Comments on Tentative Draft No. 2

Michael Marcus
April 16, 2011

Risk and Needs Assessment, False Positives, Purposes

The Reporter gradually but commendably recognizes the growing value of accurate assessment of offenders' risks and needs to a meaningful analysis of which offenders should be treated in which way. He favors diverting offenders from prison, as do I – *if* it can be done with safety to the public. He recognizes that risk in some cases, coupled with an insufficient likelihood of reducing that risk, calls for incarceration. He only briefly mentions the role of incarceration in keeping the dangerous from society – they can't do harm on the outside while they are inside. He recognizes the public safety dilemma posed by wrongly reducing incarceration and letting the wrong people out – with avoidable and often terrible crimes that we could have prevented – and wrongly increasing sentences to subject offenders to the brutality of unwarranted incarceration, destruction of their families, and – on some occasions – *increasing* the offender's likelihood of offending when finally released.

But critical errors continue to subvert the value of his project:

The Reporter fails to distinguish actual "false positives" from the typical hoax

Because risk (and need) assessments address *probability*, it is awkward and easily misleading to speak of "false positives" and "false negatives." When understood precisely, when a calculated *risk* that is higher than the actual risk, the results can be called a false positive; a report of a lower *risk* than the actual risk can be called a false negative. But many who oppose statistical support for sentencing insist that a perfectly accurate analysis that deems a cohort at 70% likelihood of violent recidivism is producing 30 "false positives" for every 100 offenders. This use of "false positive" is nothing less than a hoax protecting the unaccountability of the many who exercise whatever they feel "just" with no obligation to attend to other sentencing purposes.

Indeed, at 80% risk, these advocates of punishment for its own sake would stress 20% "false positives" when there are *none*.

So the published analyses of the value and accuracy of risk assessment instruments and protocols must be carefully scrutinized. For example, if an analysis calls every offender who does not recidivate within a cohort deemed "moderate" risk a "false positive" *does not properly assess the accuracy of the instrument.* Its assessment may be 100% accurate – and many times more accurate than any competing methods of assessment of *probability of recidivism* available to sentencers.

Moreover, instruments rating probabilities need not be perfect to be far more useful than the existing alternative methods of assessing risk. Of course, instruments are nowhere near 100% perfect, and we must insist that we do the best we can to perfect analytic tools to assist us in sentencing. If a tool with 80% accuracy identifies one cohort as 30% likely to recidivate with substantial crimes of violence, and another cohort as 2% likely to recidivate in the same manner, a fifteen fold risk distinction would be helpful and significant for dispositions. Analytics require that we continuously monitor the success of sentencing supported by such tools to compare outcomes – recidivism rates -- with sentencing by those rejecting such tools.

The Reporter does not mention that Virginia *started* with the production of a risk assessment that *increased* the length of incarceration for high risk sex offenders, identifying the wide range or risk among sex offenders. He properly raises concerns that increasing sentences may well invoke jury trial rights, but three points are worth stressing: 1) jury trials of fact should be honored by ALI, not evaded or disparaged; 2) he properly recognizes that an *advisory* instrument would probably not support a jury trial right; and 3) the vast majority of offenders, if offered jury trials on such questions, would elect to waive jury rights as they do with *Blakely* rights now that the flood of remands has expired.[1] He mentions the various ways the Virginia risk assessment

[1] *Blakely v. Washington*, 542 U.S. 296 (2004), recognized jury trial rights when a statutory scheme permitted "upward departures" from a mandatory guidelines "presumptive" range of sentences only upon specific findings of fact. Although sloppy commentators reported this as proclaiming "only juries can impose" upward departure sentences under a guideline system, 1) finding the prerequisite departure facts does not result in the sentence, but merely extends the sentencing judge's range of discretion – only the judge selects the sentence; 2) an offender can waive jury rights on departure facts. The decision specified that its rule would apply to cases not yet finally sentenced, which created a cohort of such offenders who had already felt the sentencing views of the trial judge and were willing to try their luck with a jury – or the resulting negotiated compromise with the prosecutor. Now that the flow of such remands has largely dried up, offenders facing upward departure allegations prefer to keep them from juries, and even from juries who learned of them in a separate sentencing trial because they feel they have a better chance with most judges than with most juries. The impact varies with variations among state laws responding to *Blakely*. Some avoided the whole problem as the US Supreme Court did by simply making guidelines "advisory" to avoid any jury trial right on enhancement facts.

conflicts with his *proposed* code – but that's not an argument against the tool and not even an argument that the proposed procedures and Virginia's assessment cannot be reconciled. Rather, it is a residual and persistent adherence to the opacity of "proportional severity" that the Reporter apparently treasures for its protection of sentencers from meaningful performance measurement.

