

RESPONDING TO THE MODEL PENAL CODE SENTENCING REVISIONS: TIPS FOR EARLY ADOPTERS AND POWER USERS

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The next release of the Model Penal Code sentencing revision is quite predictable; although the revision will be undergoing some years of further development, the primacy of “just deserts” ordered by sentencing guidelines is now apparently set in stone.¹ Some had hoped for more as it has been nearly a half century since the Code’s first release in 1962, and the revision will disappoint any who expected a modern, empirical, or promising strategy for overcoming the shortcomings of the current criminal justice system. Some states are considering adopting a model based on current drafts of the revision. For these early adopters, this piece will offer some adjustments that will keep the revision from standing in the way of real progress, while allowing jurisdictions to reap the modest benefits the new version promises. For those who can see beyond the pretense of progress, this piece will offer an outline of a more comprehensive modernization—one that attempts meaningful modification of the criminal justice system into an accountable, evidence-based engine that pursues the social purposes the criminal justice system is supposed to serve.

Part I of this Article reviews the present plight of sentencing and demonstrates that current sentencing practices are a brutally dysfunctional betrayal of the rightful expectations of citizens for the pursuit of public safety and public values. Part II will identify the flaws in the developing Model Penal Code sentencing revision and propose modest modifications to allow early adopters to achieve the few benefits the revision has to offer without enshrining its flaws as impediments to more substantial progress. Part III will offer a more comprehensive model ordered around evidence-based harm reduction.

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¹ MODEL PENAL CODE: SENTENCING (TENTATIVE DRAFT NO. 1, 2007) [hereinafter TENTATIVE DRAFT NO. 1] (approved in relevant part at the ALI Annual Meeting, May 16, 2007). Some portions, not here in issue, were not submitted for approval.

I. THE PLIGHT OF SENTENCING

There seems to be a consensus as to the path that the criminal law has followed in the last half century. The mid-twentieth century fascination with the medical model was as distant from empiricism—and as buoyed by faith—as the *a priori* reasoning that first brought us prisons from Jeremy Bentham's panopticon in the early nineteenth century. Just as the Quakers who built the Eastern State Prison in Philadelphia were certain that ordered incarceration and isolation would produce penitence (hence the name "penitentiary"),² the rehabilitationists of the mid-twentieth century were confident that crime was ubiquitously susceptible to diagnosis and treatment. Neither were much on performance measures, so by the time the original Model Penal Code had solidly codified the rehabilitation directive, Robert Martinson's 1974 announcement that "nothing works"³ resonated with the public and discouraged the criminal justice community. The results were a virtual stampede toward incarcerationism and away from indeterminate sentences.⁴ Ignoring steady advances in criminology since Martinson's retreat from his destructive exaggeration,⁵ policy-makers increasingly diverted enormous resources toward building prisons and away from rehabilitative programs. Leadership in incarceration rates is now perhaps our least vulnerable national prominence.

The author of the Model Penal Code sentencing revisions—the Reporter selected to direct the project—correctly identified several flaws in the current Code,⁶ including the fact that it lists various purposes of sentencing—rehabilitation, deterrence, parsimony, incapacitation when necessary to achieve public safety, and proportionality—without prioritization, and with no strategy for their pursuit. As with the Quakers' assumption that imprisonment would produce penitence, the articulated purposes serve as mere proclamation, and little else. The second major flaw the Reporter identified is that the widely adopted Model Penal Code of 1962 failed to prevent the grotesque explosion of incarceration rates. The third flaw—and arguably the only one actually addressed by the Reporter's evolving revision—is that the existing Code has permitted wide disparity in sentencing results. Disparity was the inevitable product of the pernicious combination of high maximum sentences, unguided and unformed judicial

² The first modern prison, based on the "Panopticon" of Jeremy Bentham, was built in Philadelphia in the early nineteenth century when Quakers took up the cause that Bentham had not yet sold in his native England. AM. PHILOSOPHICAL SOC'Y, STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA RECORDS (2001), available at <http://www.amphilsoc.org/library/mole/s/statepen.pdf>.

³ Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 22–49 (1974).

⁴ E.g., Richard S. Frase, *Sentencing Guidelines in Minnesota: 1978–2003*, 32 CRIME & JUST.: REV. RES. 131 (Michael Tonry ed. 2005); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69 (1999); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

⁵ Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

⁶ MODEL PENAL CODE: SENTENCING (PLAN FOR REVISION 2002) [hereinafter PLAN FOR REVISION]; MODEL PENAL CODE: SENTENCING (PRELIMINARY DRAFT NO. 3, 2004) [hereinafter PRELIMINARY DRAFT NO. 3].

discretion, the Code's lack of any strategy for pursuing *any* purpose, and the cruelly arbitrary demands of just deserts—the brutal master of the ritual of punishment since the enlightened resolution to extract *only* an eye for an eye.⁷

The Reporter failed to acknowledge—and therefore to address—precisely those flaws of criminal justice which are the major causes of mass incarceration: most offenders sentenced for most crimes offend again; most heinous crimes are committed by offenders who were sentenced for earlier crimes with no responsible effort at preventing their next crime. Recidivism rates are enormous—ranging from sixty to seventy percent and beyond—depending on the crime, the cohort, and the definition of recidivism.⁸ Our crime control failures—even without exaggeration by those who pander to public fear and anger—have spawned draconian sentencing provisions, enormous incarceration rates, and increasing diversion of resources from programs that work on some offenders. Worse yet, the resulting “prison-industrial complex”⁹ has also drained resources from social services and even from public education—losses which only exacerbate society's many criminogenic features. Our sentencing failures have taught the public the fallacy that severity in sentencing is the same as crime prevention, with the multiplier effect that the worse we do at preventing recidivism, the more those who pander to fear are able to substitute increasingly severe sentences for real responses, generating more failures and more crime, diverting more resources from programs that prevent or reduce crime, and creating increased pressure for more draconian responses. Without addressing these causes of our imprisonment rates, a real solution is virtually impossible.

The retributivists and the rehabilitationists among us are locked in battle as to the relationship between crime rates and incarceration rates. Proponents of mandatory minimum sentences, three strikes, and similar incapacitative attempts at crime reduction cite the correlation between generally declining crime rates and rising imprisonment rates as proof that incarceration is indeed the answer to crime. Opponents see the relationship as ironic rather than causal, showing unnecessary increase in incarceration in the face of declining crime rates, arguing most persuasively when they cite decreasing crime rates in jurisdictions that have not resorted to ballooning imprisonment. The respective views of rehabilitation are predictable, with one side arguing that programs and alternatives to prison do not work, while the other—often accepting the terribly misguided

⁷ *Lex talionis*, or the principle of equivalency, finds expression in *Exodus* 21:23. Although “an eye for an eye” is now the slogan of severe punishment, it originally implied moderation and was intended to condemn excessive retaliation or retribution for injuries or wrongs. A similar concept runs through the *Code of Hammurabi* (c. 2500 BCE). See, e.g., Arthur B. Berger, Note, *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglia of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 567 (1992).

⁸ E.g., Michael Marcus, *Justitia's Bandage: Blind Sentencing*, 1 INT'L J. PUNISHMENT & SENT'G 1, 2–4 (2005), available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf [hereinafter *Justitia's Bandage*].

⁹ E.g., Eric Schlosser, *The Prison-Industrial Complex*, *The Atlantic Monthly*, Dec. 1998.

assumption that our choice is between rehabilitation¹⁰ through programs or public safety through incarceration—focuses on evidence of some success through the programs.

This ideological stalemate has produced an unholy alliance against empiricism, with each side fearing that data-based dispositions would support the opposing view. Whether the fear is that the empirical data would *in fact* support the opposing side, or that opponents will distort the data matters not: the operating consensus is the same—by fear and suspicion as well as by fundamentalism, just deserts remains the driving principle. We increasingly fill prisons with the most violent offenders. Progressive members of the community are satisfied with the scraps of restraint obtained, outside the federal system,¹¹ primarily as a consequence of budget limitations: drug-courts, other “treatment” courts, and early disposition programs. While treatment courts and other laudable exceptions to just deserts spare some the consequences of the standard fare of criminal justice, the rule remains the mindless persistence of victimizations we would avoid with smarter sentencing, and brutality for many offenders whose punishment serves no purpose other than to maintain the façade of just deserts.

As is the case with so many social ills, it is easy to overlook the human realities we generally tolerate by abstraction. Among those avoidable victimizations are undoubtedly many property crimes¹² and crimes whose immediate victim is the offender himself. But also among those avoidable victims are the children irreparably damaged by sexual, physical, or emotional abuse; the young people seduced into addiction, crime, and despair; and our fellow citizens who are assaulted, raped and murdered. Trial judges, attorneys, and medical examiners (as well as some jurors) see the photographs documenting the murders and assaults that characterize the worst of these victimizations. Perhaps protecting the policy-makers from these images undermines attempts to enlist more effective responses to crime than the misdirection of just deserts.¹³

¹⁰ My colleague, Oregon Circuit Judge John Collins, prefers “habilitation” because “rehabilitation” suggests that our task is to restore to offenders a set of attributes they once had, when the requisite attributes are new to most.

¹¹ This restraint has not reached the federal realm in which budgets for draconian projects seem endless, and anything approaching fiscal restraint is reserved for expenditures to support health, education, housing, disaster relief, or care for those who return sorely wounded from the battles we fight beyond our borders. The federal guidelines scheme is widely condemned as irrationally draconian in its pervasive reliance upon a calculus of blame worthiness. *United States v. Booker*, 543 U.S. 220 (2005), rendered the federal guidelines scheme advisory. Most view this as a temporary reprieve, likely to be overwhelmed by a response from Congress that will be at least as reliant upon incarceration as the ritual to which the vast majority of federal trial judges have become accustomed throughout their careers.

¹² The impact of property crime can occur anywhere along a wide spectrum. It may be mere inconvenience that fuels the business plan of the insurance industry, but it may be the loss of items whose emotional value is priceless. Compared to the images of physical violence, however, all property crime remains substantially less concrete for most observers. The difference is apparent to those who meet the victims.

¹³ Of course, confronting policy-makers with these realities could also exacerbate their mistakes.

The others who pay the price of our ancient liturgy of punishment¹⁴ are those we send to prison,¹⁵ largely to avoid having to perceive directly their actual fate while cherishing the illusion that—as with the victims of the Inquisition—their suffering is just and in service of a greater good. We send these offenders into a world in which the worst and most violent among them spar with corrections officials for the direction of the culture of prisons, imposing a very real and brutal influence on daily life behind bars. The most vulnerable often find a semblance of safety only by paying dearly for the protection of the more powerful individuals or gangs within an institution, and risk suffering similar abuse for attempting to avoid the price. Offenders return with new sentences after years of imprisonment, old beyond their years, some missing teeth to facilitate the gratification of more powerful inmates. Many display prison tattoos as evidence of the primitive tribalism spawned by prison realities. Most evince despair, hopelessness, or resignation. Although some come without explanation for their criminality, most have roots in dysfunctional families, abusive childhoods, mental illness, or other disadvantages. Quite aside from the minimal value of debates about their moral implications for degrees of culpability, these realities dramatically affect the availability of effective correctional strategies. Perhaps policy-makers who actually meet these offenders might be more careful in designing responses to their behaviors—or in allocating dollars between Head Start and prison, mental health programs and jail beds, teachers, and police officers.¹⁶

Many have noticed that the universe of offenders intersects more broadly with that of victims than on the occasion of the crimes that define them. Many offenders were victims of abuse or the collateral consequences of punishment of a parent—broken families, economic duress, or degraded role models—as a child. Communities that produce more than their proportionate share of offenders are also home to a disproportionate share of victims; the files of the police, courts, juvenile authorities, and prosecutors commonly contain the names of offenders in one file who appear as victims in another.

The state of sentencing in our society remains cruelly archaic and dysfunctional. Even in jurisdictions that have adopted sentencing guidelines in a feeble attempt to normalize sentencing practices, just deserts is still the master—demanding sentences crafted in terms of aggravation or mitigation rather than by rational application of strategies to reduce the harms inflicted by recidivism and misdirected punishment. We persist in punishing primarily out of a sense of morality, immune to the suffering of victims whose crimes we could prevent and of offenders we punish for punitive reasons alone, clinging to the rationale of just deserts with the same sort of fundamentalism that sustained the Inquisition for centuries.

¹⁴ Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76 (2003).

¹⁵ See, e.g., ALAN ELSNER, *THE CRISIS IN AMERICA'S PRISONS* (2004); TARA HERIVEL & PAUL WRIGHT, *PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR* (2003); JEFFREY IAN ROSS & STEPHEN C. RICHARDS, *BEHIND BARS: SURVIVING PRISON* (2002).

¹⁶ A less beneficial reaction is also possible.

True, our zeal is clothed with the trappings of a secular state, and the mechanisms of criminal justice are less obviously distorted by political jealousies, but the distinction in brutality between older and modern versions of this crusade lays not in its extent. We have avoided burnings at the stake; our executions are fewer in number and conducted more privately, but we have substituted for prompt and public torture the clandestine yet sustained brutality of years in prison. The totality of the suffering we have inflicted on a tremendous proportion of our population—even without the addition of the victimizations we have unnecessarily allowed—surely rivals that of the purportedly discredited past.

II. FLAWS IN THE REVISION AND TIPS FOR THEIR MITIGATION

The Reporter set out to address both the lack of precision of a shopping list of sentencing objectives and the rise of mass incarceration, but ultimately offered only a feeble solution to mass incarceration and disparity: sentencing guidelines to limit judicial discretion, designed and maintained by a sentencing commission sequestered from public passions, and monitored by appellate review.¹⁷ Pursuit of such utilitarian objectives as rehabilitation, deterrence, incarceration, and newer formulations such as restorative justice and prisoner reintegration, is abjectly optional.¹⁸

The Reporter has followed the guidelines movement that has appealed to fewer than half of our states. Guidelines themselves are neutral. Like frequency modulation to radio content, they are but a means to an end; their value depends upon the purposes for which they are deployed and the effectiveness with which they pursue those purposes. Even by archaic standards, guidelines are inherently neither severe nor lenient.

