentencing structure, substantive sentencing policy, and sentencing process.¹² The primary structural issue he identified was the proper assignment of sentencing authority.¹³ The drafters of the original *Code* assumed that risk assessment and rehabilitation could be carried out fairly effectively, and thus left the ultimate duration and nature of sentences largely up to parole boards.¹⁴ But, according to Reitz, “[t]he research consensus today is that . . . the aggregate crime-reduction returns from [rehabilitative] programs have been disappointing.”¹⁵ Furthermore, “no one has mounted a persuasive defense of rehabilitation theory sufficient to reinstate it as the dominant purpose of criminal penalties, nor has anyone produced a serious defense of the distribution of sentencing authorities within indeterminate structures.”¹⁶

Thus, Reitz suggested that the ALI consider adoption of the “guidelines” approach that has been at the center of most reform proposals over the past several decades.¹⁷ Although numerous types of guidelines systems exist, all are the product of deliberations by sentencing commissions and consist of sentencing ranges for each offense that, compared to the usual indeterminate sentencing system, are meant to provide more direction to judges at the front-end and diminish the role of parole boards at the back-end. The possible advantages of such a system, Reitz noted, include greater predictability and fairness in sentencing outcomes and increased transparency in the disposition decision-making process.¹⁸ Moreover, such systems can enhance control over the costs and

12. Kevin R. Reitz, *A Proposal for Revision of the Sentencing Articles of the Model Penal Code* (Working Draft 2001).

13. *Id.* at 2–3.

14. *Id.* at 3–4.

15. *Id.* at 4.

16. *Id.* at 5.

17. *Id.* at 10.

18. *Id.* at 5–6 (recounting commentators’ arguments that indeterminate sentencing is deficient in achieving either of these goals).

use of imprisonment because of the sentencing commission's access to and expertise in evaluating system-wide data and the greater ease with which forecasts about prison populations can be made when sentences must adhere to statewide criteria.¹⁹ Anticipating some negative reaction to the guidelines idea from those familiar with the federal system,²⁰ Reitz also cautioned that the various flaws in that much-maligned guidelines regime—which is based almost entirely on retributive principles, is relatively inflexible, and micro-manages the sentencing decision through a large number of variables—are not necessarily replicated in most state guidelines systems, which often provide greater discretion to judges and contemplate that multiple purposes can be implemented through sentencing.²¹

Consistent with the latter observation, Reitz's discussion of possible approaches to substantive sentencing policy—his second general reform category—did not reject rehabilitation out-of-hand.²² Reitz noted that, in contrast to the federal system, many states guidelines systems have relied on a “mixed formula of utilitarian and moral purposes,” albeit a formula that usually uses desert to set the lower and upper penalty limits.²³ Reitz also proposed that the ALI consider a number of other substantive innovations that the original *Code* did not mention, including: mechanisms for reducing prison growth; the adoption of procedures for obtaining information about minority sentencing; the expanded use of “intermediate sanctions” such as community residential facilities, victim restitution, criminal forfeiture, home confinement with electronic monitoring, and “shaming” sanctions; and restorative justice principles that provide more of a role for the victim in the dispositional process.²⁴

The final area of potential reform Reitz identified in his prospectus was the sentencing process.²⁵ Here he primarily had in mind the difficult question of when a fact that affects a sentence must be decided at trial by a jury rather than at sentencing by a judge.²⁶ The drafters of the original *Code* were unconcerned about the issue, probably because they felt facts considered at sentencing would usually redound to the defendant's benefit or at least be considered within a paternalistic, rehabilitative paradigm.²⁷

19. *Id.* at 7–8.

20. For one criticism of the federal guidelines system, see Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Sentencing Guidelines*, 58 STAN. L. REV. 85 (2005).

21. Reitz, *supra* note 12, at 9–10.

22. *Id.* at 11–19.

23. *Id.* at 15.

24. *See id.* at 11–19.

25. *Id.* at 19.

26. *Id.*

27. *Id.* at 20–21.

But in recent years the Supreme Court decided *Apprendi v. New Jersey*,²⁸ *Blakely v. Washington*,²⁹ and *United States v. Booker*,³⁰ which together upend this aspect of sentencing by establishing that, under the Sixth Amendment, all facts enhancing a sentence beyond a mandatory guideline maximum must be found by a jury. Writing after *Apprendi* but before *Blakely* and *Booker*, Reitz suggested that a new *Code* could build upon the old *Code*'s crime definitions to distinguish between "material" trial facts (decided by a jury) and trial facts that can be left to sentencing (by the judge).³¹ Although *Blakely* and *Booker* now require a somewhat different analysis,³² considerable room remains for experimentation.³³

