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The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions

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THE ENDURING (AND AGAIN TIMELY) WISDOM OF THE
ORIGINAL MPC SENTENCING PROVISIONS

Douglas A. Berman *

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I. INTRODUCTION

My favorite bit of folk wisdom is “if it ain’t broke, don’t fix it.” However, when considering the ongoing revisions to the *Model Penal Code: Sentencing (MPCS)* provisions, a corollary comes to mind: “fix what’s really broke, and don’t risk breaking what ain’t really broke.” Unfortunately, the *MPCS* revisions fail to address what is really broken in modern American sentencing systems, and they overlook enduring (and still timely) wisdom found in the original *MPCS*. Thus, I view the *MPCS* revision as at best, a missed opportunity; at worst, the codification of problematic modern sentencing dynamics.

The *MPCS* revision starts with the premise that the original *MPCS* provisions are broken. The Reporter’s Introduction states that although the original *MPCS* provisions “were a vast improvement over pre-existing American Law, they were built on assumptions that have fallen into uncertainty or disfavor.”¹ Stressing the “weakening of rehabilitation as the general justificatory aim of punishment” and modern structures designed to regulate and regularize discretionary sentencing decisions, the *MPCS* revision asserts that “the architecture of the 1962 *Code*’s sentencing provisions no longer fits current realities.”²

As a descriptive matter, the original *MPCS* is dated by its endorsement of judges and parole officials having broad discretionary authority to tailor sentences to each individual offender’s unique rehabilitative needs. But, as a normative matter, it is not obvious that either the theoretical

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

2. *Id.*

commitments or the structural architecture of the original *MPCS* is dated or broken. Indeed, because the current realities of mass imprisonment and sentencing severity are the real problems with modern systems, the American Law Institute (ALI) should focus on refreshing some of the wisest aspects of the original *MPCS*.

Not only does the *MPCS* revision fail to champion some enduring wisdom to be found in the original *MPCS*, it also fails to address effectively the structural and social forces that have fueled the severity revolution that now defines most modern sentencing and punishment schemes. Indeed, I fear the *MPCS* revision risks legitimating and reifying the social, political, and legal forces that have helped make the United States the world's leader in incarceration and other extreme punishments. Rather than seeking to codify what might seem like best practices of modern reforms that are leading us in the wrong direction, the ALI should be speaking out forcefully about modern injustices and should be using its prestige and authority to try to radically redirect the United States' sentencing attitudes and practices.

II. WHAT'S TRULY BROKEN IN MODERN PUNISHMENT AND SENTENCING

The Reporter's Introduction to the revised sentencing provisions acknowledges the "near quintupling of the incarceration rate from 1970 to 2005" and also "the unprecedented growth in sentenced populations through the 1970s, 1980s, 1990s, and early 2000s."³ But there is no explicit statement or even implicit acknowledgment in the *MPCS* revision that the extraordinary modern growth in the American imprisonment rates is conceptually problematic in a nation "conceived in Liberty."⁴ Nor does the revision grapple with the fact that mass incarceration is so practically problematic due to the extreme economic and social costs imposed on offender populations and society as a whole.

As I have noted in an earlier work,⁵ although wrongful convictions and the death penalty regularly capture the attention of academics and the media, America's modern affinity for locking people in cages has yet to become a regular aspect of political, scholarly, or public dialogues. Although a few academics and public policy groups are starting to examine the causes and consequences of modern mass incarceration with increased urgency,⁶ neither the scope nor the dire nature of the mass incarceration

3. *Id.* at xxvii, xxix.

4. See Abraham Lincoln, President of the United States, The Gettysburg Address (Nov. 19, 1863), available at <http://www.loc.gov/exhibits/gadd/images/Gettysburg-2.jpg>.

5. See, e.g., Douglas A. Berman, *Extreme Punishment*, in *WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE* 163, 163 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

6. See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 1 (2006); MARC MAUER, *THE SENTENCING PROJECT, RACE TO INCARCERATE* 1 (1999); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* xi (2007); see also THE PEW CENTER ON THE STATES, *PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND*

problem in the United States has garnered sufficient attention.