The ends to which the revision would direct guidelines are the normalization and, indirectly, moderation of sentencing severity. Unfortunately, the Reporter has utterly surrendered to the continued dominance of just deserts and to the inevitable dysfunction that accompanies that surrender. All sentences are to be of appropriate severity; nothing more is required. This capitulation cripples guidelines as a bulwark against punitivism, and substantially impedes their success in limiting sentencing disparity. This approach unavoidably contemplates that we will deploy prison beds overwhelmingly on the basis of just deserts—not public safety or any other social purpose.¹⁹ Professor Edward Rubin, now Dean of

¹⁷ See PLAN FOR REVISION, *supra* note 6.

¹⁸ TENTATIVE DRAFT NO. 1, *supra* note 1.

¹⁹ “Incapacitation” is only to be pursued if “reasonably feasible.” Perhaps incapacitation in the form of imprisonment is always “feasible” if a bed is available (in law and in fact). Perhaps to the Reporter incapacitation is “feasible” only when it demonstrably serves interests in crime reduction—ultimately a calculus about how much crime is avoided during imprisonment and how much, if any, recidivism is accelerated after imprisonment. Necessarily, the means of imposing “severity” is or is not limited to the “mechanisms” listed in Subsection (a)(ii). Since the list does not include a host of common mechanisms of alternative sanctions such as alternative community service, it would appear that the list of “purposes” is not intended to include all mechanisms of inflicting “proportionate severity.” Either way, it is obvious that the Reporter intends that commissions prescribe ranges of imprisonment for more serious crimes based on just deserts, and that prisons be filled on that basis to achieve proportionate severity regardless of the feasibility of the pursuit of other “purposes.”

Vanderbilt University Law School, described this ultimately retributivist revision as “a serious mistake, both for the Code and for the country . . . because it would align the Code with the worst features of contemporary American penal practice [T]he revised Code will remain shackled to an approach that will seem primitive and inefficient, the artifact of an abandoned theory.”²⁰

There are, however, rather minor adjustments to the language of the revision the Reporter proposes that would substantially ameliorate these flaws. The adjustments would not cure the ills of the culture of sentencing, but the resulting sentencing code would support rather than subvert efforts to do so. Most importantly, the amendment proposed here would prevent the revision itself from cementing the brutal sentencing flaws of the past for generations to come.

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

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

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

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

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

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

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii);²¹

²⁰ Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 17–18 (2003). Professor Rubin was addressing an earlier version of the revision, but his analysis applies with full force to the current draft.

²¹ TENTATIVE DRAFT NO. 1, *supra* note 1. The remainder of this section acknowledges more modern aspirations for administrative purposes, apparently apart from the function of “sentencing individual offenders”:

(b) in matters affecting the administration of the sentencing system:

(i) to preserve judicial discretion to individualize sentences within a framework of law;

(ii) to produce sentences that are uniform in their reasoned pursuit of the purposes in

Subsection (a);

(iii) to eliminate inequities in sentencing across population groups;

(iv) to encourage the use of intermediate sanctions;

(v) to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources;

(vi) to ensure that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental- health care, and opportunities to rehabilitate themselves;

(vii) to promote research on sentencing policy and practices, including assessments of the effectiveness of criminal sanctions as measured against their purposes, and the effects of criminal sanctions upon families and communities; and

The Reporter explains this approach as resting upon the theory of “limiting retributivism,”²² setting a maximum and minimum for all sentencing based upon deontological principles, and allowing for the optional pursuit of the identified “utilitarian” objectives of sentencing only “when reasonably feasible.” Although it is certainly appropriate that sentences be limited by proportionality, and that we be concerned with feasibility whenever we impose sentences for any purpose, it is critical to this analysis, and fundamental to the failure of the revision, that the Reporter’s approach both identifies severity as *a purpose* and holds sentencing to no limit or purpose *other than* proportionality.

Although the revision permits pursuit of the utilitarian goals identified in Section 1.02(2)(a)(ii) when the pursuit is reasonably feasible, Subsection (a)(iii) limits severity by the *purposes* identified in Subsections (a)(i) and (a)(ii), and Subsection (a)(i) directs that we achieve severity “in all cases” that is “proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.” This articulation of purpose infests every significant function the Reporter proposes, as all components of his structure—including those of sentencing commissions and appellate review—are to be guided by the “purposes stated in Section 1.02(2)(a).”²³

The revision has essentially abandoned any solution other than guidelines to the problem of un-prioritized sentencing purposes, eschewing responsibility for improvement of the public safety performance of sentencing, and settling for whatever guidelines can bring us to moderate mass incarceration and sentencing disparity. Indeed, it is only by proposing guidelines, sentencing commissions, and related appellate review that the revision has any claim to improvement as compared with the

(viii) to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities.

²² “Limiting Retributivism” is the concept attributed to Norval Morris. Nothing suggested by any of these motions is inconsistent with Morris’s analyses.

The concept of “just deserts” sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles.

NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 199 (1982). Indeed, Morris counseled that we would never achieve a “rational sentencing policy” until “Justitia . . . remove[s] that anachronistic bandage from her eyes and look[s] about at the developments in society,” and until we learn to analyze criminals and their environment in a painstaking and objective exploitation of developing social sciences and correctional technology. See NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL 245, 138–44 (1970). See generally Michael Marcus, *LR: Limiting Retributivism or Lamentable Retreat?: The Third Draft of Revisions to the Model Penal Code*, available at <http://www.smartsentencing.com>; *Justitia’s Bandage*, *supra* note 8.

²³ As the Reporter notes,

New § 1.02(2) is cross-referenced frequently in the revised Code, and is made a required basis for decisionmaking and explanation by identified officials throughout the sentencing system. See §§ 6A.01(2)(e), 6A.04(3)(a), 6A.05(2)(e) and (4)(b), 6A.09(1)(a), 6B.03, 6B.06(1), 7.XX-(1), (2), (3), and (5), and 7.ZZ(1), (2), and (6)(a). TENTATIVE DRAFT NO. 1, *supra* note 1, at 3.

existing Model Penal Code.²⁴ Through the various drafts of the revision, it is apparent that the Reporter believes that programs and alternatives are appropriate for only a small “layer” of crimes.²⁵ It is less obvious, but increasingly likely, that the Reporter’s steadfast refusal to identify public safety as a purpose of sentencing²⁶ is the product of an unspoken concern that linking crime reduction to incapacitation and deterrence would undermine efforts to reduce incarceration rates. Because the revision has yielded all to the continued archaic dominance of just deserts—retribution, however named—and because it evades responsibility for public safety, its only promise is that of guidelines. That promise is anemic indeed.

As a cure for mass incarceration, the guidelines are at best a modest bulwark. The experience of Oregon, in common with other guidelines states, is that punitivism easily overwhelms the sentencing limits proposed by sequestered commissions. The guidelines provide no defense against mandatory minimum sentences and similar overrides that were designed to achieve high imprisonment rates and assuage the public.²⁷

²⁴ The 1962 Model Penal Code is superior to the revision in many respects, including its accommodation of the likelihood that differences in susceptibility to or availability of treatment justify disparity in treatment, and its assertion that public safety is a purpose of sentencing:

Section 1.02(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to prevent the commission of offenses;
- (b) to promote the correction and rehabilitation of offenders;
- (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (e) to differentiate among offenders with a view to a just individualization in their treatment;
- (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
- (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
- (h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

Oregon’s version, for example, articulates the relationship between disparity and rehabilitation in this statement of a purpose: “To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.” ORS 161.025(1)(f).

²⁵ See KEVIN R. REITZ, Reporter, *Model Penal Code: Sentencing: Preliminary Draft No. 3* (May 28, 2004), Proposed §1.02(2) at 4, *passim*; KEVIN R. REITZ, Reporter, *Model Penal Code: Sentencing: Preliminary Draft No. 1* at 16–28 (American Law Institute, August 26, 2002); Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135, 150–52 (2003) [hereinafter *Comments on the Model Penal Code*].

²⁶ The Reporter has successfully and expressly resisted the inclusion of “public safety” as a purpose of sentencing at several stages of the drafting process. Although he previously mischaracterized the issue as whether public safety should “trump” proportionality. MODEL PENAL CODE: SENTENCING, COUNCIL DRAFT NO. 1, *Issues for the Council* at xiv–xv (American Law Institute, September 27, 2006). He ultimately conceded that he opposed including “public safety” as an express purpose even within proportional sentencing limits. Compare Michael H. Marcus, *Motion #2: Articulate “Public Safety” as a Purpose of Sentencing* (American Law Institute 2007 Annual Meeting), with *Reporter’s Response to Judge Marcus* (American Law Institute 2007 Annual Meeting). Most states would presumably agree that the existing code (*supra* note 24) is preferable in recognizing public safety as at least one purpose of sentencing.

²⁷ Oregon initially adopted sentencing guidelines in 1989 Or. Laws ch. 790, § 87. From the same legislative session, 1989 Or. Laws ch. 1, §§ 2 & 3, and ch. 790, § 82, required previous mandatory “gun” minimum sentences to trump guideline sentences, and required “determinate” sentences without reduction, leave, or parole for certain felonies if committed by offenders with similar prior convictions (“Denny Smith” sentences). In 1993, the Oregon legislature negated guidelines limitations on

It is astonishing to most members of the public, but insipidly apparent to criminal justice practitioners and informed policy-makers, that guidelines in most permutations make no pretense of serving public safety.²⁸ Crime reduction is neither their purpose nor their design; guidelines serve to balance prison resources against just deserts, measured under the revision by the “gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.” It is hardly surprising, therefore, that they fail adequately to achieve public safety. Under the revision, including criminal history as a factor that might affect the severity of a sentence is optional with the states; the Reporter is reluctantly satisfied with guidelines that prescribe sentences by crime seriousness without reference to an offender’s past convictions.²⁹ Oregon’s version of guidelines, like the guidelines of many states, promulgates presumptive sentences by the intersection of the seriousness of the presenting crime and the criminal history of the offender. Some had hoped that guidelines sensitive to criminal history actually capture the most predictive of variables that support risk assessment, but it turns out that as a risk assessment instrument, even these guidelines are probably wrong two-thirds of the time. By one measure, Oregon’s guidelines overestimate the risk of future crime in about a third of the sentences, underestimate risk in about a third of sentences, and get it about right for the remaining third.³⁰ Translated into our use of prison, even given the obvious short-run efficacy of incarceration as a crime control device, we misallocate prison beds in most cases by failing to incarcerate some offenders, and by incarcerating others who we should not incarcerate at all or for as long as we do. In terms of the resulting human costs to victims and offenders, these victimizations and punishments are alone sufficient to condemn the revision as a wholly inadequate solution to only a small part of the problem.

dangerous offender sentences. 1993 Or. Laws ch. 334, § 6. In 1995, Oregon voters adopted mandatory minimum sentences for a similar range of serious felonies. Ballot Measure 11, 1995 Or. Laws ch. 2 (codified at ORS 317.700, *et seq.*). In 1996 (effective July, 1997), Oregon legislated thirteen and nineteen month presumptive sentences (to override lower presumptive sentences in the guidelines) for certain “repeat property offenders.” ORS 137.717, 1996; Or. Laws ch. 3, § 1. Oregon is hardly alone in this experience. Compare, e.g., J. Clark, J. Austin, & D. Henry, “*Three Strikes and You’re Out*”: A Review of State Legislation 1 (U.S. Dept. of Justice, National Institute of Justice, Sept. 1997), available at <http://www.ncjrs.org/pdffiles/165369.pdf>, with ARK. CODE ANN. § 16-90-804 (Supp. 2003), KAN. STAT. ANN. § 21-4701, *et seq.* (2003), FLA. STAT. § 9210016 (2003), N.C. GEN. STAT. § 15A-134016 (Lexis 2003), and 204 PA. CODE § 303, *et seq.* (2004), reproduced following 42 PA. CONS. STAT. ANN. § 9721 (Purden Supp. 2004).

²⁸ 2005 Or. Laws ch. 474 (SB 919). Directs that “the Oregon Criminal Justice Commission shall conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission’s sentencing guidelines and, if it is possible, the means of doing so.” The resulting efforts of the Commission to introduce risk assessment into a group of grid blocks in the 2007 legislative session failed for a combination of budgetary and ideological reasons. Although more success may be achieved in subsequent sessions, and the Commission itself has recognized the failure of guidelines to pursue public safety, to date the greatest achievement of 2005 Oregon SB 919 has been official recognition that guidelines are not intended to directly protect or promote public safety.

²⁹ “Section 6B.07(1) does not require a commission to build into guidelines the consideration of offenders’ criminal histories, but it does require a commission to ‘consider’ whether and in what circumstances it is desirable to do so.” TENTATIVE DRAFT NO. 1, *supra* note 1, at 231.

³⁰ These were among the many implications of the as yet unpublished work of Oregon Department of Corrections researcher Paul Bellatty to support the work of the advisory committee appointed pursuant to 2005 Or. Laws ch. 474 (SB 919), *supra* note 28.