A Report authored by Reitz on the status of the *MPCS* issued two years into the project echoed many of the themes in his prospectus.³⁴ A particularly useful elaboration of his criticism of the original *Code*'s approach is the Report's comparison of indeterminate sentencing with commission-guidelines sentencing in terms of the proportion of sentence controlled by front-end decision-makers (legislatures, commissions and judges) and back-end decision-makers (correctional officials and parole boards). According to the Report, back-end decision-makers are typically responsible for between seventy-five percent and eighty-five percent of the sentence in indeterminate regimes but only about fifteen percent of the sentence in guidelines regimes.³⁵ The Report expressed a strong preference for the latter type of regime because it imports the rule of law into sentencing, enhances the ability to implement and monitor systemic reforms and manage resources, and diminishes disparate and biased sentences.³⁶ However, the Report, like the prospectus, cautioned against relying on the federal guidelines model, given its severe limits on judicial discretion, its complexity and rigidity, its failure to encourage alternative sanctions, and its tendency to ignore or be agnostic about issues of resource management, racial bias, and sentencing philosophy.³⁷

28. 530 U.S. 466 (2000).

29. 542 U.S. 296 (2004).

30. 543 U.S. 220 (2005).

31. Reitz, *supra* note 12, at 23.

32. All facts, not just "material" ones, must be found by a jury if they enhance a sentence beyond the guidelines maximum, unless the maximum is "advisory." See *Booker*, 543 U.S. at 233–34.

33. See, e.g., Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 186–215 (describing possible responses to *Blakely* and *Booker*).

34. See generally MODEL PENAL CODE: SENTENCING REPORT (2003).

35. Compare *id.* at 21–26 (illustrating indeterminate sentencing), with *id.* at 59–63 (illustrating determinate sentencing).

36. *Id.* at 49, 63–115.

37. *Id.* at 115–25.

III. TENTATIVE DRAFT NO. 1

Despite the *Blakely/Booker* revolution, the ALI has made significant progress on the *MPCS* project since Reitz's 2003 Report.³⁸ *Tentative Draft No. 1*, dealing with sentencing goals, sentencing commissions, and the sentencing process, was approved by the membership of the ALI in May, 2007.³⁹ And since September 2008, a preliminary version of *Tentative Draft No. 2*, which focuses on the details of sentencing structure, has been under serious consideration by the ALI Council, preparatory to its submission to the full ALI membership.⁴⁰

Probably the most important aspect of *Tentative Draft No. 1* is its revision of the original *Code*'s § 1.02 regarding the purposes of the *Code*.⁴¹ Whereas the old *Code* had specified a wide array of objectives to be achieved through crime definition and punishment, with no clear enunciation of whether or when particular goals should predominate,⁴² the new provision adopts Norval Morris' concept of "limiting retributivism."⁴³ As the commentary to the provision explains, this principle posits that "utilitarian goals such as rehabilitation, incapacitation, general deterrence, and victim and community restoration should not be allowed to produce sentences more or less severe than those deserved by offenders on moral grounds."⁴⁴ In other words, under the *MPCS* retributive considerations—the relative "gravity" of the offense, harm done to the victim, and "blameworthiness" of the offender⁴⁵—are to dictate the potential range of the sentence. Only within this range may considerations about the offender's dangerousness and treatability or the type of message the public should receive influence the sentencing decision. The new purposes provision also displays its cautious stance toward these and other utilitarian objectives by stipulating that they may affect a sentence only when achieving them is "reasonably feasible."⁴⁶ Thus, compared to the old *Code*, *Tentative Draft No. 1* gives desert a much more conspicuous role in

38. Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683 (2009).

39. *Id.* at 689.

40. *Id.*

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

42. MODEL PENAL CODE § 1.02(2) (1962).

43. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); see also Richard S. Frase, *Sentencing Principles in Theory and Practice*, in 22 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* (Michael Tonry ed. 1997).

44. MODEL PENAL CODE: SENTENCING § 1.02(2) *illus.*, at 4–5 (*Tentative Draft No. 1*, 2007).

45. *Id.* § 1.02(2), at 1. Section 1.02(2)(a)(i) uses these terms to operationalize "retribution." *Id.* at 31. It avoids the latter term because it has become "ideologically charged" and associated with the growth of imprisonment in recent years. *Id.*

46. *Id.* § 1.02(2)(a)(ii), at 1.

fashioning criminal sentences. It eschews the type of open-ended sentencing that some jurisdictions adopted to facilitate flexible implementation of individual prevention goals.

At the same time, *Tentative Draft No. 1* rejects not only the view that desert should be the sole determinant of disposition,⁴⁷ but also the notion of some desert theorists that there is a single correct retributive punishment for each offender.⁴⁸ Instead, it adopts Morris' assumption that we do not have adequate "moral calipers" to reach such definitive conclusions and that, at best, we can merely ascertain when a punishment is clearly excessive or insufficient on desert grounds.⁴⁹ The result of this reasoning is a statement of purpose that represents an innovative compromise between deontological and consequentialist principles unique among sentencing codes in this country.