An accounting of a few basic statistics highlights why mass incarceration and extreme prison punishments are the most pressing modern sentencing problems in the United States.⁷ A recent report from the Vera Institute of Justice provides this quantification of America's growing eagerness for locking up its populace:

Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 5.6 million living Americans had spent time in a state or federal prison—nearly 3 percent of the U.S. population.⁸

Disconcertingly, these increases in prison populations seem unlikely to reverse course anytime soon as the overall population of incarcerated individuals nationwide hits record highs each year,⁹ and sophisticated projections suggest these numbers are likely to continue upward.¹⁰

When placed in a global perspective, the unprecedented growth in American imprisonment is especially stunning. A far higher proportion of adults is imprisoned in the United States than in any other country in the entire world.¹¹ Our incarceration rate, which is nearly 750 individuals per 100,000 in the population, is now roughly five to ten times the rate of most other Western industrialized nations.¹² Indeed, our prison population and incarceration rates surpass even those of countries that have long been viewed as particularly disrespectful of human rights:

BARS IN AMERICA 2008, at 5 (2008) [hereinafter PEW CENTER, ONE IN 100], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf (discussing incarceration levels in the United States).

7. Indeed, given the racial, social, and economic inequalities reflected in and reinforced by modern incarceration patterns, mass incarceration and extreme prison punishments are now the nation's most pressing modern civil rights problems. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2009).

8. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISONERS IN 2007, at 1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>.

9. See LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf>.

10. THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at 1 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf.

11. *Id.*

12. *Id.*

The U.S. imprisons significantly more people than any other nation. China ranks second, imprisoning 1.5 million of its much larger citizen population. The U.S. also leads the world in incarceration rates, well above Russia and Cuba, which have the next highest rates of 607 and 487 per 100,000. Western European countries have incarceration rates that range from 78 to 145 per 100,000.¹³

While these statistics reveal the basic dimensions of modern mass incarceration in the United States, drilling deeper into the numbers provides an even more disconcerting snapshot of America's affinity for extreme imprisonment terms. For example, a study by The Sentencing Project documents an extraordinary growth in offenders serving life terms:

The 127,677 lifers in prison [as of 2003] represent an increase of 83% from the number of lifers nationally in 1992, which in turn had doubled since 1984. During the 1990s the growth of persons serving life without parole has been even more precipitous, an increase of 170%, between 1992 and 2003. Overall, one of every six lifers in 1992 was serving a sentence of life without parole. By 2003, that proportion had increased to one in four.

Moreover, the number of long-term prisoners is considerably greater than just the total number of lifers and contributes to the population of what can be considered "virtual lifers"—persons serving very long sentences or consecutive sentences that often outlast the person's natural life. One 2000 study estimated that more than one of every four (27.5%) adult prisoners was serving a sentence of twenty years or more. Further, data from the Department of Justice show that as of 2002, state and federal prisons held 121,000 persons aged fifty or over, more than double the figure of a decade earlier.¹⁴

These sobering statistics indicate that there are now more individuals nearly certain to die in American prisons than there were in the total United States' prison population at the time the original *MPCS* provisions were developed. Furthermore, female offenders, non-violent drug offenders, and mentally ill offenders have now become a significant portion of the population sentenced to life terms.¹⁵ Moreover, as another recent report documents, American jurisdictions are uniquely willing to sentence even juvenile offenders to life without the possibility of parole:

13. *Id.*

14. MARC MAUER ET AL., *THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT* 11 (2004).

15. *Id.* at 1.

[T]here are currently at least 2,225 people incarcerated in the United States who have been sentenced to spend the rest of their lives in prison for crimes they committed as children Before 1980, life without parole was rarely imposed on children. . . .

Virtually all countries in the world reject the punishment of life without parole for child offenders. At least 132 countries reject life without parole for child offenders in domestic law or practice. And all countries except the United States and Somalia have ratified the Convention on the Rights of the Child, which explicitly forbids “life imprisonment without possibility of release” for “offenses committed by persons below eighteen years of age.” Of the 154 countries for which Human Rights Watch was able to obtain data, only three currently have people serving life without parole for crimes they committed as children, and it appears that those three countries combined have only about a dozen such cases.¹⁶

Though not quite as dramatic and life-defining as incarceration, novel and highly consequential forms of liberty deprivation in the United States are an aspect of daily life for millions more American citizens now confined to prison or jail cells. Currently, well over five million persons are serving probation, parole, or some other form of post-release supervision,¹⁷ and certain classes of offenders have become modern pariahs subject to new types of extreme social control. For example, hundreds of thousands of sex offenders not only must register their movements with authorities, but are literally banished from living or even coming near many regions of the country.¹⁸

Finally, beyond the extremely large number of persons formally subject to criminal justice control in the United States, former offenders in virtually every American jurisdiction suffer a range of punitive collateral consequences that serve as a persistent sort of shadow imprisonment. As one recent report explains:

In every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society. When a person is convicted of a crime, that person

16. AMNESTY INT’L HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 1, 2, 5 (2005), available at <http://www.amnestyusa.org/countries/usa/clwop/report.pdf>.