Moreover, the revision's promise of reduced sentencing disparity is profoundly compromised by categorizations that decree sentencing severity based upon a paucity of variables. Even under the optionally more complex guidelines that comprehend criminal history as well as the severity of the crime, guidelines ignore differences that should matter. Guidelines prescribe the same sentence for an assault by a social drinker redeemable through corrections and for a similar assault by a psychopath whose incorrigible pleasure is the imposition of pain on others. They demand a higher sentence for a thief who steals an expensive trophy from a collector's stable of antique automobiles than for one who takes a single mother's modest sole means of transportation. They prescribe the same sentence range for the youthful accomplice lured into driving the getaway car in a convenience store robbery as for the skillful manipulator who exploits others to commit the crime while he remains out of harm's immediate way. They prescribe disparate sentences for an arsonist whose crime destroys a home and for one of identical intent and behavior, but whose fire was more rapidly repressed.³¹ All of this is a regression from the existing Model Penal Code.³²

Worse by far than the revision's deficits in resisting punitivism and achieving uniformity is its absolution for sentencing policies and practices that make no claim other than proportional retribution. Comfortably for those who shun accountability or fear performance measures, it is entirely sufficient under the Reporter's approach for sentencing judges, commissions, and appellate review to be concerned with proportionality alone. A sentence that achieves the broad target of proportionality is immune from review or reproach; neither trial judges, advocates, commission members, nor appellate analysis need be troubled with best efforts at achieving anything else; all are entirely free, while distributing the enormous human impact and public resources represented by prisons, supervision, and programs, to ignore public safety or even the social purposes which punishment might promote.

A relatively modest amendment to the revision would substantially reduce the regression it otherwise promises. The proposed adjustments would provide some bounds to the role of just deserts beyond the ephemeral restraint of proportionality, while requiring that all modalities of sentencing be deployed rationally in pursuit of at least some identifiable public purpose—prominently, but not exclusively, public safety. Early

³¹ The example I have in mind was an arsonist who by accident chose the home of a firefighter—who promptly extinguished the blaze before it caused extensive damage. Uniformity in sentencing is, in any event, of limited value. *Comments on the Model Penal Code*, *supra* note 25, at 155 & n.66. There is no sufficient reason why an offender whose risk can be substantially reduced by a program in one community should be sentenced the same as an offender in a community that lacks the same resource. The uniformity mantra would in its purest manifestation preclude experimenting with any promising new modality of rehabilitation—or even restitution. In practice, the notion of equal treatment is most commonly proclaimed by prosecutors unwilling to accommodate a uniquely appealing plea for an alternative disposition, just as “color blindness” is so commonly invoked to rebuff requests to ameliorate consequences for an offender on grounds of his victimization by racism. Overwhelmingly, uniformity is invoked to resist recognizing differences that should matter rather than to achieve treating alike those who really are alike.

³² See ORS 161.025(1)(f), *supra* note 24.

adopters of the revision should consider amending Section 1.02(2)(a) as follows:

- (2) The general purposes of the provisions on sentencing are:
- (a) in decisions affecting the sentencing of individual offenders:
- (i) when reasonably feasible, to impose sanctions to serve a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others; to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders
- (ii) when reasonably feasible, to achieve pursue public safety through offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community; provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and
- (iii) when reasonably feasible, to achieve restoration of crime victims and communities;
- (~~iii~~ iv) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i), (a)(ii), and (a)(~~iii~~); and
- (v) to ensure that sentences do not exceed a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.³³

This amendment would remedy the three most glaring failures of the revision: capitulation to unbounded just deserts, subversion of any pursuit of empiricism, and abdication of responsibility for public safety.

New Subsection (a)(i) unpacks what the Reporter labels proportionate severity—more commonly captured by “just deserts,” “retribution,” or, more currently, “consequences,” “personal responsibility,” or “accountability.”³⁴ This proposal recognizes that punishment can properly serve multiple social purposes: to respond to a legitimate need of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, and/or to enhance respect for the persons, property, or rights of others.³⁵ The contributions of this formulation are to identify the

³³ This proposal combines and slightly modifies two motions separately proposed at the 2007 annual meeting of the American Law Institute. The motions separately addressed substituting the underlying social purposes for “proportional severity” in Subsection (a)(i) and identifying public safety as a purpose (and incorporating specific as well as general deterrence) in (a)(ii). The modification is to separate (while retaining in new Subsection (a)(iii)) restorative justice from the objective of public safety. That modification concedes that the relationship between restorative justice and public safety is sophisticated enough to warrant pursuit of restorative justice in its own right and regardless of its connection to public safety.

³⁴ Pursuant to a 1996 voter-initiated amendment, OR Const., art. I, § 15, provides, “Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one’s actions and reformation.”

³⁵ This list appears to be conclusive of all legitimate purposes. Its function, however, need not be compromised by its expansion, should additional legitimate purposes of punishment be identified. Professor Richard Frase argued against amendment at the 2007 annual meeting by contending that the

social purposes of punishment and to subject their pursuit to the same accountability for performance that the Reporter properly assigns to other pursuits.

This is not nuance; under the Reporter's revision, there is no obligation for a commission, judge or policy-maker to consider, much less to articulate, why or how a given level of sanction—typically a range of months in prison—is correct for a given crime. Without amendment, the revision allows all actors to punish in the name of just deserts with no measure other than proportionality—a measure no more demanding of logic than religious faith or Justice Potter Stewart's exasperation, "I know it when I see it."³⁶ Since the Reporter's version is satisfied by proportionate severity alone, anything approaching empiricism or accountability for social impacts is optional at best and, more likely and traditionally, wholly absent. The proposed amendment is intended, therefore, to require at least some rational thought and discussion, and to encourage some appropriate empirical examination, before prison and other correctional resources are allocated for purposes other than those the Reporter labels utilitarian.

No consensus is required for linking punishment to the purposes the amendment lists. The modest but critical point is that mindless ritual does not compete with the pursuit of *any* social purpose. There are surely cases calling for punishment even when not necessary to incapacitate, to reform, or to deter. Trial judges sentence social drinkers who have killed others while drinking and driving, and who will never drink and drive again.³⁷ Whether for the emotional needs of the victim's survivors or to maintain the sanctity of human life or to maintain respect for the law, judges will properly impose a sentence of substantial severity. There are opportunistic, intra-familial sex offenders who can be adequately kept from recidivism by supervision alone, but whose sentence must be perceived as substantial to serve the therapeutic needs of a child victim who might otherwise wrongfully and destructively accept blame for the crime.³⁸

The amendment is intended to recognize the wisdom underlying much of restorative and "therapeutic" justice—that punitive sanctions may

proposed list failed to include equal treatment of similar offenders. He and the Reporter also argued that the list failed to insist on some minimum punishment for every crime. The listed purposes would, however, surely encompass all occasions which might properly require a minimum punishment, or compromise of an individually crafted sentence in the name of equal treatment. When the listed purposes do not do so, only fundamentalism remains as support for deviating from the "utilitarian" functions identified in the other subsections. The Reporter argued at the 2007 annual meeting that the proposal to replace severity with this list of social purposes is yet further evidence of an instinctual utilitarianism. For purposes of this analysis, a "utilitarian" strategy is one aimed primarily at public safety, while a "non-utilitarian" purpose is one aimed primarily at public values. Arguably, insisting on a purpose that is not "utilitarian" under the Reporter's expansive meaning—serving *any* demonstrable function—is instinctively mystical. In any event, it is by definition socially useless and demonstrably harmful to the very real extent that it displaces socially useful performance.

³⁶ *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

³⁷ There are, of course, other drunk drivers whose likely recidivism represents extreme risk of future harm.

³⁸ Of course, there are sex offenders whose likely recidivism calls for prolonged incarceration. The example in the text is complicated by the occasions on which subjective responsibility for the punishment compounds a child's victimization—a reality that occasionally makes tragic the scarcity of input from treatment providers.

actually undermine the pursuit of such values as respect for the persons, property, or rights of others. At least in some circumstances, degrading punishments are counterproductive if the social purpose is to enhance those values that underlie lawful behavior: empathy, human dignity, and community; measured by the likely service of social functions, these concepts surely should have some place among sentencing considerations.³⁹

Express pursuit of public safety is, of course, resonant with the policies of the many states that have adopted some version of the existing Model Penal Code—and probably with the populations of all jurisdictions. Although our submission to the reign of just deserts has promoted the corrosive fallacy that severity and safety are directly proportional, all students of public attitudes have found that—notwithstanding the perceptions of most policy-makers to the contrary—citizens are primarily supportive of public safety and rehabilitation, as opposed to punishment per se.⁴⁰

³⁹ In common with the Reporter's revision, this proposal avoids directly confronting the continued presence of capital punishment in our arsenal of sentencing options. This proposal, however, at least focuses the issue toward the purposes of punishment, allowing others to continue to debate whether the sanctity of life is promoted or debased by executions. Articulating the purposes of punishment might help ultimately to modernize our position; perhaps doing a better job of crime prevention might at least weaken our apparent national passion for the death penalty.

⁴⁰ It is critical to examine the question that is asked. Asking what sentence is "appropriate" for a given crime scenario, or "should the punishment fit the crime?" is almost as useless as such "push-poll" questions as "should judges be tougher on crime?" Smarter questions reveal the public's priorities by asking the subjects to rate or to articulate the purposes of sentencing. In any event, it is overwhelmingly obvious when examination of the issue is not precluded by study design flaws that the public wants public safety above all else and is far more supportive of rehabilitation than policy-makers generally believe. See generally U.S. Department of Justice, National Institute of Corrections, "Promoting Public Safety Using Effective Interventions," Section 1 (Feb. 2001), available at <http://nicic.org/Library/Default.aspx?Library=016296> (citing B.K. Applegate, F.T. Cullen & B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 PRISON J. 237–58 (1997)); FAIRBANK, MASLIN, MAULIN & ASSOCIATES, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998); Peter D. Hart Research Associates, Inc., *Changing Public Attitudes toward the Criminal Justice System* (Feb. 2002) (for The Open Society Institute), available at http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf; Beldon, Russonello & Stewart, *Optimism, Pessimism, and Jailhouse Redemption: American Attitudes on Crime, Punishment, and Over-incarceration* (2001); Judith Green & Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis* 5–8 (Ctr. on Juvenile and Criminal Justice 2002), available at <http://www.cjcr.org/pdf/cut-cor.pdf>; NAT'L INST. OF CORR., *Promoting Public Safety Using Effective Interventions* Section 1 (2001), <http://nicic.org/Library/Default.aspx?Library=016296> (citing B.K. Applegate, F.T. Cullen & B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Idea*, 77 PRISON J. 237–58 (1997)). When it examined the issue of public opinion through empirical means in the United Kingdom, the HALLIDAY REPORT found:

When asked unprompted what the purpose of sentencing should be, the most common response is that it should aim to stop re-offending, reduce crime or create a safer community. Next most frequently mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation.

John Halliday, Cecilia French & Christina Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, HOME OFFICE, July 2001 at 8, http://www.homeoffice.gov.uk/documents/halliday_report/sppu. For an analysis of the HALLIDAY REPORT, see Marcus, *Thoughts on Strathclyde, Processing the Second Sentencing and Society Conference*, 31–38, nn.101–131, and accompanying text, August 20, 2002, http://ourworld.compuserve.com/homepages/SMMarcus/Thoughts_on_Strathclyde.htm. See also Princeton Survey Research Assoc. Int'l, *The NCSC Sentencing Attitudes Survey: A Report on the Findings* (2006), http://www.ncsonline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf.

A further improvement accomplished by the proposed amendment is express recognition that *all* of the traditional mechanisms of corrections—rehabilitation, deterrence, and incapacitation—as well as the more recently articulated mechanism of “offender reintegration”—are properly employed as tools to achieve public safety. We may desire improvement in the lives of offenders through rehabilitation or reintegration after incarceration, but the justification for public expenditures in criminal justice along these lines is the expectation that through them we will reduce the offender’s likelihood of recidivism. The contrary implication—that rehabilitation *competes* with public safety in the form of incarceration—is a destructive artifact of the ideological divide between rehabilitationists and incarcerationists; the un-amended revision exacerbates that divide by divorcing the “mechanisms” of punishment from their purposes.⁴¹ Recognizing that different things work or don’t work for different offenders, and that all legally and practically available correctional resources are rationally deployed only when allocated by reason of risk, efficacy, proportionality, and priority, is critical to any successful modernization of sentencing law and practice.⁴² The revision without amendment at best retards this recognition; the proposed amendment permits it, and the model proposed in Part III exploits it.

Another improvement accomplished by the proposed amendment is the correction of the revision’s odd omission of the notion of specific deterrence—that offenders are deterred from recidivism by a wish to avoid the punishment received for criminal behavior in the past. Indeed, across the spectrum of crime, specific deterrence is more often a realistic strategy than general deterrence—the notion that others are deterred from the offender’s crime by their awareness of the offender’s punishment. Both forms of deterrence are surely limited in their efficacy, and probably useless for wide swaths of the offender population, whose crimes are linked to deficient impulse control, foresight, judgment, or empathy; or to mental illness, addiction, or desperation. These factors are not easily overcome by abstract threats of punishment; public hangings were notoriously exploited by pickpockets when such theft was a capital offense. The strongest proponents of deterrence concede that it depends upon certainty, celerity and severity for its success.⁴³ Criminal justice is best known for its lack of

⁴¹ The Reporter resisted articulating “public safety” as a purpose of sentencing by arguing that the Purposes provision already lists these “mechanisms” for pursuing public safety. *See supra* note 19. Rather, the awkward Purposes provision lists these “mechanisms” as purposes in their own right, along with proportionate severity. And since these mechanisms are the only identified means by which any purpose is to be achieved under the Reporter’s version, they are unavoidably to be deployed based on just deserts—particularly when no other purpose can achieve the “reasonably feasible” threshold.

⁴² Lawrence H. Sherman et al., *Preventing Crime: What Works, What Doesn’t, What’s Promising*, NAT’L INST. OF JUST. RES. IN BRIEF, July 1998, available at <http://www.ncjrs.org/pdffiles/171676.pdf>. “The important issue is not whether something works but what works for whom.” Pagination varies with the format accessed and its display; the quote is in Chapter 9, *Criminal Justice and Crime Prevention* 4. REHABILITATION AND TREATMENT (meaning preventing crime by focusing on known offenders through sentencing and corrections).