I applaud the Reporter's growing acceptance of risk and need assessment at the lower end of risk, particularly to divert from prison those who don't belong there. But I remain convinced that assessment of higher risk offenders to determine the best disposition is more likely to achieve higher accuracy at higher levels, and are critically important to identify the cohorts who really belong in prison because there is presently no hope of sufficiently successful treatment. I agree we should allow for the possibility that better tools to address needs and thereby reduce risk – even though at some point the Reporter must acknowledge the "back end" assessments. Limiting dangerous psychopaths sentencing up front *in hopes of such developments* should not be among front end constraints on sentencing.

Of course, we must never rely on such tools alone – their proper role is to assist judicial discretion in achieving the optimum disposition *for public safety purposes*. Whether and to what extent other sentencing purposes are *competing* with public safety, evidence-based sentencing is clinical judgment assisted by tools and information sources – not clinical judgment displaced by risk and needs assistance or other input.

Sentencing purposes, proportional severity [the Reporter's version of just deserts], and rejection of metrics

A great irony is that the Reporter worries about how well newly improved analytics (risk and needs assessment) compares with judicial discretion while championing guidelines which tremendously constrain that discretion [though he has gradually and commendably warmed toward "advisory" guidelines] and, except while worrying about "false positives" compares analytic accuracy at crime reduction against a discretion which is impossible to compare when its purposes are so broad, and it is always "correct" as long as it complies with the opaque[2] standard of "proportional

[2] *See, e.g.,* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 Journal of Criminal Law & Criminology 1293 (2006). Many agree with me that a major flaw with unconstrained "proportional severity" essentially gives judges and prosecutors a free pass – freedom from any accountability for achieving *any* objective once they can claim "proportional severity" with no effective metric.

severity." He ultimately insists that "proportional severity" has no useful metric *so that it cannot be required to compete with any other sentencing purpose*.[3]

To be fair, when discussing pros and cons he is invoking "false positives" the Reporter is probably limiting his consideration to relative recidivism rates. But please consider the implications of his persistent refusal to include "public safety" or "crime reduction" *expressly* in the list of sentencing purposes. Yes, he concedes that incarceration has a role in responding to risk, but his selection of studies to cite about accuracy continues his incredible resistance to the proposition obvious to the public – that the main function of prisons is to keep people in the inside who would otherwise hurt people on the outside.

I submit that at the heart of this is the Reporter's commitment to the notions that prisons are over used and that the only way to constrain over use is the sentencing guideline/sentencing commission strategy. He wants "proportional severity" to be a constraint on over-use and fears that expressly seeking public safety *will contribute to prison growth* – and that accurate risk and need assessment will swell prisons if the purpose of prisons is recognized as crime reduction.

I concede holding a similar bias in favor of prison use reduction. Our persistent support of irrational sentencing is enormously brutal – to the victims whose crime would not have been committed had we rationally sentenced the offender in the past, and to the offender we subjected to the realities of prison for no purpose whatever – and may have exacerbated *his* future criminality.

I believe our misuse of prisons is a result of our unfortunate diversity in understanding the purposes of sentencing; our unfortunate enabling a wide-spread fallacy among voters that severity and effectiveness are directly proportional; and our failure of leadership in demonstrating how much improvement rational sentencing can bring to the public fisc and appropriate allocation of incarceration, treatment modes (in and out of custody), and correctional resources. It is obvious that our attempts to isolate sentencing guideline promulgation from the public have been failures – constraints have been obliterated by ballot measures and legislation.

---

[3] The Reporter insists that the *only* sentencing purpose that need not be"feasible" before being *required* for a sentencing is "proportional severity." *See, e.g., Marcus, Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users,* 17 S Cal Interdiscipl L J 68 (2007). This and other articles at http://www.smartsentencing.info/ArticlesonSSP.htm suggest how properly to allow this purpose into consideration.

I submit that we must recognize the public safety mission of prisons, properly constrained, and articulate the legitimate purposes of "proportional severity" so those purposes can be rationally considered when they do in fact compete with public safety and any other purposes in fashioning an appropriate disposition; then demonstrate that we solve the crime problem with far fewer uses of prison if we refine and use analytics.