17. See GLAZE & BONCZAR, *supra* note 9, at 1.

18. See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L.R. 101, 103–04 (2007); see also Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 3 (2006) (discussing the political appeal of exclusion laws and the likelihood that they will be applied to other ex-offender subpopulations in the future).

becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called collateral consequences of conviction may continue long after the court-imposed sentence has been fully served . . . [and] a criminal record can be grounds for exclusion from many benefits and opportunities, including employment in education, health care, and transportation. . . . These legal barriers are always difficult and often impossible to overcome, so that persons convicted of a crime can expect to carry the collateral disabilities and stigma of conviction to their grave, no matter how successful their efforts to rehabilitate themselves.¹⁹

This brief review of various facets of modern mass incarceration and extreme social control in the United States only begins to document what is most badly broken in America's current punishment and sentencing schemes. But this summary overview highlights why I question the notion that the original *MPCS*' theories and structures are what need to be fixed. In my view, the stunning expansion of United States imprisonment rates and other extreme punishments, along with the costs and consequences of mass incarceration and other forms of government deprivations of liberty, should be the preeminent concern for anyone assessing the theories and structures of modern sentencing systems. Moreover, as explained in the next Part, the theoretical underpinnings and social consequences of structured sentencing reforms embraced by the *MPCS* revision may further contribute to America's modern affinity for locking more and more people behind bars.

III. AS A MATTER OF THEORY, THE *MPCS* REVISION BREAKS WHAT DOESN'T NEED FIXING

As mentioned above, the *MPCS* revision rightly notes that the original *MPCS* provisions "were built on assumptions that have fallen into uncertainty or disfavor."²⁰ But the *MPCS* revision neglects to highlight that the "assumptions" of the rehabilitative model of sentencing and corrections in the original *MPCS* were fundamentally progressive. They reflected an ultimate commitment that governments should focus the state's awesome and coercive power at sentencing on helping offenders become law-abiding citizens through rehabilitative programming. Further, the *MPCS* revision fails to acknowledge, and perhaps even fails to recognize, that these "assumptions" may have played an important role, at least indirectly, in preventing the extreme increases in prison populations and liberty

19. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE ix-x (2006).

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

deprivations that have come to characterize modern American sentencing and punishment systems.

A complicated set of political and social factors have contributed to modern mass incarceration;²¹ new attitudes and prevailing sentencing theories are only part of this story. Still, it is unlikely coincidental that incarceration rates have increased dramatically and punishments have become much harsher during the same era in which the progressive “assumptions” of rehabilitative theory have been eschewed. Moreover, the *MPCS* revision essentially seeks to put the final nail in the coffin of the rehabilitative ideal by formally embracing the theory of “limiting retributivism” as the best and dominant philosophy for modern sentencing systems.²² With its embrace of limiting retributivism, the *MPCS* revision never confronts or even directly considers the possibility that the movement away from rehabilitative commitments in modern sentencing reforms have been a critical catalyst for forces contributing to modern mass incarceration.

Though other contributors to this symposium provide a more thorough critique of “limiting retributivism” in the *MPCS* revision,²³ it is useful here to briefly review the progressive origins of the rehabilitative ideal and the progressive origins of its modern decline. In the nineteenth century, progressives pioneered a move away from brutal physical punishments toward the development of penitentiaries focused on the spiritual rehabilitation of lawbreakers.²⁴ And in the twentieth century, progressives looked to advances in medicine and psychology to reinforce their sympathetic view of criminal offenders as “sick” and their humanistic commitment to sentencing schemes that employed the government’s coercive power to help “cure” the patient.²⁵

But progressives discovered that sentencing and corrections systems did not in operation live up to society’s purportedly humane commitments, and

21. See generally GOTTSCHALK, *supra* note 6 (detailing the array of forces leading to incarceration increases); KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1999) (same); MAUER, *supra* note 6, at 15–99 (same).

22. See MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum xxx* (Tentative Draft No. 1, 2007); *Id.* § 1.02(2) & cmts. and ill., at 1-8; *Id.* § 1.02(2), *Reporter’s Note*, at 24-32.

23. See Michael H. Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751 (2009); Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727 (2009).

24. See generally David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 100, 111 (Norval Morris & David J. Rothman eds., 1998) [hereinafter *OXFORD HISTORY OF THE PRISON*] (discussing the origins and development of prison systems and their commitment to the rehabilitative ideal).