⁴³ Most support this order and agree that the severity of punishment, at least beyond a sufficiently unpleasant threshold, is relatively insignificant. The literature of deterrence is remarkably light on good evidence of the actual efficacy of punishment as a means of preventing crimes by others. *See, e.g.*, H. Laurence Ross & Gary D. LaFree, *Deterrence in Criminology and Social Policy*, in BEHAVIORAL AND

celerity, and so the quest for deterrence begins sorely disadvantaged. General deterrence is probably most realistic at the level of parking tickets and environmental crimes motivated by business plans that calculate risk.

The proposed amendment retains the qualification “when reasonably feasible” for incapacitation for reasons in addition to the Reporter’s focus on jail bed availability.⁴⁴ Incapacitation in the form of imprisonment is perhaps the most obviously successful correctional tool. During incarceration, offenders generally do not commit crimes; or at the very least, they don’t commit crimes with victims outside prison.⁴⁵ The real problem—resolutely overlooked by a just deserts regime—is that for most low and medium risk offenders, incarceration correlates with increased post-release recidivism rates.⁴⁶ When, as is the case in the vast majority of prison sentences, the offender is released well before the end of his potential criminal career, we run a very real risk that we do more harm than good with a given incarceration sentence, measured by crime reduction. When we ignore this issue, there are surely offenders who commit more crimes because we incarcerate them, just as there are surely other offenders who commit more crimes because we do not incarcerate them.

However, the proposed amendment does not depend on any consensus as to when and where (or even why) any sentencing modality is effective. As compared with the un-amended revision, the point is to impose accountability related to feasibility for all sentencing, largely to prevent

SOCIAL SCIENCE: 50 YEARS OF DISCOVERY 129–52, and authorities cited (1986). A particularly popular form of discourse is the proposal of a model that assumes the underlying axioms and purports to compare the relative significance of swiftness (“celerity”), severity, and certainty as variables. *See, e.g.*, Daniel D. Nagin & Greg Pogarsky, *Integrating Celerity: Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001), available at <http://www.hss.cmu.edu/departments/sds/BDRauthors/criminology.pdf>. Modern thought and the great majority of criminal justice practitioners recognize that deterrence is of minimal efficacy for the vast majority of crimes and criminals—because so much crime is the product of poor impulse control, poor role modeling and parenting, addiction, and a host of other criminogenic factors largely or wholly extrinsic to the rational process presupposed by deterrence theory. Deterrence may work for parking tickets, and it may work for business offenders who actually attempt to estimate risk and reward, but most in the criminal justice world agree that we are far more realistic to seek prevention, incapacitation, or behavior modification of those convicted than to rely on punishment to prevent crime by others. Marcus, *supra* note 25, at 151–52 & n.58. In any event, there is no question that we must improve the crime reduction impact of sentences on those we sentence if we are to improve criminal justice’s impact on the total crime rate.

[I]n regard to the general deterrence question, it is better in the present state of knowledge for the penal system to concentrate on the task of making the community safer by preventing the actual offender’s return to crime upon his release than to pursue the problematic preclusion of offenses by others. MORRIS & HAWKINS, *supra* note 22.

⁴⁴ It is now apparently common that jails are overflowing, so that “matrix release” and “furlough” programs are routinely used to accommodate jail population limits and prisons continue to ease their overcrowding with alternative incarceration, work release, and reintegration programs. These are all usually motivated primarily to relieve overcrowding rather than to pursue their unfortunately secondary functions of minimizing the criminogenic propensities of separation from normal social interaction (work, housing, relationships) and concentration of criminal cohorts.

⁴⁵ Charles Manson may have directed crimes by his unincarcerated associates and organized crime figures reportedly were able to do so, but these are exceptions that tend to prove the rule.

⁴⁶ Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates, 1975-1999*, 15 CRIM. JUST. POL’Y REV. 212 (2004); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, 1996 J. OKLA. CRIM. JUST. RES. CONSORTIUM 2 (1996); LIN SONG & ROXANNE LIEB, WA STATE INST. FOR PUB. POL’Y, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED (1993), <http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf>.

sentencing from avoiding all accountability by invoking the ephemeral façade of proportional severity. Although assessing feasibility varies widely in its attainable precision among the listed sentencing objectives, the amendment would not expand the breadth of variation. Thus the un-amended revision would have sentencing judges impose, and commissions research, calculate, and promulgate, sentences in light of the feasibility of general deterrence as well as the appropriate severity for all sentences.⁴⁷ If anything, the amendment improves the potential precision of these tasks by unpacking proportional severity into its legitimate functions: to respond to the legitimate needs of a victim, to prevent vigilantism or private retribution, to maintain respect for legitimate authority, and to enhance respect for the persons, property, and rights of others.⁴⁸

The amendment proposed by Part II would do much to avoid the harm threatened by the revision. Policy-makers intent on making more meaningful progress, however, would be better served by the more comprehensive approach suggested in Part III.

III. SUBSTANTIAL PROGRESS: A HARM REDUCTION SENTENCING CODE

The amendment proposed by Part II would discourage merely proportionate retribution as sufficient sentencing performance, and expressly restore public safety to its rightful place among the articulated purposes of sentencing. But even with these improvements, the revision would still retain major flaws that at the very least fail to exploit the occasion of change for meaningful progress in sentencing law and policy. Among those flaws is the absence of substantial priority among the purposes of sentencing. The revision is also flawed in its pursuit of guidelines as an end in themselves. The appeal of guidelines is far from universal; since guidelines are no better than the purpose to which they are put and the effectiveness with which they are deployed for their purpose,⁴⁹ this part proposes a model code that is neutral with respect to guidelines

⁴⁷ Thus, Section 1.02(2)(b)(vii) of the revision contemplates research on the effectiveness of all sentencing purposes, of which proportional severity is one and general deterrence another. Section 6A.01(2)(d) directs sentencing commissions to “assemble and draw upon sources of knowledge, experience, and community values from all sectors of the criminal-justice system, from the public at large, and from other jurisdictions” in order to promulgate their guidelines. Although the Reporter laudably endorses data collection and research to facilitate evidence-based pursuit of utilitarian objectives (TENTATIVE DRAFT NO. 1, *supra* note 1, at 21), the revision’s acceptance of proportionate severity as sufficient performance subverts enforcement of any other accomplishment. The point of the text, however, is that rationally assessing what does and does not further the social values of punishment articulated by the amendment involves an effort already deemed plausible by the un-amended revision. Although we can, should, but rarely do measure the impact of programs and prisons on recidivism, we also can, should, but rarely do engage in the kind of social science research designed to determine what serves the therapeutic needs of victims, and what furthers or retards the various public values related to respect for the law and for the persons, property, or rights of others. *See* authorities cited *supra* note 40.

⁴⁸ The model proposed *infra* Part III would charge sentence commissions and appellate review with the task of developing standards for evidence relating to these considerations.

⁴⁹ *See supra* note 19, and accompanying text.

and open to the employment of other modalities to marshal sentencing towards the pursuit of social purposes.

As distinct from the changes proposed in Part II, the model code presented here⁵⁰ adds a protocol for the pursuit of sentencing purposes and invites participation by states that do not embrace guidelines as well as those that do.⁵¹ As compared to the un-amended revision, this proposed code would focus sentencing primarily on crime reduction within limits of proportionality and priority, throughout the range of available sentencing dispositions, and with due regard for available resources; sentencing may pursue other purposes in the unusual circumstances in which they are not adequately addressed by a sentence responsibly based on considerations of public safety alone. Every sentence we impose—not just those we think of as rehabilitative—has an outcome in the sense that it is or is not followed by⁵² reduced, delayed, or avoided recidivism. The un-amended revision would direct sentencing commissions primarily to the task of divining which deserts are just for whom, and then to the tasks of predicting imprisonment trends and researching the effectiveness of sentencing to achieve proportional severity and compliance with guidelines. Optionally, commissions guided by the Reporter's vision might research how well we accomplish deterrence, incapacitation, rehabilitation, and restorative justice. The proposed code would direct sentencing commissions primarily to the task of increasing our knowledge of what works to reduce crime by which offenders—considering the full range of available dispositions, and the full extent of potential criminal careers—and to the task of encouraging sentencing behaviors that exploit that knowledge to the end of crime reduction. The proposed code would have commissions develop recommendations and standards for evidence addressing the various purposes of sentencing. The proposed code would also direct commissions secondarily to the tasks that the un-amended revision deems primary. The un-amended revision would respond to the very real limitations of our knowledge about the crime reduction efficacy of sentencing by condoning pursuit of proportional severity in lieu of crime reduction, and by immunizing most sentencing from empirical accountability by assigning to it the quixotic mission of achieving “limited” retribution—and by deeming that mission sufficient and anything more optional and accompanied with

⁵⁰ I am grateful to Ohio Senior Judge Burt Griffin for instigating the exchange that led to this effort, and for offering his wisdom and experience. See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1 (2002).

⁵¹ In the drastically abbreviated process that substituted for deliberation during code approval in the American Law Institute 2007 annual meeting, the Reporter and the Director announced—with no opportunity for rebuttal—that this proposal was essentially the same as the proposals combined *supra* Part II. This proposal is markedly different in proposing a protocol and being agnostic about guidelines; it also substantially redirects the focus of sentencing commissions and appellate review. As compared with the proposal presented at the annual meeting, this version is somewhat expanded to address the responsibility of attorneys and sentencing judges, including responsibility for sentences resulting from plea negotiations.

⁵² “Followed by” recognizes that although sentencing at its best causes a reduction or prevention of recidivism, what is more accessible is whether a sentence correlates with reduction or prevention of recidivism. It is often a substantial achievement of sentencing that we merely avoid disrupting processes that would reduce the offender's recidivism without our intervention. There are surely offenders whose sentences do more harm than good by any of these measures.

an added burden of justification. In contrast, the code proposed here would have us accept accountability for our public safety impact, make the best use of the best information we can access, focus our energies on improving our information about what works on which offenders, and adopt strategies to promote the exploitation of that information while fashioning sentences. The proposed code would subject the public functions bundled within “just deserts” to the same rigor that we should apply to all purposes of sentencing.

A Harm Reduction Sentencing Code

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Introduction

This code is intended to illustrate how a sentencing code organized around evidence-based harm reduction would affect purpose and discretion, as well the roles of judges, crime victims, attorneys, probation officers, sentencing commissions, and appellate review. It is as consonant with “limiting retributivism” as is the Reporter’s approach;⁵³ both versions endorse the proposition that no sentence should be disproportionately severe.

The foundational propositions of this code include:

- The need for reform arises from the profound disconnect between the claimed objectives of sentencing and the existing culture of sentencing practices and their public safety outcomes.
- The Reporter’s criticisms of existing sentencing law are correct insofar as they challenge the validity of mere suppositions that sentencing somehow serves social purposes, but we should require validation for all suppositions about the effects of sentencing.
- Founding a sentencing code upon ordered retribution as a sufficient purpose of sentencing, rather than as merely a limitation on sentence severity, subverts the social utility of punishment and ultimately enables rather than moderates punitivism and mass incarceration.
- Accepting accountability for public safety outcomes is the best way to moderate punitivism, and to harness the public’s pervasive but largely untapped support for rehabilitation.
- The need for evidence-based validation and accountability for actual outcomes exists throughout any responsible sentencing theory. It is not limited to any one component, any subgroup or “layer” of crimes, or any subset of functions of sentencing; among those functions, retribution is particularly in need of continued assessment of its actual relationship to social purposes: the promotion of public values.
- The function of punishment is complex; limiting the role of punitivism is far better served by confronting and deconstructing that complexity than by exalting retribution (however “limited”) per se as the overriding function of sentencing while avoiding accountability for our public safety impact as well as the actual impact of retribution measured by its social functions.
- A viable revision must recognize the utility of incarceration in the interests of public safety for some classes of offenders, but must also recognize that for many offenders, rigorously vetted alternatives are more productive of public safety and more cost effective than legally or practically available and proportional incarceration.
- While retribution is an important component of sentencing for serious

⁵³ TENTATIVE DRAFT NO. 1, *supra* note 1. See authorities cited *supra* note 22.

crimes with actual victims, it rarely justifies departure from sentences responsibly crafted to reduce or prevent recidivism.

- For many offenses and offenders, dispositions that best serve reformation are also best at promoting values supportive of lawful behavior: human dignity, compassion, and respect for the persons, property, and rights of others.
- Enforcing loyalty to the principles of sentencing requires law, structure, the functions of a sentencing commission, and a strong appellate role, but there is no need to exclude jurisdictions that prefer or reject guidelines, or to insist that jurisdictions adopt or retain guidelines.

§ 1 Purposes of Sentencing

Within the context of criminal justice, the purposes of sentencing are to provide public safety and to promote public values.

All who have addressed the issue agree that the Purposes Section is critical. This brief statement reduces the purposes of sentencing to basics, recognizing that the typically listed contents of such provisions and discussions constitute means to ends rather than ends in and of themselves. The two purposes of providing for public safety and promoting public values comprehend all legitimate sentencing objectives. They are not mutually exclusive.

The qualification that these are purposes that operate “within the context of criminal justice” recognizes that public safety is the object of a wide range of social activities and institutions of which criminal justice is only one. At its furthest reaches, “public safety” includes such diverse enterprises as national defense, flood control, public health, and highway signage. As it relates to criminal conduct, however, we pursue public safety in part through crime prevention; not just through law enforcement, but also through high school completion, parenting education, and early childhood intervention efforts. “Within the context of criminal justice,” sentencing addresses public safety to the extent that it attempts to reduce the subsequent criminal behavior of those sentenced (through such means as specific deterrence, reformation, incapacitation, offender reintegration, supervision, and the devices of restorative or therapeutic justice), and of others who may be influenced by sentencing via general deterrence or by the successful promotion of values such as human dignity and worth, and respect for the persons, property, and rights of others.