The new section contains a number of other interesting provisions. First, telegraphing a hostile stance toward the legislative tendency to increase sentence lengths after every moral panic, it calls for "sentences no more severe than necessary" to achieve the stated purposes of punishment,⁵⁰ a declaration that the commentary calls the "parsimony" principle.⁵¹ Second, the section requires uniformity with respect to *all* sentencing goals, not just desert.⁵² Thus, some attempt apparently must be made not just to treat all robberies alike, but all robbers with a particular risk profile alike. Third, consistent with Reitz's prospectus, it states that sentencing policy must be designed to reduce racial and ethnic disparities, encourage intermediate penalties, and "promote research on sentencing policy and practices,"⁵³ so that, as the commentary to the provision puts it, sentencing will be "evidence-based."⁵⁴

The next several provisions of *Tentative Draft No. 1* are devoted to outlining the role of the sentencing Commission. Under the *Draft* the Commission would be permanent, rather than the temporary entity it has been in states that established commissions simply to create guidelines and then disbanded them.⁵⁵ The Commission would also be sizeable, ranging

47. See, e.g., ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 51 (1976).

48. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 34 ("[O]nce a society sets the endpoint of its punishment continuum [according to desert], the ordinal ranking of cases along that continuum will produce quite specific punishments.").

49. Norval Morris & Marc Miller, *Predictions of Dangerousness*, in 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 1, 37 (1985).

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

51. *Id.* at 13.

52. *Id.* § 1.02(2)(b)(ii), at 2.

53. *Id.* § 1.02(2)(b)(iii)–(vii), at 2.

54. *Id.* at 21.

55. *Id.* § 6A.01, at 46 (establishing permanent Commission). The commentary notes that "[a]

between eleven and twenty-two members,⁵⁶ and diverse, in that it would include judges, legislators, prosecutors, defense attorneys, correctional authorities and members of the public.⁵⁷

Finally, the Commission would have three prominent jobs. First, it would be charged with developing sentencing guidelines that ensure, consistent with § 1.02 (but largely contrary to the federal system), that judges retain considerable discretion in meting out sentences within desert-bound ranges.⁵⁸ Second, during its first two years or so the Commission would be required to carry out detailed research about a host of issues relating to sentencing (including the resource and race issues already mentioned) to ensure that its development of the guidelines is based on sound information.⁵⁹ Third, it would have an ongoing responsibility to review the efficacy of the sentencing regime, to keep statistics that assist in developing rational sentencing policy, and to make recommendations to the legislature consistent with that policy.⁶⁰

Tentative Draft No. 1 then describes in more detail the contours of the Commission's first job, the development of sentencing guidelines. Consistent with § 1.02, it calls for "presumptive guidelines" that may not exceed the range dictated by desert but that can be further refined within those limits by reference to realistic utilitarian goals.⁶¹ Thus, for instance, the Commission could adopt a presumptive maximum sentence lower than one that would be required by retributive analysis (although not one that would be too lenient under that analysis) for any class of drug offender that research shows is particularly amenable to substance abuse treatment.⁶² Furthermore, *Tentative Draft No. 1* expresses no preference for any

number of states have elected to create temporary sentencing commissions, or have abolished standing commissions at some point after the commission's guidelines have taken effect." *Id.* at 48.

56. *Id.* § 6A.02, at 58–61. This provision sets out two options, one of which would establish an eleven-member Commission and one of which would establish a twenty-two-member Commission. *Id.* The commentary states that, since "[n]o one formula for a commission's composition has proven superior," the *MPCS* merely sets out possible options. *Id.* at 62.

57. *See id.* § 6A.02, at 58–61 (listing types of individuals who should be on the Commission).

58. *Id.* § 6A.04(1), at 90 (requiring development of guidelines); *id.* § 6B.03(4), at 178 (noting, "[t]he guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations").

59. *Id.* § 6A.04, at 90 (setting out "initial responsibilities" of the Commission).

60. *Id.* § 6A.05, at 99–103 (setting out "ongoing responsibilities" of the Commission); *id.* § 6A.09, at 147 (requiring "omnibus review of [the] sentencing system . . . [e]very [ten] years"). Section 6A.06 also calls for the development of a "community corrections strategy," which can be carried out either as part of the Commission's initial responsibilities or at some later point in time. *Id.* § 6A.06, at 129–30.

61. *Id.* § 6B.02(1), at 159–60 (requiring development of presumptive guidelines); *id.* § 6B.03, at 177 (requiring that presumptive guidelines conform to the purposes of punishment in § 1.02(2)).