25. See generally Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *OXFORD HISTORY OF THE PRISON*, *supra* note 24, at 171, 188–96 (discussing the “new rehabilitative thrust” in which enthusiasm for psychological treatment led to a new emphasis on a “therapeutic model of rehabilitation”).

they complained about the failure to devote sufficient resources to effective corrections programming and about the tendency of rehabilitative ideals to be corrupted in practice.²⁶ In the 1960s and 1970s, especially as lawyers, politicians, and activists became increasingly suspect about the efficacy of rehabilitative efforts and increasingly concerned about individual rights and equality of treatment in the criminal justice system, the paternalistic and more pernicious facets of the rehabilitative model of sentencing and corrections came under attack.²⁷ Criminal justice researchers and scholars began criticizing the unpredictable and disparate sentencing outcomes that are inevitable when discretionary sentencing decisions are focused on offender rehabilitation; structured sentencing regimes promising more predictable and consistent punishments became more appealing to academics and policymakers.²⁸ And, during the early calls for repudiation of the rehabilitative ideal and for increased focus on consistent sentencing outcomes, many sentencing reformers suggested that a shift in sentencing purposes and structures would result in an overall reduction of sentence severity.²⁹

But noble goals rarely ensure idealized outcomes, especially in the administration of criminal justice systems. As jurisdictions abolished or greatly limited discretionary parole opportunities and created structured rules for sentencing decision-making, no cogent or even fully-conceived sentencing theory filled the vacuum that followed the rejection of the rehabilitative ideal. Practically speaking, much of the modern sentencing reform movement came to function as an anti-movement. Jurisdictions adopted structured sentencing laws and abolished parole not in an express pursuit of a new sentencing theory, but rather just as a rejection of the rehabilitative ideal.³⁰ Though some often sought to justify longer prison sentences with claims about deterrence, incapacitation, and retribution, the only clear and consistently tangible goals of many sentencing reforms were

26. See generally *id.* at 169 (discussing the international rehabilitative emphasis in prisons); STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 8–9 (1971) (arguing that rehabilitative programs in American prisons have largely failed).

27. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895–97 (1990).

28. See generally *id.* (tracing the restructuring process that led to the restriction on judicial discretion in sentencing laws); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272–74 (1977) (arguing that judicial discretion causes disparity in sentencing but that fixed sentencing will not solve all the disparity problems).

29. See generally FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 3 (1976); DAVID FOGEL, “. . . WE ARE THE LIVING PROOF . . .”: THE JUSTICE MODEL FOR CORRECTIONS 2 (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 4 (1976).

30. See Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 11–13 (discussing how the modern sentencing revolution has been theoretically underdeveloped); see also Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 279 (2005) (“The federal guidelines have been demonstrably purpose-free.”).

the repudiation of rehabilitation as the dominant theory of punishment and the reduction of sentencing disparities that resulted from discretionary sentencing practices.³¹

Despite the absence of any dominant, clear new sentencing theory, modern reforms have gravitated toward one dominant, clear new sentencing outcome: legislators, prosecutors, and judges have all regularly and readily embraced terms of imprisonment as a default punishment.³² Unlike various punishment alternatives that might seem inconsistent with certain sentencing theories, imprisonment has the ready appeal of always being defensible in service to retributivism, incapacitation, or deterrence and has the added convenience of being distributable in the readily quantifiable units of months and years.³³ In other words, even when legislators, prosecutors, and judges were unsure about what exact purpose punishment should serve, imprisonment terms had the virtue of always seeming to serve some purpose. Moreover, prison punishments could be distributed and compared in defined quantum so that those focused on sentencing disparities could numerically assess whether seemingly similar offenders were receiving similar sentences.

Stated slightly differently, despite (or perhaps because of) the absence of an effective and informative guiding theory for modern sentencing structures, jurisdictions reforming their sentencing systems have generally recast the concepts, culture, and structure of sentencing decision-making toward actors and factors that foster an imprisonment-first orientation and more punitive sentencing impulses. Modern sentencing regimes have principally shifted excessive power to ex ante sentencing rule-makers, like legislatures and commissions, who necessarily focus on the perceived harm of general offenses and who necessarily respond more to concerns about crime rates being too high or particular sentences seeming too lenient.³⁴ Further, the emphasis placed on the goal of sentencing uniformity has profoundly diminished the authority or desire of ex post sentencing decision-makers, such as prosecutors, judges, and parole officials, to focus on the redeeming (often disparate) personal qualities of individual offenders.

31. See Berman, *supra* note 30, at 11–13.

32. See, e.g., MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* (2005); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995) (highlighting the reliance on imprisonment in penal policy).

33. See, e.g., Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI. L. SCH. ROUNDTABLE 391 (1995) (stressing forces leading to undue reliance on imprisonment as opposed to other forms of punishment).

34. See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. POL'Y REV. 93 (1999); Ronald F. Wright, *Three Strikes Legislation and Sentencing Commission Objectives*, 20 LAW & POL'Y 429, 437 (1998).