Similarly, sentencing is hardly unique in having the role of promoting social values. In the public sector, public education and educational publicity by governmental agencies are common methods of promoting the values of a society. In the private realm, faith-based and issue-oriented private organizations, and private educational institutions assume a substantial portion of the effort of promoting values, as does the family

unit. “Within the context of the criminal law,” sentencing serves in theory to denounce conduct deemed criminal,⁵⁴ but also serves the function of promoting values through a host of additional modalities. While deterrence uses fear of incarceration to restrain future misbehavior by others (general deterrence) or by the offender (specific deterrence), sentences can seek to reinforce the compassion of others by exhibiting mercy toward an offender, or to enhance empathy on the part of an offender through counseling, restorative justice, education, or even focused community service. If imposing punishment deemed excessive on a mentally ill, addicted, or homeless offender undermines public values of concern for the mentally ill, addicts, or the homeless, responding correctly to the circumstances of mental illness, addiction, or homelessness in crafting evidence-based sentences may have the opposite, pro-social impact. A sentence that effectively responds to an offender’s criminogenic circumstances will often enhance the offender’s respect for the persons, property, or rights of others. In a given case, an offender’s pro-social values may also be enhanced by restorative justice, or by simply requiring a letter of apology as a sentencing element. Within limits of proportionality, this draft is neutral with respect to severity and leniency; the draft proposes that the choice within limits of proportionality be driven by rational and evidence-based pursuit of public safety and social values.

This draft expressly embraces public safety as a purpose of sentencing. Those who argue that our science is too limited fairly to justify imposing sanctions in order to pursue public safety serve neither the fairness nor the function of sanctions by immunizing them from assessment in terms of public safety.⁵⁵ Sentences justified on the basis of an ephemeral matrix of just deserts are just as harsh or lenient, and gain nothing in equity by avoiding utilitarian purposes. Worse still, they produce avoidable victimizations and arbitrary cruelty (to victims *and* to offenders) to the extent that they would be better crafted if responsibly aimed at crime reduction. Whatever exceptions might properly exist for capital punishment, allocating correctional resources among offenders according to best efforts at assessing the risk they represent and the effectiveness of available devices for reducing that risk is at the core of any rational approach to sentencing.

This draft also directly rejects the notion that some pain—psychic or otherwise—must be extracted from every offender in service of some presupposed universal need for retribution. By deconstructing the purposes usually bundled within notions of “punishment” into essential components, and by noticing the consistent results of responsible efforts to assess public attitudes, retribution per se may be properly reserved for those crimes and offenders that actually call for punitive sanctions in pursuit of social values. If a minimum punishment is not necessary to secure crime reduction,

⁵⁴ Some jurisdictions expressly list “denunciation” as a function of criminal punishment. *See, e.g.*, CRIM. CODE CAN., Part XXIII, § 718(a).

⁵⁵ *See, e.g.*, Michael Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 1 FED. SENT’G. REP. 227, 228 (2006) [hereinafter *Post-Booker Sentencing Issues*].

respond to a legitimate need of a victim, prevent vigilantism or private retribution, maintain respect for legitimate authority, or enhance respect for the persons, property, or rights of others, then there is nothing worthwhile to be accomplished by that punishment; almost by definition, such a punishment is likely to be counterproductive of any legitimate social objective.

Public safety and social value functions are not mutually exclusive. The traditional notion of proportionality, for example, is a limit on severity that serves public values, just as any actual need for a minimum sentence also serves public values. Meeting public and private expectations for punishment for serious crimes serves public safety by discouraging private retaliation and vigilantism—distinct, but related threats to public safety.

This section rejects the notion that only some functions of sentence carry a burden of validation. Approaches that are satisfied with merely ordered just deserts, as in typical guideline schemes, would allow retribution fully to justify sentencing as long as the severity of a sentence is within some range established by a sentencing commission with legislative endorsement or acquiescence. The Reporter's revision would permit (but never require) sentencing to pursue deterrence, reformation, or incapacitation *only* when "reasonably feasible." Surely, we should not pursue sentencing goals when they are not reasonably likely to succeed. To justify any sentence on *any* principle should, however, require something more substantial than ordered sophistry. Whether a given level of severity is necessary to deliver substantial justice to an actual victim, sufficient to prevent vigilantism, private retribution, or loss of respect for legitimate authority, or to enhance respect for the persons, property, or rights of others, are questions at least as subject to validation as propositions about the general deterrence value of a sentence.⁵⁶

Stated another way, there is no less a need for assessment of our success at serving legitimate social objectives when we seek to "punish appropriately" in the form of retribution than when we seek utilitarian objectives directly. When and where retribution has no "utility" in promoting public values, there is no need for its imposition, no loss in its avoidance, and only harm, waste, and cruelty to be achieved by its imposition.

The process of sentencing allocates substantial resources with tremendous consequences for the public, as well as for victims and offenders. Retributive rationales for that allocation therefore demand no less substantial a basis than do utilitarian rationales. In most sentencing scenarios, it is more reasonable to make our best evidence-based efforts at crime reduction and simply to assume that other purposes of sentencing are not thereby subverted, than to assume that we accomplish anything of value by resting on just punishment—retribution—alone. In the vast majority of sentencing occasions it makes no sense whatsoever to justify forgoing best efforts at reducing the likelihood of the offender's recidivism based on the

⁵⁶ See *supra* notes 47 and 48, and accompanying text.

theory that other purposes of sentencing are somehow furthered only by doing so.

Inclusion of incapacitation in the Reporter's list of functions needing validation is particularly ironic, as the only relatively certain outcome of a sentence is that an offender will not commit more crimes (outside of the prison) *during* any period of incarceration. Incapacitation does demand validation in common with other functions of sentencing where the period of incarceration is limited by proportionality or resources—as it is in the vast majority of sentences in which incarceration is an option. Because we have learned that different periods of incarceration can increase or decrease recidivism for different cohorts, the responsible pursuit of public safety within limits of the law, proportionality, and resource demands that we do our best to select periods of incarceration that produce the best crime reduction results over the course of a potential criminal career, as compared with such alternative dispositions as may be available.⁵⁷ As to all functions, we have at least some capacity and an enormous responsibility to bring science to the effort of guiding sentences, so that we are as likely as possible to achieve the purposes of any sentence.

§ 1.1 Means of Pursuing Public Safety

Sentencing pursues public safety by responsibly employing such means as:

- a. Incapacitation and reintegration of released offenders;**
- b. Deterrence;**
- c. Reformation;**
- d. Alternative sanctions;**
- e. Restorative justice;**
- f. Therapeutic justice;**
- g. Dispositions promoting values preclusive of crime; and**
- h. Dispositions allocating limited correctional resources to reduce harm consistently with public priorities.**

This subsection recognizes that the traditional ingredients of incapacitation, deterrence, and reformation, are but *means* to the end of public safety. Deterrence includes both specific deterrence and general deterrence. This subsection adds the components of offender reintegration, alternative sanctions, restorative justice (including such means as restitution, compensatory fines, and victim-offender mediation), and therapeutic justice (including such means as drug courts, domestic violence courts, drunk driving courts, and mental health courts).

⁵⁷ See *supra* notes 44-46, and accompanying text.

This subsection also recognizes that sentences may reinforce values that serve to prevent criminal behavior. At one critical level, the traditional function of denunciation serves to proclaim abhorrence in response to acts of brutality, exploitation, or criminal greed, as disdain for such behavior is founded on values favoring human worth and the integrity of the persons and property of individuals. At another critical level, notions of proportionality are included here (although not exclusively so), as those values that abhor excessive, cruel, and barbaric sentences are rooted in compassion, empathy, and respect for individual human beings—values that themselves most profoundly serve to prevent crime. Within the broad spectrum of criminal behavior, sentences that reflect compassion for offenders can serve to reinforce social values that are social bulwarks against crime. There are criminal acts and concomitant harms that demand severe punishment to denounce abhorrent conduct, to deliver tangible justice to victims or their survivors, and to obviate private retaliation. There are also crimes and offenders as to whom a humane and therapeutic response best serves the public values of human dignity and compassion, empathy, and respect for the persons, property, and rights of others.

An offender's criminal history can certainly be part of a responsible, evidence-based assessment of an offender's risk and likely susceptibility to reformation (meaning that an analysis of whether and to what extent any available means of reducing an offender's risk is likely to succeed).

This list is expressly non-exclusive. It is important to note that the inclusion of any means in this list does not imply that it has a valid application in any particular sentencing. Whether any means is reasonably likely to produce the desired outcome is properly the subject of challenge, validation, and analysis at the trial and appellate levels in individual cases, and during policy-making by sentencing commissions and legislatures regarding such issues as categories of crimes, offenders, and circumstances. The qualification that means must be "responsibly" employed is a reference to the need for validation in contrast to mere supposition that any means serves any purpose in any given application, and to the reality that limitations of resources require that sentencing choices be sensitive to prioritization of risk and resources.

Although generic allocation of resources is largely a legislative matter rather than a sentencing issue, in choosing among competing sentencing choices, a judge properly serves public safety by using incapacitating resources primarily for those offenders whose risk of harm to society is greatest, and directing the scarce treatment beds to those offenders most likely to benefit from those resources. This approach is similar in function to policy proclamations favoring parsimony for its own sake, but has the advantage of appealing to a broader range of values. True parsimony is largely synonymous with reserving the most secure dispositions for those who present the greatest risk of harm, and with expending less secure and expensive correctional resources on those most likely to benefit from them.

The Reporter has called lists such as this “decoration,” correctly criticizing existing sentencing statutes as providing little to no effective guidance for the exercise of sentencing discretion (although his most recent drafts are subject to the same criticism).⁵⁸ This code responds by proposing a protocol in Subsections 1.3 and 5.1 that requires a sentencing judge first to pursue the sentence, within the range of proportionality and the limitations of law and resources, that is most likely to reduce the offender’s likelihood of recidivism, and then to compromise that objective only to the extent necessary to accommodate other legitimate purposes of sentencing.

§ 1.2 Means of Promoting Public Values

Sentencing promotes public values by responsibly employing such means as:

- a. Imposing punishment that is not disproportionate to the moral culpability of the offender and the harm risked or occasioned by the crime;**
- b. Denouncing criminal conduct;**
- c. Promoting human worth and dignity;**
- d. Responding to the interests of victims of crime;**
- e. Restorative justice;**
- f. Therapeutic justice;**
- g. Promoting values preclusive of crime; and**
- h. Pursuing dispositions that are consistent in severity with those imposed on like offenders sentenced for like crimes, with due regard to differences in offenders and offenses that correlate with differing susceptibility to reformation or need for incapacitation, and to variations in the availability of suitable correctional resources.**

This subsection includes the traditional retributive sentencing functions of just punishment and denunciation, but recognizes as well that in serving the needs of victims and others, punitive or non-punitive dispositions may promote public values best in any given case. A sentence that fails in its severity to reflect the enormity of a heinous crime may undermine public values, but so, too, can a sentence that denigrates human dignity by disproportionately punishing a minimally culpable offender whose crime was of low severity and risked or caused little harm to others. The proper balance between the need for denunciation on the one hand, and for compassion promoting empathy, human dignity, and respect for the persons, property, and rights of others on the other, will vary depending upon the circumstances surrounding the offender, the offense, and any

⁵⁸ Compare PLAN FOR REVISION, and PRELIMINARY DRAFT NO. 3, *supra* note 6, with TENTATIVE DRAFT NO. 1, *supra* note 1.

victims. It will also vary over time, based upon “the evolving standards of decency that mark the progress of a maturing society.”⁵⁹

Significantly, the extent to which severity is a socially productive or necessary component of sentencing calls for meaningful assessment as poignantly as does any other function of sentencing. The potential for social and individual harm in merely presuming the utility or need for retribution is no less than for merely presuming the utility or need for any other sentencing rationale.

As with the Reporter’s revision, this code does not dictate that an offender’s criminal history contributes to the offender’s moral culpability, but commissions, legislatures, and sentencing judges, absent law to the contrary, are free to conclude that it does.⁶⁰

In some scenarios commonly presented by criminal cases, restorative justice is more likely to promote social values than is retributive justice. Many victims of at least the more common and less heinous crimes often find non-punitive, restorative measures far more satisfying than punitive measures. All crimes with a victim conflict with the values of empathy and respect for the persons, property, or rights of others, and yet those values can be subverted rather than promoted by subjecting the offender to humiliation, incapacitation, or other traditional retributive punishments that inherently debase the offender, and seek to degrade the offender and inflict pain upon him. It is not just the death penalty that conflicts with the value it purports to further.

As with the list of means of pursuing public safety in Subsection 1.1, this list of means of promoting public values is expressly non-exclusive, and the inclusion of any means in this list does not imply that it has a valid application in any particular sentencing. Whether any means is reasonably likely to produce the desired outcome is properly to be the subject of challenge, validation, and analysis at the trial and appellate levels in individual cases, and at the level of sentencing commission and legislative policy-making as to categories of crimes, offenders, and circumstances. The qualification that means must be “responsibly” employed is a reference to the need for validation in contrast to mere supposition that any means serves any purpose in any given application, and to the reality that resource limitations require that sentencing choices be sensitive to the prioritization of risks and resources.