62. *See id.* § 6B.03 illus. 1, at 181.

particular utilitarian goal, so long as its effect does not exceed the desert-based range. Thus, the commentary states:

[A] commission might promulgate a guideline stating that, for serious violent offenses, the primary purposes to be weighed by sentencing courts should be retribution and incapacitation of the offender. Another guideline might provide that, for certain kinds of property crime, the leading considerations ought to be restitution to the crime victim and specific deterrence of the offender through the application of economic sanctions. For categories of cases at the lowest end of the gravity scale, the guidelines may direct the courts chiefly to restorative sentences that address the needs of victims, offenders, and their communities.⁶³

Tentative Draft No. 1 also contemplates that the presumptive guidelines will consist of relatively narrow ranges, a stipulation meant to promote consistency, enhance perceptions of fairness, and facilitate predictability about prison populations.⁶⁴ However, the *Draft* also emphasizes that sentences in particular cases are ultimately to be fashioned by judges, who have authority to depart from the presumptive range, limited only by appellate review.⁶⁵ Thus, while the Commission is charged with developing a list of aggravating and mitigating factors that support such departures, its list is non-exclusive and may not ascribe a particular duration to any aggravators or mitigators.⁶⁶ Further, whether they come from the Commission or the courts, departure factors can derive from either retributive or utilitarian principles and target virtually any characteristic or conduct of the defendant, subject to four caveats. First, race, gender, creed, national origin, and the like generally may not be considered.⁶⁷ Second, in order to conform to *Blakely*, all aggravators that

63. *Id.* at 183.

64. *Id.* § 6B.04(3), at 192 (“Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.”).

65. *Id.* § 6B.04(1), at 191 (“The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX.”). Section 7.XX is one of a number of provisions not yet officially adopted by the ALI. It states, *inter alia*, that judges may depart from the presumptive guidelines provided they justify the decision in writing, subject to appellate confirmation that the departure is justified by “substantial circumstances” in ordinary cases and by “extraordinary and compelling circumstances” when the departure is more than twice the guidelines maximum. *Id.* § 7.XX, at 264–65.

66. *Id.* § 6B.04(4), at 193.

67. *Id.* § 6B.06(2)(a), at 211.

are “jury sentencing facts” (which, under the Supreme Court’s jurisprudence, may be virtually all aggravators except prior convictions)⁶⁸ must be proven to a jury beyond a reasonable doubt.⁶⁹ Third, alleged criminal conduct that has not led to conviction may not form the basis of an aggravator.⁷⁰ Finally, neither aggravators nor mitigators may be used to produce sentences that fall outside desert-based limits, a rule to be enforced by the appellate courts.⁷¹

IV. THE COUNCIL DRAFT

The preliminary version of *Tentative Draft No. 2* (called a Council Draft because it is presented to the ALI Council and revised there prior to full ALI review)⁷² rests on these building blocks. Its most controversial proposal, albeit one that is not surprising in light of the 2003 Report and *Tentative Draft No. 1*, is the abolition of back-end release decision-making by parole boards.⁷³ Instead, sentences are to be fixed at the front-end, meaning that sentencing authority is to reside in the Commission as a general matter and in trial judges and the appellate courts in specific cases. The commentary for this proposal argues that, with few exceptions, the trial court possesses all relevant dispositional information at the time of sentencing.⁷⁴ Relative desert, based on crimes already committed, can be calibrated immediately after conviction and, given the static nature of most risk and treatment factors, the need for incapacitation and the usefulness of rehabilitation can also be measured at that time (assuming such measurement is “reasonably feasible” at all).⁷⁵

68. See WAYNE R. LAFAVE ET AL., 6 CRIMINAL PROCEDURE 787 (3d ed. 2007) (noting the *Apprendi* Court “held that regardless of how a fact is designated by a legislature, that fact must be proven beyond a reasonable doubt to a jury, if it is a fact other than prior conviction, and it authorizes the imposition of a penalty that is more severe than the penalty authorized by law for the offense of conviction alone”).

69. Tentative Draft No. 1 sets out a complex procedure for assuring *Blakely*’s stipulations are met. See MODEL PENAL CODE: SENTENCING § 7.07B, at 296–98 (Tentative Draft No. 1, 2007).

70. *Id.* § 6B.06(2)(b), (3), at 211–12. This limitation is meant to reject the “real offense” sentencing that predominates in the federal system, a process that permits sentence enhancements based on allegedly criminal conduct that was not prosecuted or was found not to be criminal by a court. *Id.* at 217–20.

71. *Id.* at 201.

72. See Reitz, *supra* note 38, at 688.

73. MODEL PENAL CODE: SENTENCING § 6.10(1), at 51 (Council Draft No. 2, 2008).

74. *Id.* at 9–10 (noting that behavior in prison is seldom predictive of behavior once released).