Specifically, in nearly all jurisdictions throughout the United States, legislatures and sentencing commissions came to embrace and enact mandatory imprisonment terms for certain offenses and more severe and rigid sentencing rules based on enhanced concerns about consistently imposing “just punishment” and deterring the most harmful crimes.³⁵ Particularly because legislatures and sentencing commissions make decisions about crime and punishment *ex ante*, they necessarily think of criminal offenders as abstract characters—the threatening figure of a killer or sex offender or drug dealer—rather than as individuals. With a focus on the most abstract horrors of criminal activity and the most vile versions of criminal offenders, these *ex ante* sentencing judgments will always tend to be more punitive in response to any real or perceived “crime problem.” Moreover, most structured sentencing reforms have tended to formally mandate (or at least informally encourage) prosecutors and sentencing judges to focus principally on offense conduct.³⁶ The move away from an offender orientation was driven by understandable concerns about the tendency for prosecutors and judges to show disproportionate leniency toward favored individuals; in effect, this move has often operated to limit judges’ ability to consider those aspects of a defendant’s life and characteristics that have historically been thought to justify mitigating the need for a harsh response to an offense.³⁷

These modern sentencing dynamics have been on special display in the federal criminal justice system over the last two decades. The United States Sentencing Guidelines and mandatory minimum sentencing statutes have excessively focused attention on aggravating offense conduct and have limited judges’ opportunities to consider mitigating offender characteristics.³⁸ Mandatory sentencing provisions and enhancement are

35. See Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics*, 58 STAN. L. REV. 277, 280–83 (2005).

36. See *id.* at 280–85.

37. See Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) (lamenting that federal reforms had drained sentencing of its humanity); John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551, 551–52 (1993) (discussing judicial complaints that federal sentencing reforms “have eliminated the human element from the sentencing process”).

38. Tellingly, the first four steps in the sentencing process described in the U.S. Sentencing Guidelines Manual are concerned exclusively with offense conduct. See U.S. Sentencing Comm’n, U.S. Sentencing Guidelines and Policy Statements § 1B1.1 [hereinafter U.S.S.G.]. Other provisions declare that many potentially mitigating offender characteristics—such as a defendant’s education and vocational skills, mental and emotional conditions, previous employment record, and family and community ties—are either “not ordinarily relevant” or entirely irrelevant to whether a defendant should receive a departure below the guideline sentencing range. See, e.g., U.S.S.G. §§ 5H1.1–1.6 (providing that age, education and vocational skills, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are “not ordinarily relevant in determining whether a sentence should be outside the

triggered typically by quantifiable offense factors—e.g., a longer prison term for certain drug quantities or certain monetary loss amounts or possession of a firearm. These provisions necessarily diminish the significance of less quantifiable offender characteristics in federal sentencing.

Consequently, while important and largely progressive goals initially fueled modern reforms in state and federal sentencing systems, emphasis on the goal of sentencing uniformity has fueled a “leveling up” dynamic. In most efforts to make sentences more uniform, new sentencing structures, legal doctrines, and policy decisions have resulted frequently in legislatures and sentencing commissions making disparately lenient sentences consistently harsher, and have rarely encouraged or even allowed prosecutors or judges to make disparately harsh sentences more consistently lenient.

Of course, the *MPCS* revision does aspire to replace the rehabilitative ideal reflected in the original *MPCS* with a modern theory of “limiting retributivism.” However, as punishment theorists justifiably have complained, this hybrid theory does not have all that much tangible content to shape either ex ante or ex post sentencing judgments.³⁹ The theory thus seems unlikely to play a significant role in retarding the structural and political forces that have driven modern incarceration increases over the last three decades. The *MPCS* revision asserts that the most successful modern sentencing jurisdictions, such as Minnesota, have followed the theoretical and structural model it endorses; but so too have the least successful modern sentencing jurisdictions such as the federal system. Problematically, even the success stories within the modern sentencing reform movement—the best practices which the *MPCS* revision avowedly embraces and essentially seeks to codify—still reflect the modern tendency to shift sentencing power to ex ante rule-makers who are likely to favor punitive sentences and are likely to place undue reliance and emphasis on quantifiable offense harms and quantifiable punishments like incarceration.⁴⁰ The *MPCS* revision and its Reporter make much of the fact

guidelines”); *id.* § 5H1.4 (providing that drug dependence or alcohol abuse “is not a reason for imposing a sentence below the guidelines”).