The consistency principle is articulated as the last of the value-promoting means, inasmuch as there is general consensus that offenders whose culpability is truly similar should be subjected to roughly equivalent burdens in fashioning a sentence. As with other means of serving the objectives of sentencing, this means has no inherent dominance in any particular sentencing occasion. As argued by Norval Morris, consistency is

⁵⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁶⁰ Consideration of an offender’s criminal history is certainly part of responsible pursuit of public safety, as discussed in § 1.1. This subsection is concerned with the assessment of the limitations of proportionality, ultimately essential to a successful promotion of social values.

but one objective of sentencing—and can easily be overdone.⁶¹ Surely there is no virtue in consistency if the effect is to ensure the repetition of the mistakes made in the past—sentencing choices that have failed to achieve crime reduction or the other purposes of sentencing are surely not to be emulated in the name of consistency. Guideline schemes frequently feign consistency by ignoring differences in culpability or in harm that should not be ignored—regardless of whether our objective is to crime reduction or moral equivalency.⁶² Judges should be sensitive to variations in culpability, harm, and susceptibility to reformation by looking at available dispositions and the availability of resources. It makes no sense to deprive one offender of a disposition that will prevent that offender’s future crime(s) just because that disposition is unavailable to an identical offender in another location.

On the other hand, sentencing must consciously avoid oppressive discrimination based on ethnicity, gender, class, or minority status, as is addressed in Subsection 1.6.

§ 1.3 Priority Among Sentencing Purposes

Within legally and practically available dispositions, with appropriate consideration of risk and safety, the first priority of sentencing is to prevent or reduce subsequent criminal behavior by the offender. Sentencing shall compromise that priority only when and to the extent required otherwise to pursue public safety or to promote public values.

This subsection introduces priority and direction to sentencing purposes, and as such serves as a significant departure from the approach of the Reporter’s revision. It requires that judges and the sentencing commission be cognizant of legal and practical limits on available dispositions, and recognizes that an offender’s culpability may be limited sufficiently to reduce the available disposition for reasons of proportionality. As with the revision, this code assumes that concepts of proportionality will operate at a “sub-constitutional” as well as a constitutional level.

The reference to risk and safety recognizes that an offender’s risk of committing harm may be so great that even a community-based program with some substantial chance of success at reducing eventual recidivism represents an irresponsible gamble as compared with the relative certainty of available incarceration. Although this could be left unsaid because incarceration may be deemed “otherwise required” to pursue public safety, it is far less ambiguous to recognize, for example, that the safety provided

⁶¹ “Treating like cases alike is by no means a categorical imperative of justice; it is merely one of several interacting, guiding principles of justice to be accorded respect up to the point that it decreases community protection or increases individual suffering without sufficiently compensating social advantage.” MORRIS, *supra* note 22, at 209.

⁶² See *Comments on the Model Penal Code*, *supra* note 31, and accompanying text.

by a substantial term of incarceration may properly trump hopes of reducing recidivism over even a longer term with a less secure program. In practical terms, we may have good reason to expect repetition by some categories of predatory child molesters or stranger rapists; a twenty-year prison term may be the appropriate choice even though an available program has a thirty percent chance of reducing recidivism over the next thirty years.⁶³

Within these limits, this subsection then directs attention first to recidivism and then to remaining purposes for three reasons. First, affecting the future behavior or capacity for harm of the offender before he commits another crime is almost always the most attainable of sentencing goals. “It is better in the present state of knowledge for the penal system to concentrate on the task of making the community safer by preventing the actual offender’s return to crime upon his release than to pursue the problematic preclusion of offenses by others.”⁶⁴

Second, the sentence that most effectively reduces recidivism in the vast majority of cases is also the sentence that best serves all other sentencing purposes. Third, the primary failure of past sentencing, and the strongest need for revision of sentencing law, is that sentencing has long proclaimed crime reduction as a purpose, yet effectively abandoned that purpose in practice, with brutal results for the victims of crimes that could have and should have been prevented, and for the offenders whose sentences would have been less punitive and more rehabilitative had crime reduction been responsibly pursued.

Another primary departure from the Reporter’s revision is this subsection’s response to the failure of sentencing rigorously to pursue best efforts at crime reduction. Unlike the revision, which responds to past utilitarian failures by largely abandoning crime reduction, this code would demand accountability for outcomes under *all* sentencing purposes.

Once again, in the vast majority of cases and within the range of legally and practically available dispositions, the sentence that is most likely to reduce the offender’s future criminal behavior also best serves public safety and promotes public values. Accepting accountability for best efforts at crime reduction is the surest path to public respect for the law and the courts, and most directly obviates private retaliation and vigilantism. Depending upon the circumstances of a given case, a sentence that relies upon incapacitation, reintegration, specific deterrence, reformation, or

⁶³ The example assumes, as is often true, that prison does not afford meaningful or effective treatment for such offenders. It is to be hoped, of course, that increasing the focus on best practices would help to restore custodial programs, long discarded during our retreat from rehabilitation, that actually reduced some sex offenders’ post-prison recidivism. One of many issues demanding rigorous research is the likelihood of optimum sentence length in light of the high likelihood of success during incapacitation and the real risk of increased recidivism after incarceration for many offender cohorts. *See* authorities cited *supra* note 46. Allowing just deserts to drive prison term length has resulted in disastrous misappropriation of prison resources. Recent Oregon data suggests that we get prison right one out of three times—for most, we either under- or over-incarcerate based on the likelihood of new crime. *See* 2005 Or. Laws Ch. 474 (SB 919), *supra* note 30, and accompanying text.

⁶⁴ MORRIS & HAWKINS, *supra* note 22, at 122.

restorative or therapeutic justice, or upon a combination of these devices, may be the most likely to reduce criminal behavior.

Although general deterrence may be a viable objective for some categories of crime and of offenders, in the great majority of cases, a sentence that best serves the purpose of reducing the sentenced offender's likelihood of recidivism is as likely to have as much, or as little, deterrent value as would any other sentence, and no adjustment will demonstrably improve the chances of deterring crime by others.

A sentence that is the most likely to reduce recidivism is also, in the vast majority of cases, the sentence most likely to promote public values at stake in the sentencing or offended by the crime. Virtually all investigations of what the public wants most from sentencing demonstrate that the public values crime reduction and reformation ahead of punitivism, yet sentencing politics continue to support the fallacy that the public uniformly demands harsh sentencing.⁶⁵ Most sentences that presume an offender's capacity for reformation and actually accomplish that reformation also best promote human worth and dignity and other values that prevent crime through respect for the persons, property, and rights of others.

It is also likely that in many cases with a victim, a sentence that involves some form of restitution to a victim is most likely to both reduce the offender's likelihood of recidivism and to satisfy the victim's need for substantial justice.

Often, there are a variety of means all of which represent a reasonable likelihood of success in reducing recidivism. Of course, if other purposes of sentencing can be accommodated by selecting among those means, there is no reason to compromise the goal of reducing recidivism in pursuit of other sentencing objectives. This protocol anticipates that there are circumstances that do call for such a compromise.⁶⁶

§ 1.4 Evidence-Based Sentencing

In all respects, the determination of what sentence best serves the purposes of sentencing shall be based on the best available evidence, research, and data.

Even with a strong proclamation of principles, it is only with rigorous and enforceable pursuit of the best evidence, research, and data upon which to base sentencing laws and decisions that sentencing can emerge from the fog of ineffective liturgy and assume a socially responsible role. By inviting all to avoid this scrutiny by allowing just punishment free of any demonstrable social value to serve as adequate sentencing performance, the Reporter's revision would preserve that fog of ineffective liturgy for generations—unless, of course, it is modified as suggested in Part II or

⁶⁵ See authorities cited *supra* note 40, and accompanying text.

⁶⁶ See *supra* notes 37 and 38, and accompanying text.

ignored by the states that might otherwise be guided by the Reporter's revision.

The formulation "best available evidence, research, and data" recognizes the paucity of validated information currently accessed in sentencing, and anticipates an evolution towards regular use of more substantial and reliable evidence. Uninformed supposition with no basis in data or science—such as assessing an offender's susceptibility to rehabilitation based on a judge's perception of his level of remorse, or an assessment of the efficacy of incarceration based on the hypothesis that it gives an offender the opportunity to think about making better choices in the future should be replaced by rigorous analysis and social science research, which is itself subjected to rigorous scrutiny and validation through advocacy in sentencing proceedings and on appeal, as well as through the usual academic processes. The reference to "research" as distinct from "data" acknowledges that judges can make significant use of evidence without intermediate academic interpretation, although they may benefit from such interpretation, which has been subject to rigorous analysis and validation. Such data would include the collected experience indicating which sentences best correlate with reduction of what species of recidivism for cohorts of offenders sentenced for similar crimes—as is presented by Multnomah County's sentencing support tools.⁶⁷

Thus, in considering whether a given offender would benefit from a proposed treatment, alternative sanction, or modality of supervision, and in assessing the risk that such an offender would represent to the community, a judge should be provided with evidence about the efficacy of various dispositions for various offenders, and with risk and needs assessments⁶⁸ for quantifying the likely risk of harm posed by the offender and assessing the likely success of any programs.

What is called for to promote public values should be tested similarly by the likelihood that a disposition serves the needs of a specific victim is necessary to uphold respect for the law, to prevent private retribution or vigilantism, or to promote values of empathy, compassion, or respect for the persons, property, or rights of others.

The nature of appropriate evidence, research, and data to use in sentencing may vary widely depending on which sentencing purpose is being furthered. A victim's professed preferences may be sufficient—at least initially in the life of this code—to support an assessment of that victim's need for a level of punishment, and the victim's input is to be solicited and respected whenever possible for this reason alone. However, the court, rather than the victim, has the ultimate responsibility for crafting the appropriate sentence; and the court cannot properly presume that only the needs of victims who are willing and able to make a presentation should

⁶⁷ See, e.g., Michael M. Marcus, *Sentencing Support Tools: User Manual for Attorneys*, Jan. 6, 2006, <http://www.ojd.state.or.us/MUL/Marcus.htm> [hereinafter *Sentencing Support Tools*].

⁶⁸ Risk assessment purports to discern the risk of future harm the offender represents, while needs assessment purports to identify those variables that may be susceptible to modification to reduce that risk.

be considered; it is entirely appropriate for the prosecution to attempt to articulate the needs of victims who are unable or unwilling to do so themselves. What punishment is necessary to retain or promote public confidence in the courts, or to promote relevant social values through denunciation, demonstrated compassion, or restorative justice devices, are issues susceptible to some level of social science research—as is the question whether such values as respect for the persons, property, or rights of others are promoted or undermined by severity or leniency in a given class of cases. Social science may also help determine which types of punishments victims need for substantial justice.⁶⁹

This code proposes that the minimum level of what constitutes “best available evidence, research, and data” will vary with the sentencing purposes under analysis, and will evolve with input from the legislative authority, appellate courts, the sentencing commission, social science, and, ultimately, “the evolving standards of decency that mark the progress of a maturing society.”⁷⁰

§ 1.5 Moral Culpability

A sentence shall not be excessive in relation to an offender’s moral culpability. An offender’s moral culpability by itself does not establish a minimum sentence. The moral culpability of an offender is not a basis for a sentence that is more severe than a sentence most likely to reduce the offender’s subsequent criminal behavior, unless a more severe sentence is otherwise required to pursue public safety or to promote public values. Moral culpability is determined by such factors as:

- a. **The nature of the offender’s conduct;**
- b. **The offender’s intent or motivation; and**
- c. **The harm risked or caused by the crime.**

Moral culpability is enhanced by such factors as:

- a. **The vulnerability of a victim;**
- b. **Exploitation by the offender of a position of trust or power;**
- c. **Participation in organized or sustained criminal activity;**
- d. **Committing an offense for hire; and**
- e. **Planning, instigating, or directing an offense committed by more than one offender.**

Moral culpability is mitigated by such factors as:

- a. **A victim’s provocation or participation in the offense;**
- b. **Mental limitation or impairment not rising to the level of a**

⁶⁹ The breadth and difficulty of research and data are no greater than that presupposed by the Reporter’s revision. *See supra* note 47, and accompanying text.

⁷⁰ *Trop*, 356 U.S. at 101.

defense; and

- c. Remote or minimal participation in an offense primarily committed by others.**

Proportionality is achieved by limiting sentences so that they are not excessive in view of the offender's culpability. In the first instance, the legislative authority fixes the maximum sentence, reflecting moral culpability, correctional priorities, and general resource allocations. A guideline scheme may impose or suggest lower limits based on the severity of the crime and optionally, criminal history. As with the Reporter's drafts, this code does not dictate that an offender's criminal history be considered as a factor in determining the offender's moral culpability, but commissions, legislatures, and sentencing judges, absent law to the contrary, are free to consider it as a factor. An offender's criminal history can certainly be part of responsible pursuit of public safety, as discussed in Section 1.1. A sentence may in no event exceed one proportional to the offender's moral culpability in a specific case.

Although the definition of moral culpability used in this code is similar to that of the Model Penal Code revision, a critical difference is that in this code, moral culpability serves to limit sentences, but does not aim to achieve a sentence severity proportional to that culpability. Moral culpability alone does not establish a minimum sentence. A court can find, however, that public confidence in law enforcement (and hence the functions of obviating private retaliation and vigilantism), or the needs of the actual victims of a crime, require a more severe sanction than the sentence that results from a recidivism-reduction analysis alone in light of the offender's culpability. As with any other deviation from mere recidivism reduction under this code, a judge shall rely upon the best available evidence, research, and data to determine what sentence best serves the purposes of sentencing—again, recognizing that what evidence is appropriate and sufficient to the task may vary with the issue addressed.

§ 1.6 Ethnicity, Gender, Class, and Minority

Because social values condemn discrimination based on ethnicity, gender, class, and minority, a sentence may not result in such discrimination. However, the court may properly consider ethnicity, gender, class, and minority in:

- a. Considering whether an offender's criminal record is exaggerated in comparison with non-minorities due to discrimination;**
- b. Evaluating whether any aspects or consequences of the offender's ethnicity, gender, class, or minority reduce the offender's moral culpability; and**
- c. Selecting a disposition that is designed and administered effectively to serve an ethnic, gender, class, or minority**

population of which the offender is a part.