75. In further support of this position, the *Council Draft* includes a fascinating account of research suggesting that (1) offenders released after determinate sentences are no less likely to be “rehabilitated” than those subject to parole board release-decision-making; and (2) determinate, guidelines-oriented systems are probably more likely to slow the growth of prison populations than indeterminate regimes, perhaps because of the system-wide attention to resource allocation that

Even if dramatic changes in the offender's character or risk do significantly alter the retributive or utilitarian analysis after sentence has been imposed, the *Council Draft* permits these factors to reduce only the lengthiest sentences (those that last more than fifteen years)⁷⁶ and those imposed on individuals who have since developed serious physical or mental infirmities or become advanced in age.⁷⁷ The *Council Draft* recognizes only two other situations where sentences may be shortened after they have been imposed, neither of which involves upsetting the trial court's sentencing judgment. Courts must grant credit for time already served for the crime in question,⁷⁸ and each sentence is automatically reduced fifteen percent for "good behavior" unless the offender commits a criminal offense or serious disciplinary infraction or "fails to participate satisfactorily in work, education or other rehabilitation programs."⁷⁹

With respect to the precise length of the sentences, the *Council Draft* suggests five categories of felonies (as compared to the old *Code's* three categories),⁸⁰ with maxima of life, twenty years, ten years, five years and three years, respectively.⁸¹ Post-release supervision is encouraged, but as with the old *Code*, this supervision is to be imposed independently of prison sentence rather than, as occurs in many parole regimes, incorporated into sentence duration.⁸² This arrangement is designed to avoid the illogic of visiting the longest post-release supervision on those who receive the maximum suspension of sentence for good behavior and the shortest supervision on those who deserve no such credit.⁸³ The *Council Draft* also prohibits mandatory minimum prison sentences⁸⁴ on the ground that judges, rather than legislatures, commissions, or prosecutors, should be the ultimate arbiters of desert.⁸⁵

A final aspect of the *Council Draft* worth mentioning given its relevance to many of the articles in this Symposium is the role it assigns risk assessments in the sentencing process. The *Council Draft* permits

sentencing commissions provide. *Id.* at 13–30.

76. *Id.* § 6.10A(1), at 58. As currently drafted, Section 6.10A(1) allows a judge to reduce or terminate a sentence for an offender who has served at least fifteen years if the judge finds that desert or incapacitative goals are no longer met by the original sentence. *See also id.* at 60. However, Professor Reitz has indicated that the judicial component of this provision will be eliminated and that the entire provision is likely to undergo substantial change in future revisions. E-mail from Professor Reitz to Professor Slobigin, Feb. 13, 2009 (on file with author).

77. *Id.* § 6.10A(2), at 58.

78. *Id.* § 7.09, at 76.

79. *Id.* § 3.05.1(2), at 78.

80. MODEL PENAL CODE § 6.01 (1962).

81. MODEL PENAL CODE: SENTENCING § 6.01(1), at 32 (Council Draft No. 2, 2008).

82. *Id.* § 6.10(2), at 51.

83. *Id.* § 6.10 cmt. d, at 52–53.

84. *Id.* § 3.05.6(6), at 85.

85. *Id.* § 6.06 cmt. c, at 39–40.

sentencing commissions to construct presumptive guidelines that permit low-risk felons to avoid prison entirely, assuming a non-prison term is not too lenient under desert principles.⁸⁶ Conversely, high-risk offenders may be assigned enhanced sentences,⁸⁷ although again desert determines the outer limits of such sentences and the risk factors must be proven to a jury in accordance with *Blakely*.⁸⁸ To facilitate rational exercise of this risk assessment authority, the *Council Draft* also directs the Commission to develop and update instruments for needs and risk assessment and to incorporate them into the Guidelines when they prove “sufficiently reliable.”⁸⁹

V. THE ARTICLES IN THIS SYMPOSIUM⁹⁰

We are fortunate to have as the first contributor in this Symposium the Reporter for the Model Penal Code sentencing project, Kevin Reitz, a law professor at the University of Minnesota. After emphasizing the importance of looking at the states (as opposed to the federal system) when considering various reform routes, Professor Reitz’s article, *Demographic Impact Statements, O’Connor’s Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, focuses on three aspects of the *MPCS* project: the demographic impact statement (DIS), presumptive sentencing, and the extent to which sentences should be determinate. Analogous to environmental or fiscal impact statements, demographic impact statements under the *MPCS* would accompany each sentencing proposal, and “[a]t a minimum . . . model the racial, ethnic, and gender composition of future sentencing populations if the proposed change in sentencing law were to take effect.”⁹¹ Although the DIS requirement in *Tentative Draft No. 1* has not been controversial within the ALI, only two states have a similar provision⁹² and the political risk inherent in pointing out the differential racial impact of sentences could create considerable resistance to this proposal. Nonetheless, Professor Reitz makes a good case for the requirement and explores the types of information and the possible impacts it might generate.⁹³

86. *Id.* § 6B.09(3), at 62.

87. *Id.* § 6B.09 cmt. e, at 64–65.

88. *Id.* at 65.

89. *Id.* § 6B.09(1), at 62.

90. Douglas A. Berman, Kevin R. Reitz, Alice Ristroph, and Robert Weisberg presented a version of their articles at a panel at the American Association of Law Schools in San Diego on January 9, 2009, sponsored by the Criminal Justice and moderated by the author. Symposium, *Model Penal Code: Sentencing*, 61 FLA. L. REV. 665 (2009). Nora V. Demleitner and Michael H. Marcus did not present at the panel.