This approach is far more hopeful and best serves the true purposes of sentencing – surely as compared with the primacy of the cloak against accountability that unfettered "proportionally severity" avoids.[4]

The role of plea bargaining

The Reporter properly disparages the tremendous bargaining power ballot measures demanding minimum sentences that arm prosecutors with a means of compelling defendants – some who may be entirely innocent but fear being convicted – to accept an enormous sentence to avoid an even larger "minimum sentence" compelled by ballot measures enabled by our persistence in support of unaccountability in sentencing.

The Reporter must take on plea bargaining at a more fundamental level. As a practical matter, the sentence in roughly 90% of cases is virtually dictated by counsel – without any assurance that *any* purpose is served by the "recommended" sentence. In theory, prosecutors should represent the interests of public safety and any victims involved. The latter usually reduces to restitution, and the few victims who actually exercise their right to speak at sentencing are generally coached to support their prosecutor's agreement extracted from the defense, and in any event expected to vent

[4] There is an interesting parallel between the Reporter's use of the cloak of "proportional severity" to avoid accountability and his persistent (but now only implicit) derogation of our sentencing support tools as risk assessment (which I've repeatedly pointed out they are *not*) and impliedly as racist because the tools allow examining the fate of cohorts distinguished by ethnicity. Blinding ourselves to ethnicity would also serve to cloak the actual role of bias in sentencing. Our tools allow us to discern differences based on ethnicity which would be *hidden from examination* if ethnicity were hidden. With that variable, we can easily compare sentences actually delivered to cohorts separable by ethnicity – and explore the possibility that bias inflates criminal histories to result in a more severe sentence than would be reflected without that inflation. The purpose of including ethnicity as a variable is precisely to detect and avoid bias in dispositions – not to perpetuate it. The cloak of just deserts simply protects those responsible for irrational sentencing and its consequences (including avoidable victimizations); the cloak of blindness to ethnicity protects those responsible for racist sentencing (and allows the innocent sentencers from seeing and avoiding racist dispositions).

about their loss or pain – but are generally never expected to *engage in a discussion about the purposes of the sentence and how best to serve them*.

This evades judicial discretion and, usually, all that the Reporter has been working and writing about.

It is also worth noting that a vast majority of crimes *have no victim,* yet we talk of "proportional severity" in terms of the harm caused or threatened – while ignoring the bigger and more important question of whether the public as victim is served well by using criminal justice to deal with the numerous crimes that exist as political gestures – such as criminalizing marijuana – with enormous costs to society in terms of the greatly increased use, profit and costs such criminalization brought to us.

In any event, the Reporter must surely take on plea bargaining if his code is going to reach any but a tiny fraction of sentences even in the unlikely event it is broadly adopted among the states.

How eCourt must help

Judges simply freed from the constraints they now face and "returned" to the judicial "discretion" they once enjoyed will not reliably solve these problems. The Reporter properly advocates advisory guidelines to propose a typical range of "proportional" sentencing options to limit outlier sentencing, but insists on the free pass of an opaque "proportional severity" and resists any attempt to penetrate that opacity into the prosocial purposes lurking beneath that cloak.[5] The sad fact is that minimum sentences have merit *in comparison with entirely undirected judicial sentencing (except for statutory maxima) under the old system.* Fortunately, the judiciary has made great strides in recent years in family and juvenile court and in the rising number of "specialty courts" that have defined prosocial goals, typically in cases involving drug and alcohol addiction, domestic violence, or mental health issues.

The State of Oregon, primarily due to the courageous endorsement of our Chief Justice Paul J. De Muniz committing Oregon Courts to exploit technology to *improve* our impact on the communities we serve:

> Oregon eCourt will give courts and judges the tools they need to provide just, prompt, and safe resolution of civil disputes; to

---

5 These are discussed at length in *Marcus, Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users,* 17 S Cal Interdiscipl L J 68, 88-113 (2007).

improve public safety and the quality of life in our communities;
and to improve lives of children and families in crisis.

This is the vision of eCourt we presented to the legislature. Budgets are always uncertain, but we have substantial hope that we can continue this project. It includes web access to the risk assessment developed by our Department of Corrections and sophisticated analysis of our actual experience with thousands of offenders over many years. It includes providing sentencers to easy access to a variety of tools and analytics based on our data designed to assist them in making the best dispositions – as well as a sophisticated organizational change management team to help judges expand their skills and commitment to the "vision."[6]

[6] *See* Marcus, *Only the* Really *Hard Part of eCourt Is* Really *Worth Doing*, 45:4 Court Review 124.