Although it is typical to reject any consideration of ethnicity, gender, class, and minority status, such an approach is unnecessarily broad and forecloses appropriate consideration of such variations. Some minorities have criminal records that are exaggerated by discriminatory law enforcement practices, and are therefore unfairly compared with records accumulated by non-minority offenders in assessing culpability and dangerousness. The consequences of the offender's ethnicity, gender, class, or minority status may reduce, but may not increase, and offender's moral culpability.

Some correctional programs are particularly designed to serve the needs of a minority—such as at-risk Hispanic or Black youth, Native American alcohol abusers, and gay and lesbian teenagers. It is not necessary to ignore these circumstances to avoid oppressive or preferential discrimination; indeed, this subsection is a proposal for addressing this dilemma. However, a “hate crime,” in which the offender is motivated by the intent to cause harm because of the victim's ethnicity, gender, class, or minority, is of course not covered by this subsection or these principles.

§ 2 Purposes of Sentencing Laws

The purposes of sentencing laws are:

- a. To declare the purposes of sentencing;**
- b. To determine the maximum sentences available for crimes by reference to social values of moral culpability, proportionality, and responsible allocation of correctional resources;**
- c. To establish mechanisms and procedures for the effective and evidence-based pursuit of sentencing purposes;**
- d. To protect the rights of the state and the offender pursuant to the fair and accurate determination of facts relevant to sentencing;**
- e. To ensure a range of judicial sentencing discretion that is sufficient to give sentences that best further the purposes of sentencing under the circumstances of individual offenses, offenders, resources, and the interests of crime victims; and**
- f. To establish evidentiary standards for sentencing proceedings.**

It is clearly the role of the legislative authority to set maximum sentences. In doing so, that authority properly articulates general social values about the relative moral culpability of offenders and the seriousness of offenses, the range of sanctions properly available for classes of crime,

and the priorities implied by allocating resources to perceived levels and species of risk. The legislative authority may define degrees or categories of offenses based on levels of intent, culpable conduct, and harm risked or caused, as well as an offender's criminal history or other factors deemed relevant to the maximum amount of sanction "deserved" or morally appropriate.

Consistent with the theme of this code, the purposes of sentencing laws also critically include establishing strategies for ensuring that the declared purposes are in fact pursued, rather than becoming the "decoration" that sentencing purposes have constituted in the past. Mechanisms must, of course, ensure fairness, including both constitutional and sub-constitutional requirements. Equally critical for the purposes of this code, the mechanisms must encourage improvement in the nature of evidence, research, and data relied upon to analyze sentencing choices. The reference to the rights of the parties is intended to embrace both the developing law of procedural fairness in sentencing proceedings and the enhanced scrutiny available to adjudicating "enhancement facts" in states that opt for a guideline scheme or other mechanism that triggers rights under *Apprendi v. Illinois*,⁷¹ *Blakely v. Washington*,⁷² and their progeny.

Consistent with the approach of other drafts, this code recognizes the essential role of sentencing discretion vested in the trial court, as no generalized proclamation can accurately achieve best efforts at accomplishing the purposes of sentencing under all of the widely diverse circumstances of individual cases. Such circumstances commonly include variations in the offender's conduct, intent, and culpability, in the degree of harm risked or caused by the offense, in the interests of any victims, and in the nature, promise, and availability of any dispositional resources.

The legislative authority also properly establishes minimum standards for the receipt of evidence to support sentencing decisions. The permissible range as a matter of constitutional law varies from the presently virtually boundless bases of judicial discretion within the realm of *Williams v. New York*⁷³ to the sort of proof required to establish a fact necessary for an increased sentence within the realm of *Blakely*. As a matter of sound social policy, however, the legislative authority should exceed constitutional minima as to the sufficiency of evidence as a means by which to promote the actual accomplishment of sentencing purposes.⁷⁴

§ 2.1 Means of Directing Sentencing Towards Sentencing Purposes

Sentencing laws shall promote sentences that serve sentencing purposes by:

- a. Providing for appellate review as provided in Section 11 of**

⁷¹ 530 U.S. 466 (2000).

⁷² 542 U.S. 296 (2004).

⁷³ 337 U.S. 241 (1949).

⁷⁴ See *supra* § 1.4 and *infra* § 3.

- this code;**
- b. Establishing a sentencing commission with the functions described in Section 12 of this code;**
 - c. Establishing ranges and modalities of sentences for categories of offenses and offenders;**
 - d. Optionally, establishing advisory or enforceable guidelines or sentencing ranges for sentencing based on crime seriousness and criminal history; and**
 - e. Optionally, establishing minimum sentences deemed essential for sentencing purposes.**

Like the Reporter's revision, this code proposes a substantial role for appellate review and sentencing commissions. Unlike the revision, this code emphasizes that the first calling of appellate review and the sentencing commission is to ensure that sentencing actually furthers its purposes. The revision compromises that pursuit by exaggerating the role of just deserts beyond its proper application, and pretends that a well-glossed structure of ordered retribution actually performs a social function, when it actually serves overwhelmingly to evade accountability of criminal justice for socially useful outcomes. With this draft, sentencing begins with reducing recidivism within the limits of proportionality and resources, and deviates only as necessary to achieve public safety more broadly or social values not adequately served by a sentence that best reduces recidivism.

This code does not promote unlimited sentencing discretion, in part because the sentencing process has languished so long without direction, evidence, or accountability for actual pursuit of public safety or promotion of public values that the process surely needs limits. The guidelines movement has achieved some reduction in disparity and has served managerial interests in predicting demand for correctional resources. Although these accomplishments are far from adequate in their extent or in their nature—and although they compete with higher callings of sentencing when they take the form of guidelines as they exist in most states, the federal jurisdiction, and the Model Penal Code revision—they do reflect the reality that simply modifying marching orders does not negate the need for limiting discretion.

This code therefore recognizes that sentencing laws should establish ranges of sentences under specified circumstances by determining that such ranges adequately capture the sentences most likely to further sentencing purposes. Ranges established for sentences should be broad enough to ensure that the resulting discretion can adequately pursue the purposes of sentencing. Arguments for restored and expanded sentencing discretion will

strengthen as sentencing demonstrates its competence and effectiveness in pursuing the purposes of sentencing.

It is also appropriate for the legislative authority to encourage dispositions in the form of modalities of correction that are appropriate for general categories of offenders. The most common legislative directive is for alcohol evaluation and treatment for offenders convicted of driving while under the influence of alcohol. It is equally appropriate for the legislature to direct, at least in the form of a presumptive disposition, that those convicted of drug possession be evaluated and required, as a condition of probation, to participate in indicated treatment. Analogs for theft, domestic violence, gambling-driven crimes, and sex crimes are obvious and appropriate.⁷⁵ Note that the legislative authority would presumably promote dispositions that meet the criteria established by or under the guidance of the sentence commission or some other appropriate public agency, such as a state mental health agency in the case of alcohol or drug addiction treatment.

Although this code shares with other drafts distaste for mandatory sentences—because there are necessarily variations in individual cases that call for exceptions to further the purposes of sentencing, and because it is inappropriate to delegate recognition of such circumstances solely to prosecutorial discretion—this code nonetheless recognizes that mandatory minimum sentences are within the legislative prerogative. Moreover, having thus far failed to accept accountability for public safety in sentencing, and having tolerated a sentencing culture that ignores research and data and produces sentences that are irresponsible in terms of crime reduction, the criminal justice system at present cannot persuasively refute the case for minimum sentences. Ideally, if something akin to this code is implemented, and responsible sentencing analysis actually serves public safety, the legislative authority will likely conclude that criminal justice has earned the discretion to depart from what have been heretofore mandatory sentences. This route to restored sentencing discretion is also the most practical as a political matter.

This code recognizes that presumptive ranges, as used in Ohio, enforceable guidelines, as used in Oregon, and advisory guidelines, as used in Virginia, may all adequately serve to further sentencing purposes. It is a political reality that the Reporter's revision is unlikely to achieve a single, nation-wide choice among these approaches. To achieve the purposes of this model code, it is appropriate to allow for these variations—particularly because it is not the form of these approaches, but the goals they serve and the effectiveness with which they do so that determines their value. Any of the three methods, coupled with properly aimed appellate review and sentencing commission functions, can meaningfully accomplish sentencing

⁷⁵ On the other hand, mere symmetry—sending sex offenders to sex treatment, drunk drivers to alcohol treatment, drug offenders to drug treatment, bullies to anger management, thieves to theft counseling, and so on—is hardly adequate. The presenting crime may or may not reflect the originating issue with the offender, and that a program addresses the presenting crime does not by itself assure that it does so successfully. Best practices require risk and needs assessment and the ability to track outcomes.

reform—and none does so inherently (*i.e.*, without effective reference to the goals pursued and the strategies adopted to pursue them). Any version that insists on using only one of these modalities will deviate any campaign for adoption of the resulting code from any purpose worthy of the effort.

§ 3 Evidence in Sentencing Proceedings

Except as otherwise provided in this section, in other provisions of law, in decisions of appellate courts, or in recommendations of the sentencing commission, a court may properly rely on any of the following in fashioning a sentence:

- a. Evidence from any source known to the parties and uncontested;**
- b. Evidence provided by either party or by any agency that regularly reports to the court concerning sentencing or supervision of offenders, or from any source routinely relied upon by such agency, concerning an offender's criminal history, personal history, mental and physical health, employment history and future employment opportunities, performance in custody or under supervision pending trial or in previous criminal proceedings, performance in previous programs or treatment attempts, and any need for the offender's continued services by any dependent of the offender;**
- c. As to the perceived interests of any victim of the defendant's crime, the victim's own sworn or un-sworn statement delivered in open court, or, if the victim makes no such statement, the prosecutor's representation of the victim's expressed interests if based upon actual communication with the victim or, in the case of a minor or incompetent victim, the victim's representative;**
- d. As to any therapeutic interest of a victim, a report from a qualified treatment provider or evaluator who has substantial knowledge of the victim's circumstances, or, in the absence of such a report, research the court finds sufficiently reliable to warrant its use in sentencing**
- e. As to any of the following issues, the court may rely upon any research, data, or instrument provided that the court makes a finding that the research, data, or instrument is sufficiently reliable to warrant its use in sentencing:**
 - i. The defendant's risk of future criminal conduct or harm to the community or to any specific victim or class of victims;**
 - ii. The defendant's susceptibility to reformation, rehabilitation, or specific deterrence;**

- iii. **The likely effectiveness of any proposed program, incarceration, supervision, sanction or alternative sanction in achieving reduction in the defendant's future criminal conduct;**
- iv. **The relative value or need for any length, nature, or conditions of incarceration or supervision;**
- v. **The deterrence impact of any sentence upon the conduct of other potential offenders;**
- vi. **The impact of any sentence upon public values;**
- f. **As to the availability of any proposed program, incarceration, supervision, sanction, or alternative sanction, a report from either attorney verifying that availability, or from any provider or official with authority connected with the agency related to any such disposition;**
- g. **As to any contested issue concerning restitution, any evidence admissible under the rules of evidence applicable to civil proceedings; and**
- h. **As to any fact not admitted by the defendant and required to increase the severity of a sentence available upon conviction, any evidence admissible under the rules of evidence applicable to the trial of the issue of guilt.**

The court shall not rely upon any fact or evidence over the objection of any party without affording the objecting party a reasonable opportunity to contest that fact or evidence.

The court may rely upon the stipulation of the parties as sufficient evidence of a fact relevant to sentencing. The court is not required to accept such a stipulation.

The sentencing commission may promulgate recommendations concerning the threshold for relying upon evidence that any proposed disposition would be likely or unlikely to achieve any purposes of sentencing.

The court shall rely upon the best evidence provided by the parties or otherwise reasonably available to the court.

“Evidence,” except as otherwise provided, means information in any form. One of the central purposes of this code, and one it shares with the approach of the Reporter’s revision to further utilitarian objectives, is to require a factual basis for the pursuit of all sentencing purposes. The nature of available evidence may vary with the nature of the sentencing objective in question. For example, a court may accept a victim’s statement or a prosecutor’s statement when the issue is the victim’s perceived needs, but for establishing the amount of restitution for economic loss, for example, evidence rules applicable in civil proceedings apply. Evidence concerning the relationship between sentences and community values is inherently less

likely to be quantified than, for example, data concerning the percentage of similar offenders who remained free of recidivism after receiving a given sanction for the same or similar offense.

The court may, of course, rely upon any evidence that the parties do not dispute; subject to the offender's right to notice and an opportunity to contest facts. The court may employ sources traditionally relied upon, such as pre-sentence reports, probation reports, and reports concerning the conduct of an offender before trial and in any previous cycles through the criminal justice system. As recognized in *Blakely*, the mere fact of a prior conviction is normally established by agreement and proven when necessary by receipt of certified court records reflecting the conviction.

When the court adjusts a sentence to meet the needs of a victim, such as when punishing an intra-familial, opportunistic sex offender, or a non-recidivist drunk driver who has badly injured a stranger, the court will preferably have some input from a treatment provider, and may have input about the victim's needs based upon the victim's own assessment, but should at least have some basis beyond the inherent wisdom of judges to support the notion that an elevated level of severity is required to serve some therapeutic need. To be clear, when there is real physical harm, or substantial psychic injury, suffered by an identified victim, the victim's own statement or the prosecutor's statement after actual contact with the victim (or the victim's representative or survivor) will support sentencing that seeks to address the needs of the victim for substantial justice.