91. Reitz, *supra* note 38, at 690–91.

92. Minnesota’s Commission authorized the DIS in 2007. *Id.* at 693; *see also* IOWA CODE § 2.56(1) (West 2008).

93. Reitz, *supra* note 38, at 689–96.

Professor Reitz then explains, in terms consistent with the above discussion, why *Tentative Draft No. 1* endorsed a presumptive sentencing guidelines system rather than either an advisory guidelines approach (in which departures from the guidelines range are not reviewable or only perfunctorily so) or an entirely indeterminate regime.⁹⁴ He also describes various state reactions to *Blakeley* and *Booker*, all of which move away from presumptive sentences.⁹⁵ Agreeing with Justice O'Connor's dissents in these cases,⁹⁶ Professor Reitz views these developments as unfortunate, and hopes the *MPCS* project will provide an impetus in the opposite direction.⁹⁷ Finally, he notes that, despite *Tentative Draft No. 1*'s preference for determinate sentences, the *Council Draft* does permit some back-end adjustments (in the downward direction), most controversially through its provision allowing modification of lengthy sentences.⁹⁸ He makes the case for the importance of this provision, especially given the popularity of life without parole and long mandatory minima.⁹⁹

The rest of the articles in this Symposium tend to be critical of the *MPCS* project, especially its orientation toward desert. In *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*,¹⁰⁰ Professor Douglas Berman, Ohio State law professor and indefatigable publisher of the *Sentencing Law and Policy* blog,¹⁰¹ calls the *MPCS* project a "missed opportunity"¹⁰² because of its failure to address directly the huge incarceration rates in this country, which dwarf those of other Western countries and result in more imprisoned people in the U.S. than in China.¹⁰³ Professor Berman reminds us that the original *Code* and even its updated commentaries (as late as 1979) made a strong statement against imprisonment; the latter source asserts, for instance, that "[t]here is no offense as to which imprisonment is absolutely required, except possibly murder,"¹⁰⁴ and makes clear that prisoners who are rehabilitated should usually be released.¹⁰⁵ Noting that the increase in incarceration and

94. *Id.* at 699.

95. *Id.* at 701–02.

96. In particular, see *Blakely v. Washington*, 542 U.S. 296, 314–26 (2004) (O'Connor, J., dissenting).

97. Reitz, *supra* note 38, at 702–03.

98. *Id.* at 704–05.

99. *Id.* at 705–06.

100. See Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709 (2009).

101. *Sentencing Law and Policy*, <http://sentencing.typepad.com> (last visited June 29, 2009).

102. Berman, *supra* note 100, at 709.

103. *Id.* at 711.

104. *Introduction to Articles 6 and 7 to MODEL PENAL CODE AND COMMENTARIES: PART I* §§ 6.01 to 7.09, at 8–9 (1985).

105. *Id.*

extremely long sentences in this country coincided with the rejection of the rehabilitative ideal,¹⁰⁶ Berman fears that the *MPCS*' adoption of limiting retributivism and its goals of promoting determinate sentences and eliminating parole boards will at best do nothing to reverse these trends, and might even exacerbate them.¹⁰⁷ While Berman concedes that the expertise of sentencing commissions can lead to more rational policy decisions, he is not optimistic that legislatures will listen to commissions and is fearful that a system that focuses on defining sentence ranges at the front-end according to desert is easily manipulated into producing mandatory or increasingly harsher dispositions.¹⁰⁸ In any event, he suggests, without the moderating effect of parole decision-making at the back-end, even a sentencing regime created by a progressive commission will be unable to take into account the myriad of mitigating factors that should lead to early release.¹⁰⁹

Seton Hall Law Professor Alice Ristroph, in *How (Not) to Think Like a Punisher*,¹¹⁰ likewise expresses skepticism about the new *Code*'s adoption of retributivism as a guiding philosophy.¹¹¹ To her, sentencing is first and foremost a political statement about state power; its role as a device for punishing offenders is secondary. Thus, fashioning sentences around desert principles (or on any other theory of punishment) is short-sighted.¹¹² She notes that the new *Code* seems to recognize this point in its provisions calling for fiscal and demographic impact statements, evidence-based sentencing, uniformity and parsimony, none of which are necessarily tied to retribution or other theories of punishment.¹¹³ However, she also argues that the *Code*'s focus on limiting retributivism means that sentencing commissions, trial judges, and appellate judges may have to make decisions that are in tension with these intended limitations on state power.¹¹⁴ Once it is determined that an offender deserves a particular sentence or sentence range, considerations such as cost, racial disparities, offender risk and other non-desert variables are much harder to integrate into the decision.¹¹⁵ As Ristroph notes,

[A] moral claim that an offender deserves ten years in prison is not affected by the fact that the state cannot afford to

106. Berman, *supra* note 100, at 715.

107. *Id.* at 721.