39. See Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 621–34 (2003) (arguing forcefully against all hybrid theories of punishment such as “limiting retributivism”); see also Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 50 (2003) (offering the suggestion that, instead of “retributive” limits on utilitarianism, the revised *Code* should speak in terms of “proportionality” limits); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 87–89 (2003) (arguing that the revised *Code* is too retributive); Malcolm Thorburn & Allan Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278, 278, 310 (2007) (reviewing ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 1–4* (2005) and favoring retributive just deserts approach over revised § 1.02).

40. This is one reason why, as developed more fully in Part IV, I find it troublesome that the

that some states with well-functioning sentencing commissions have had comparatively slower rates of prison growth than states without a well-designed modern sentencing scheme.⁴¹ But slower movement in the wrong direction is still movement in the wrong direction.

Against the backdrop of these modern realities, it is useful to look back at just how the theoretical “assumptions that have fallen into uncertainty or disfavor” in the original *MPCS* found expression in the particulars of the *Code*. In particular, it is informative to review the ALI’s revised commentaries to the original *MPCS*, which were written in the late 1970s, just as structured sentencing reforms were gaining steam.⁴² Though nearly thirty years old, these revised commentaries provide a timeless defense of the essential commitments of the original *MPCS*; they also accurately foreshadow many problems now seen in modern structured sentencing systems. Because the revised commentaries so effectively highlight the enduring and still timely wisdom of the original *MPCS*, let me quote at length their discussion of the *Model Penal Code’s* (*MPC*) attitude toward imprisonment in general, and toward long prison terms in particular:

The Code accords a substantial priority to sentences that do not involve imprisonment. There is no offense as to which imprisonment is absolutely required, except possibly murder. It is conceived that even in respect to the most serious crimes there may be cases that are so exceptional that some other disposition is warranted; and it was feared that one consequence of mandatory prison sentences is evasion through plea bargaining over the offense charged. When the court is deciding between imprisonment and withholding imprisonment, it is to choose against imprisonment unless one of the specified grounds justifying imprisonment is found. A sentence not involving imprisonment avoids the poor associations and uselessness that confinement brings; and it can convey the community’s confidence that an offender can live responsibly and give him a special incentive to do so. If the offender is imprisoned, the parole board is directed to release him when he is eligible for parole unless one of the specified reasons for further confinement is thought to obtain. When imprisonment sentences are to be imposed, there are no legislatively established minima, except a one year minimum for felonies . . . [and] the court generally is without power to make certain that an offender will be imprisoned for an extraordinarily long time. That consequence is in accord with

MPCS revision explicitly calls for all jurisdictions to charter a new ex ante sentencing body, a sentencing commission, and also to abolish an old ex post sentencing body, the parole board.

41. See MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum* xxxi & n.7 (Tentative Draft No. 1, 2007).

42. See MODEL PENAL CODE AND COMMENTARIES: PART I §§ 6.01 to 7.09, at 2 (1985).

the Institute's judgment that such a determination is inappropriate at the time of sentencing [E]xcept for first degree felonies, no ordinary offender can be kept in prison longer than ten years, less good behavior time . . . [and] with every felony sentence there will be considerable latitude for the parole board to decide upon release before expiration of the maximum.⁴³

With all due respect to the *MPCS* revision, these statements cause me to cheer more than any aspect of the new sentencing provisions. In particular, the original *MPCS*' bold and forceful commitment to imprisonment as a last resort and least-preferred reality, both at the time of sentencing and at all times thereafter, is a refreshing and needed perspective in an era of mass incarceration and extreme punishment terms. A fitting sense of imprisonment's horrible human realities, not to mention its inefficacies, is palpable in the original *MPCS*. In the *MPCS* revision, sentencing and imprisonment has the feel of a technical government challenge, rather than a necessary evil within a society committed to human liberty and personal freedoms.

I do not mean to assert that the "cure" of modern sentencing reforms is categorically worse than the diseases of older sentencing systems. But I do mean to encourage reflection on the real possibility that, despite the very best of intentions, the theoretical underpinnings, legal structures, social policies, and political rhetoric of modern sentencing reforms have contributed to the growth in prison populations and the extreme liberty deprivations that have now become so common in American criminal justice systems. More directly, I think the ALI should embark upon a focused and progressive attack on modern incarceration realities. In my view, the ALI should again advocate a fundamental and forceful commitment to the concept of imprisonment as a last resort for offenders and a least-preferred response to criminal justice problems.

IV. AS A MATTER OF STRUCTURE, THE *MPCS* REVISION SHOULD NOT GIVE UP ON PAROLE BOARDS

In addition to advocating a new (and I fear problematic) theoretical foundation for "model" sentencing systems, the *MPCS* revision also embraces and promotes a significant change in the institutional actors involved in sentencing decision-making. Specifically, the "central institutional recommendation of the revised *MPC* is that every jurisdiction should charter a permanent sentencing commission, or equivalent agency, to perform the basic research and prescriptive functions"⁴⁴ involved in the

43. *Id.* at 8–9.

44. MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Note to Article 6A*, at 45 (Tentative Draft No. 1, 2007).

development and evolution of a presumptive guideline system. In addition, by virtue of its call for the abolition of traditional parole, the *MPCS* revision functionally advocates the elimination of parole boards as an institutional player in the sentencing universe.⁴⁵ Though the motivation and apparent wisdom for these structural suggestions are easy to understand given the *MPCS* revision's sentencing theories and basic goals, the *MPCS* seems too optimistic about the ability of sentencing commissions to improve sentencing policies and practices, and too pessimistic about the inability of parole boards to sentencing policies and practices.

Notwithstanding the *MPCS* revision's pessimistic view of parole boards, I accept and endorse the revision's fundamental belief that a well-functioning sentencing commission can have a positive impact on sentencing policies and practices in any jurisdiction. Because so many aspects of sentencing law, policy, and practice are complicated, contested, dynamic, and divisive, every jurisdiction can and should benefit from a specialized and dedicated agency that is well-funded, well-staffed, and well-positioned to monitor, assess, analyze, and report on system-wide and case-specific sentencing issues and problems. Especially now that administrative agencies have become a fundamental part of the structure of government at the state level, it is difficult to make a serious argument against the simple idea that a specialized sentencing agency should be part of every jurisdiction's criminal justice infrastructure. There can be much reflection and debate over the ideal forms and functions of modern sentencing commissions,⁴⁶ but the *MPCS* revision advocates a commission framework that seems as likely to be successful as any other basic model (especially since jurisdictions can and will create commissions tailored to local needs and customs).

While it is difficult to make a convincing argument against the basic suggestion that jurisdictions charter some kind of permanent sentencing commission or equivalent agency, it is also difficult to make a convincing argument that modern sentencing commissions ensure that jurisdictions only embrace and enact just and effective sentencing laws and policies. Though the *MPCS* revision rightly documents all the good that sentencing commissions are able to do, it does not directly confront the critical reality that sentencing commissions have never proven especially effective at decreasing incarceration rates even when jurisdictions clearly no longer need and can no longer afford increased prison populations. Modern sentencing history suggests that, at best, commissions can sometimes defuse the punitive tendencies of other sentencing actors and thereby help slow prison growth; at worst, commissions can sometimes support the

45. See MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Memorandum* 1–31 (Tentative Draft No. 1, 2007). Kevin R. Reitz, *Reporter's Memorandum*, in MODEL PENAL CODE: SENTENCING, *Reporter's Study* 1–31 (Council Draft No. 2, Sept. 12, 2008).

46. MODEL PENAL CODE: SENTENCING REPORT, *Reporter's Introduction* 4 (2003).

punitive tendencies of other sentencing actors and thereby further increase incarceration rates.⁴⁷

I believe the relative failings of sentencing commissions in this regard is fundamentally a problem of institutional design. Even when constructed in a “model” form, sentencing commissions will rarely possess the effective legal tools or political power or the best institutional perspective to reverse the distressing prison growth trends and extreme punishments documented in Part I. Even the best commissions can really only provide sentencing advice—principally system-wide policy advice to legislatures concerning sentencing laws and case-specific guideline recommendations to judges about sentencing outcomes (though perhaps also to prosecutors and defense counsel). But actual sentencing decision-makers can and frequently will want to ignore even the wisest advice from sentencing commissions, whether because political calculations or gut instincts suggest this advice may not be efficacious. Moreover, the advice given by sentencing commissions must often compete for attention with contrary advice and countervailing pressures that actual sentencing decision-makers receive from various other sentencing advocates.

These problematic institutional and practical dynamics limiting the positive impact of commission efforts, especially with respect to system-wide policy-making, have been especially prominent in the federal sentencing system. Often at the urging of prosecutors, Congress has repeatedly ignored or disregarded the advice of the United States Sentencing Commission concerning the harms and injustices of statutory mandatory minimum sentencing provisions⁴⁸ and the unjustified and disparate impact of sentencing distinctions between crack and powder cocaine.⁴⁹ Similarly at the state level, experience has repeatedly shown that when legislatures or judges get caught up in a wave of political and public excitement about certain types of crimes or criminals—such as the “three strikes” mania from a decade ago or the sex offender panic currently

47. See, e.g., Rachel E. Barkow & Kathleen M. O’Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973 (2006); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005).

48. See U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991); see also Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37 (1999) (noting that “in 1991, the U.S. Sentencing Commission issued a very important report on mandatory minimums, which was basically ignored once it was published, even though it was well done”).