108. *Id.* at 722–23.

109. *Id.* at 724–25.

110. Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727 (2009).

111. *See id.* at 727–28.

112. *Id.* at 728.

113. *Id.* at 729.

114. *Id.* at 744–45.

115. *Id.* at 746–49.

support him, or that the offender's incarceration will further exacerbate racial disproportions in the prison population The danger of desert is that it preserves the possibility that some will say the costs are worth it, the inequities deserved.¹¹⁶

Finally, Ristroph argues that this tension between the retributive theory of punishment and more practical, evidence-based goals is exacerbated by desert's elasticity; claims of desert are not "falsifiable" in the same way these practical claims are.¹¹⁷ Indeed, the public arguably has as much expertise as judges in deciding how much punishment is proportionate to offense gravity.¹¹⁸ If judges have expertise about proportionality, Ristroph suggests, it is not with respect to desert, but rather in terms of balancing all of the foregoing considerations against the government's contention that an offender should be deprived of liberty.¹¹⁹

Michael H. Marcus, an Oregon state trial judge who has championed "smart sentencing" focused on promoting public safety,¹²⁰ expresses even greater concerns about the retributive cast of the new *Code* in his article, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*.¹²¹ Disagreeing with the *Code*'s unwillingness to accord significant weight to risk differentials except in extreme cases, Judge Marcus believes that risk assessments should heavily influence *all* sentences.¹²² He argues that, despite their inevitable uncertainty, such assessments would not create "false positives" because they would merely allocate where offenders end up—in prison or in the community—not whether they should be punished.¹²³ Furthermore, like Ristroph, he considers determinations of desert to be at least as unstable as assessments of risk.¹²⁴

More fundamentally, Judge Marcus sees no point in basing the typical sentence on desert unless doing so enhances public safety.¹²⁵ Often the two considerations are at odds, not just because a dangerous person might not be blameworthy (or vice versa), but because characteristics that appear mitigating—youth, addiction, impaired functioning—are frequently risk

116. *Id.* at 746–48.

117. *Id.* at 748.

118. *Id.* at 740.

119. *Id.* at 745.

120. See Michael H. Marcus, *Future Trends in State Courts 2006: Smart Sentencing: Public Safety, Public Trust and Confidence Through Evidence-Based Dispositions*, TRENDS (2006), available at <http://sentencing.nj.gov/downloads/pdf/articles/2006/Oct2006/document05.pdf>.

121. See Michael H. Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 751–52 (2009).

122. *Id.* at 756.

123. *Id.* at 754–55.

124. *Id.* at 753–54.

125. *Id.* at 752.

factors.¹²⁶ Judge Marcus concedes that the imperatives of desert and public safety might overlap when bucking the public's desire for retribution would lead to vigilantism or disrespect for and non-compliance with the system, but he asserts that before sentences are affected by such considerations there must be concrete demonstration of their impact, especially if sentence ranges, like those imposed under the new *Code*, purport to be "evidence-based."¹²⁷ In any event, Judge Marcus argues, any public dissatisfaction with the criminal law that does occur most likely stems from the perception that it is failing to protect the public.¹²⁸ For Judge Marcus, only in a small subset of cases—perhaps, for instance, a homicide committed by a one-time drunk driver—should desert concerns trump a public safety orientation at sentencing.¹²⁹

In her article, *Good Conduct Time: How Much and For Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing*,¹³⁰ Professor Nora V. Demleitner, Dean at Hofstra Law School, more gently chastises the *MPCS* project. Her article focuses on the *MPCS*' position on good time credits (which is considerably less generous than the old *Code*).¹³¹ She notes that such credits can dramatically increase participation in rehabilitation programs, provide incentives to cooperate with prison authorities, and give prisoners reason to believe they control their fate at least to some extent, thus enhancing their "ability to operate as independent actors."¹³² Accordingly, she advocates good time credits of up to one-third of the sentence, with a 15% reduction for good conduct and the remainder granted for satisfactory participation in rehabilitation programs, all of which should be non-revocable (in contrast to the rule in every state).¹³³ She also admits, however, that the crediting process needs greater transparency and clearer criteria.¹³⁴

Finally, the article by Stanford Law Professor Robert Weisberg, entitled *Tragedy, Skepticism, Empirics, and the MPCS*,¹³⁵ proffers a "tragic" but

126. *Id.* at 768–69.

127. *Id.* at 771–72.

128. *Id.* at 764–65.

129. *Id.* at 775.

130. Nora V. Demleitner, *Good Conduct Time: How Much and For Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777 (2009).

131. *Id.* at 779–80. As noted above, the *MPCS* would automatically grant a 15% reduction unless misconduct occurs. *See supra* note 79 and accompanying text. The old *Code* automatically reduced sentence by at least 20% and in cases of exceptional performance by another 20%. MODEL PENAL CODE § 305.1 (1962).

132. Demleitner, *supra* note 130, at 794–95.

133. *Id.* at 790, 795–96.

134. *Id.* at 795–96.

135. Robert Weisberg, *Tragedy, Skepticism, Empirics, and the MPCS*, 60 FLA. L. REV. 797 (2009).

ultimately optimistic view of our ability to resolve the kinds of issues raised in the foregoing articles. He notes that, while the *MPCS* calls for evidence-based sentencing, it does not directly address how we are to determine whether the sentences it produces enhance public safety, save taxpayer money, or reduce prison populations.¹³⁶ For instance, he asks, how can we tell whether judges at the front-end are better than parole boards at the back-end at judging risk and rehabilitation?¹³⁷ And how do we decide whether determinate sentencing is more likely than indeterminate sentencing to increase prison populations?¹³⁸ The *MPCS* commentary presents some statistics suggesting that judges and determinate sentencing are no worse than parole boards and indeterminate sentencing in these respects.¹³⁹ But, relying in large part on Frank Zimring's work,¹⁴⁰ Professor Weisberg shows that most attempts to provide even approximately concrete answers to questions about whether particular criminal justice policies have any effect founder on intractable methodological and conceptual conundrums.¹⁴¹

So, Professor Weisberg suggests, policy that rests on empirical foundations may depend on how we assign the burden of proof.¹⁴² And perhaps the burden should be particularly high when, as with sentencing reform, the research results encourage significant structural change that would be implemented by legislators, who are often not adverse to grandstanding.¹⁴³ In the meantime, Professor Weisberg suggests, we might want to consider a number of modest empirical projects—focusing on relatively simple ways of measuring crime and recidivism rates, racial and ethnic disparity, imprisonment costs, and public “satisfaction” with criminal justice—that could incrementally provide us with relevant information and make us feel more comfortable about attempting evidence-based decisions in the sentencing context.¹⁴⁴

These thought-provoking articles should stimulate debate within the ALI, academia, and the public at large. As the introduction to *Tentative Draft No. 1* states, sentencing is by far the most important criminal justice issue.¹⁴⁵ I, like many of the authors in this Symposium, am suspicious of a

136. *Id.* at 813-23.

137. *Id.* at 800, 812.

138. *Id.* at 802-03.

139. *See supra* note 75 and accompanying text.

140. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE 195–207* (2007). *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991) (discussing the role and impact of imprisonment in criminal sentencing).

141. Weisberg, *supra* note 135, at 802-04.

142. *Id.* at 811.

143. *Id.* at 812.

144. *Id.* at 817-25.

145. MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Memorandum* xxviii

sentencing regime that focuses on desert.¹⁴⁶ I am also not as sanguine as the ALI that risk and needs assessments are better made at trial than on an on-going basis.¹⁴⁷ But the *MPCS* by no means goes all the way down the retributive road, and its basic structure provides a framework for a wide array of compromises that could work politically *and* conceptually. For instance, as noted above, the *MPCS* would allow non-prison sentences for low risk offenders and enhanced sentences for high risk offenders.¹⁴⁸ Implicit in these provisions is the assumption that both sentencing commissions and appellate courts should recognize that our “moral calipers” are very flexible, and thus should give trial judges substantial discretion to implement utilitarian objectives. The *MPCS* is also willing to countenance development of a calculus for equating community sanctions and treatment programs with prison time,¹⁴⁹ which would increase the possibility that the latter disposition becomes the exception rather than the rule, and would, in effect, make treatment providers, monitored by judges, key decision-makers. No sentencing regime will come close to achieving all the goals we would like, but the *MPCS* project, to date, has not foreclosed pursuing any of them. The articles in this Symposium provide a good platform for considering the many options still open to the ALI in its revision of the *Model Penal Code*’s sentencing provisions.

(Tentative Draft No. 1, 2007).

146. *See generally* CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 152–77 (2006) (discussing feasibility of a preventive system of justice). *See also* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 129–44 (2005) (same).

147. The claim that most risk factors are static is inaccurate. Ten of the twenty items on the HCR-20, a highly regarded structured risk assessment instrument, involve non-historical characteristics. *See* Kevin S. Douglas & Christopher D. Webster, *The HCR-20 Violence Risk Assessment Scheme: Concurrent Validity in a Sample of Incarcerated Offenders*, 26 CRIM. JUST. & BEHAV. 3, 8 (1999). Moreover, if, as should often be the case, disposition involves the community rather than prison, dynamic risk factors can be evaluated in an ecologically valid way.

148. *See supra* notes 86–89 and accompanying text.

149. *See* MODEL PENAL CODE: SENTENCING § 1.02(2)(b)(iv), at 2 (Tentative Draft No. 1, 2007) (encouraging intermediate sanctions); *id.* § 6A.06, at 129 (requiring development of a “community corrections strategy”); *id.* § 6B.02(6), at 159 (guidelines must address community sanctions).