49. U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (2002); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1997); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (1995); see also Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 CORNELL J. L. & PUB. POL’Y 551 (2006) (detailing the U.S. Sentencing Commission’s repeated efforts to reform crack sentences and Congress’s rejection of the Commission’s initial reforms and its repeated disinterest in responding to the Commission’s recommendation).

afoot—sentencing commissions are rarely able (and sometimes not even willing) to wage an effective fight against the political forces and public pressures calling for even harsher sentencing laws.⁵⁰

One can hope that the new commissions advocated by the *MPCS* revision will be more effective than old commissions at keeping in check all the political and social forces leading to modern mass incarceration. I am not particularly optimistic, especially since there is little reason to expect that the model sentencing commission devised by the *MPCS* revision will have unique new institutional powers or will be able to alter modern political sentencing pressures. Moreover, as suggested by the stunning statistics set forth in Part I, it is now no longer sufficient to propose models that we simply hope can help halt increases in imprisonment rates and extreme prison terms. At this juncture, it is critically important that American jurisdictions start *reversing* prison growth and reducing incarceration rates; however, there is little reason to expect sentencing commissions will or even can be an effective institutional actor for this critical mission.

Against this backdrop, the positive modern potential of parole boards starts to come into focus. Parole boards generally have one central mission, namely to decide when society is better served by allowing an offender to serve the rest of his sentence outside, rather than inside, prison walls. As back-end, ex post offender-oriented institutions, parole boards possess both the effective legal tools and an ideal institutional perspective to reduce incarceration rates and mitigate extreme punishments.

Of course, the modern history of parole board functioning is anything but inspiring, in part because parole officials have often been subject to the political pressures and other social and legal forces that have fueled the punitive turn in other aspects of modern sentencing systems. Nevertheless, the realities of modern mass incarceration—combined with my view that we are long overdue to show a renewed respect for our nation’s historic commitment to protecting individual liberty and limiting government power in the criminal justice system⁵¹—lead me to the conclusion that we

50. See Wright, *supra* note 34, at 429 (detailing failure of sentencing commissions to impact three-strike sentencing reforms pursued by state legislatures); see also Ohio Criminal Sentencing Commission, *Interim Report on Rape Penalties* 2 (Oct. 2006) (noting that a single well-publicized case led the Ohio General Assembly to quickly consider and approve bills without Commission input); Chris Megerian & Mary Fuchs, *NJ Maintains its Strict Drug Sentences Despite Changes Elsewhere*, NEWARK STAR-LEDGER, May 31, 2009 (noting political forces that have prevented drug sentencing reforms despite forceful reform advocacy from the New Jersey Commission to Review Criminal Sentencing).

51. See generally Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, 3 HARV. L. & POL’Y REV. (Online) (Dec. 8, 2008) (arguing that many Founding Era principles are undermined by mass incarceration and the huge growth of government structures devoted to criminal justice administration and suggesting that a “serious commitment to originalist views on human liberty and personal freedoms and to our nation’s core founding principles should lead many more modern constitutional scholars to spotlight and

should now focus on improving the functioning of parole boards, rather than just deciding to throw out the parole baby with the sentencing reform bath-water.

I have recently written an article addressing why, and how, modern sentencing commissions can and should play an active role in combating mass incarceration and extreme prison terms,⁵² and my comments here should not be read as a condemnation of the positive potential of effective sentencing commissions. Still, in light of modern crime and punishment realities, with crime rates generally on the decline and modern incarceration rates historically high, it is critical now to take an “all hands on deck” approach to the problems of mass incarceration and extreme prison terms. Though I hope modern sentencing commissions proposed by the *MPCS* will be committed to addressing the harms of mass incarceration, I also believe that modern parole boards could, and should, play an important institutional role in a truly “model” modern sentencing system.

V. CONCLUSION

Modern sentencing and punishment realities frame and define my basic reaction to the *MPCS* revision. In my view, the fact that the United States has become the world’s leader in incarceration and other extreme punishments is not merely a serious problem, but a national disgrace and embarrassment. Because the *MPCS* revision fails to address directly what is really broken in modern American sentencing and punishment systems, it represents a missed opportunity for the ALI to be a positive and progressive voice in the modern criminal justice arena. The ALI should directly assail and seek to remedy modern injustices that have come to define modern sentencing attitudes and practices.

rigorously question America’s modern incarceration explosion”), available at http://www.hlpronline.com/Berman_HLPR_120808.pdf.

52. See Douglas A. Berman, *Exploring the Theory, Policy and Practice of Fixing Broken Sentencing Guidelines*, 21 FED. SENT’G REP. 182–85 (2009).