More specifically, the court must base assessments of an offender's risk of committing future crime(s), the likelihood that the risk can be reduced by available dispositions, and the availability of any sanction considered upon some meaningful evidence, unless the parties otherwise agree. Courts should not be making decisions that substantially impact the offender, increase the risk of future harm to potential victims, and allocate expensive and scarce correctional resources, without some meaningful evidence. The court's choice among available lengths, conditions, and forms of incarceration or supervision must also be evidence-based.

It is equally important that the court not craft dispositions based upon faulty assumptions that a given component of a sentence will actually be available to the defendant when it may not be. For example, when a prosecutor suggests that a jail term will serve the interests in "drying the defendant out," it may be necessary to determine whether there is sufficient time left after credit for time served or under any jail-population matrix release program to serve that purpose. When the purpose of a proposed prison sentence is to afford secure drug treatment, that purpose will not be achieved unless there is a chance that there is enough bed space and the offender meets the applicable criteria for admission to the program.

In all of these areas, the court is expected to rely upon the best evidence provided or reasonably available to the court. This imposes an obligation of quality control upon the court and acknowledges that there may be routinely available sentencing aids or evidence provided by a

sentencing commission or otherwise—but it does not remove the first obligation from the advocates, or impose upon the judge the duty to do research for the advocates.

Courts will undoubtedly be required to address issues concerning whether or when the nature of evidence offered on a sentencing issue invokes the foundational requirements of *Daubert v. Merrell Dow Pharmaceuticals*⁷⁶ and its progeny. In general, those cases require the court to act as a gatekeeper to screen the validity of any evidence dependent upon some “scientific” principle beyond the presumed expertise of juries—at least in a jury trial and when any evidence invokes the imprimatur of “science.” Undoubtedly, such a role is necessary and appropriate in any trial by jury of a sentencing enhancement fact. Some of the rationale for this screening function may be weakened when the court is the trier of fact, based upon the proposition that judges are more competently critical than juries of arguments and evidence labeled “scientific,” at least where the sentencing fact is not critical to the maximum available sentence and thus avoids the mandates of *Apprendi*, *Blakely*, and their progeny. This code does not purport to anticipate and resolve all such issues; it recognizes that the nature, specificity, and strength of available evidence—even of the best available evidence—may vary enormously among the sorts of issues relevant to informed sentencing reflected in this section. It encourages improvement in the quality of evidence available as it pertains to all of these issues.

This code has as its highest priority achieving sentencing that is evidence-based and effectively pursues public safety and promotes public values to the ultimate end of harm reduction; it confronts a sentencing culture in which sentencing is typically dependent upon myth, misinformation, wholly untested philosophical and ideological suppositions about what works for criminals, hubris, or simply punishment with no thought of any social purpose whatsoever. Without this code or equivalent existing law, sentencing facts outside the mandate of *Apprendi*, *Blakely*, and their progeny have no threshold of validity whatsoever.⁷⁷ It would be tragically counterproductive to lose sight of the issue of whether disputed evidence is an improvement as compared with what would otherwise determine a sentence. Risk assessment is a likely example; we must be vigilant in insisting upon the greatest accuracy that we can obtain, but we must also confront arguments that risk assessment cannot perfectly predict human behavior. The opponents of risk assessment assail its error rate, but they defend, at least with respect to modern risk assessment instruments, a sentencing basis which is far less accurate and far less fair, measured by the degree to which it allocates correctional resources effectively to prevent avoidable victimizations and useless punishment.⁷⁸ Within limits of

⁷⁶ 509 U.S. 579 (1993).

⁷⁷ See Williams, *supra* note 73.

⁷⁸ See Brian J. Strom, Matthew Kleiman, Fred Cheesman, II, Randall M. Hansen & Neal B. Kauder, *Offender Risk Assessment in Virginia: A Three-Stage Evaluation: Process of Sentencing Reform, Empirical Study of Diversion and Recidivism, Benefit-Cost Analysis* (The National Center for State

proportionality, it is not only fair to do our best to assess an offender's risk of committing future harm, it is imperative that we do so if we are to serve public safety responsibly.

Subsection 3(h) is intended to accommodate constitutional mandates applicable to sentencing enhancement facts under *Apprendi*, *Blakely*, and their progeny. The phrase "required to increase the severity of a sentence" incorporates both "upward departure facts" and facts under dangerous and recidivist offender schemes that increase the available sentencing otherwise available merely by the fact of conviction. This code accommodates but does not purport to resolve potential issues surrounding facts that raise the minimum sentence or determine the availability of consecutive sentences without raising the ceiling. The introductory qualification "[e]xcept as otherwise provided in this section, in other provisions of law, in decisions of appellate courts, or in recommendations of the sentencing commission" accommodates the circumstances in which such law or commission action governs the receipt or consideration of evidence. Note that depending upon a jurisdiction's approach and any specific statute a fact may determine the available presumptive sentence,⁷⁹ the ceiling of sentencing severity, the mode of sentencing, or a minimum sentence.

As in most matters subject to this code, appellate review and the properly directed and supported efforts of the sentencing commission should steadily improve the quality and availability of evidence supporting both sentencing arguments and decisions; both should raise thresholds of acceptability for various categories of evidence. This extends beyond the obvious need to assemble, make available to the process, and vastly improve the evidence about what works or what does not for certain offenders in order to reduce the risk they represent to the public. It even extends beyond much needed research about what short and intermediate terms of incarceration, under what conditions and with what programs and mechanisms for prisoner reintegration and post-release supervision, best work to manage the risk presented by which offenders—in light of the tendency for some to increase recidivism after incarceration. The need for information reaches issues such as the function of sentences in maintaining respect for the criminal justice system, and in promoting human dignity, compassion, empathy, and respect for the persons, property, and rights of others. Some research has been done in these areas,⁸⁰ along the lines of sophisticated public opinion studies, but social science can be far more useful to us if we actually build in a requirement to access social science research in making sentencing decisions.

A modest beginning to that end is a requirement that judges base sentencing analysis upon rationally considered information that is subject

Courts and the Virginia Criminal Sentencing Commission 2002), available at http://www.vcsc.state.va.us/risk_off_rpt.pdf; Va Code Ann. § 17.1-803(5), (6); *Post-Booker Sentencing Issues*, *supra* note 55.

⁷⁹ This can be, for example, by positioning a defendant in a guidelines grid based on the defendant's criminal history and the seriousness of the crime for which the court is sentencing the defendant.

⁸⁰ See authorities cited *supra* note 40.

to validation. The “best available evidence” clause is designed to subject that information to increasing levels of validation to the end that this process actually works to achieve its purposes, rather than masking dysfunction behind empty proclamations—however vehement.

As is also apparent from other sections, this proposed code balances the practical needs of high volume courts with the needs of the public for the functions sentencing should serve. The sentencing commission may choose to render sentencing components “presumptive” for a given category of offenders and crimes after finding that those components best accomplish those functions for the relevant category of offenders and offenses. The combination of provisions regarding burdens and nature of proof with the necessity of a statement of reasons is designed to allow the process to work at high volume while affording ample opportunities to correct misdirection and inject argument and analysis to further public purposes. This code is intended as a model; interested adopters may of course take a more aggressive approach toward achieving the intended improvements.

§ 3.1 Burdens of Persuasion

As to any fact prerequisite to an increase in the maximum severity of any available sentence, the state bears the burden of persuasion beyond a reasonable doubt. As to any other fact relevant to sentencing, the proponent of the fact bears the burden of persuasion by a preponderance of the evidence.

This subsection recognizes that any statutory scheme that imposes a limit on the severity of any sentence in the absence of specified facts or findings implicates the rationale of such cases as *Blakely*, and triggers the right to proof beyond a reasonable doubt as to such facts. The factual issue may be apparent within the charging instrument (such as schemes that vary the available sentence for a burglary depending upon whether the premises were occupied), or by the assertion of such sentencing factors as “extreme cruelty to the victim” (assuming that the factor is not merely advisory under a state’s guidelines). Proof beyond a reasonable doubt is also relevant to dangerous or recidivist offender schemes and, perhaps, depending upon the relevant statutory language, to consecutive sentences. This subsection accommodates any need for the reasonable doubt standard of proof. In all other cases, the burden of persuasion by a preponderance of evidence is allocated to the proponent of the fact in question.

“Burden of persuasion” is distinguished from burden of production because, particularly in sentencing, the court may properly receive evidence from sources other than the parties.

§ 3.2 Sufficiency of Evidence

The fact of conviction shall be sufficient evidence to sustain a sentence that is within the applicable presumptive sentencing range

and modalities unless the trial court's statement of reasons is inconsistent with the conclusion that a presumptive sentence best serves the interest of preventing the offender's future criminal conduct and the other purposes of sentencing. Any sentence that represents a departure from the presumptive sentencing range, or which represents a compromise of the purpose of reducing the offender's future criminal conduct in order to pursue some other sentencing objective, shall be based on the best evidence available to the court as prescribed by Section 3.

Unless the sentencing judge states to the contrary, a presumptive sentence is deemed responsibly to pursue sentencing purposes, including reducing the offender's recidivism. The phrase "applicable presumptive sentencing range and modalities" recognizes that a sentencing commission and/or legislation may define "presumptive" in terms that extend beyond units of punishment such as fines and incarceration to modalities such as alternatives, modes of supervision, and programs. A presumptive sentence needs no further evidentiary support than the fact of conviction, but if the judge's stated reasons indicate that the sentence does not pursue reduction in recidivism but instead pursues some other purpose, or if the sentence is not within the presumptive range, the sentence must be based on evidence properly relied upon by the court under the provisions of Section 3. Any sentence calling for findings of fact and conclusions of law under Section 5 must also be supported by such evidence. As provided in Section 3, unless otherwise provided by law, a court may accept the stipulation of the parties as to any fact related to sentencing.

§ 4 The Role of Juries

The defendant shall have the right to a jury trial as to any fact prerequisite to an enhancement in the maximum severity of the available sentence, and as to any fact related to sentencing as required by the constitution of the state or of the United States. As to any such sentencing enhancement fact:

- a. The defendant may waive the right to jury trial and submit to trial by the court or may admit the fact;**
- b. The state shall afford the defendant reasonable notice of the state's intent to establish the fact before trial on the issue of guilt;**
- c. All facts related to the offense and not admitted by the defendant shall be tried with the issue of guilt, except as provided in paragraph (e) of this section;**
- d. All facts related to the offender and not to the offense shall be tried after resolution of the issue of guilt;**
- e. On motion of the defendant, any fact related to the offense shall be tried with facts related to the offender if the court**

finds that trying that fact with the issue of guilt would unduly prejudice the defendant;

- f. As to any sentencing enhancement fact not admitted by the defendant,**
 - i. Except as provided in subparagraph (e) of this section, all facts related to the offense shall be decided by the jury along with the issue of guilt, unless the defendant waives the right to a jury trial on all such facts;**
 - ii. All facts related to the offender and any issue deferred under subparagraph (e) of this section shall be decided by the same jury that decides the issue of guilt, or a separately empaneled sentencing jury if the court finds good cause for empanelling a separate sentencing jury, in a separate sentencing hearing unless the defendant waives the right to a jury trial on all such facts.**
- g. A sentencing enhancement fact submitted to a jury shall be established only if the same number of jurors required to convict the defendant find that fact. If fewer than that number of jurors find that fact, the fact shall be deemed not established.**
- h. Unless otherwise provided by law, the fact that the jury or the court finds, or that the defendant admits, a sentence enhancement fact does not dictate that the court impose the enhanced sentence. The court shall decide what sentence to impose within the range of sentences lawfully available in accordance with the provisions of this code.**

This section provides for jury trial rights for purposes of upward departure sentences in enforceable guideline states, and as to any fact critical to an enhanced sentence in any state. This section adopts the same approach as embodied in the Reporter's revision. It is intended to accommodate any sentencing provision that may trigger the right to a jury trial, including dangerous or recidivist offender provisions and any consecutive sentencing scheme that may be subject to a jury trial right, a fact not implied by the facts necessarily established by the convictions alone (or the fact of a prior conviction, excepted by *Blakely*). This section is not intended to create jury trial rights, but to accommodate those rights where they arise from a state's provision for facts essential to enhancing a sentence.

This section anticipates that many defendants will waive *Blakely* rights, and requires that such election as to any fact in dispute be made with respect to all offense-related and offender-related facts. For these purposes, offense-related facts deferred to avoid prejudice under Subsection 4(e) are grouped with offender-related facts.

If the jury does not find the fact then it is not established. Additionally, there is no retrial of sentencing facts if the jury is unable to reach a verdict. The number of jurors necessary to find an enhancement fact is the same as that necessary to convict a defendant.

This section departs from the Oregon approach of requiring a defendant to waive the right to a jury trial on all sentence enhancement facts if the defendant waives jury on the issue of guilt. A defendant may have good reason for asking for a jury trial on an issue essential to dangerous or recidivist offender⁸¹ sentencing while preferring a bench trial on an issue of guilt involving a technical defense.

This section presumes, but does not require, that sentencing jurors will be the same jurors who decided the offender's guilt or innocence. Depending on the circumstances, it may make sense to empanel a separate jury for the two phases, such as when an appellate court remands for retrial only of sentencing issues.

Finally, this section departs from the Reporter's revision in that it does not express the preference that sentencing facts not be submitted to juries except as constitutionally required. Juries are fully capable of resolving issues of fact and competing expert opinions. The purpose of this section is to provide for situations in which the defendant has a right to a jury trial; it does not purport otherwise to restrict the issues which a state chooses to submit to juries. This section does, however, reserve for the judge the exercise of sentencing discretion not specifically delegated to juries by other provisions of law.

§ 5 The Role of Judges

Judges shall interpret, enforce, and administer laws affecting sentencing in light of the rights of the parties and the purposes of sentencing stated in this code. In the course of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges shall consider and invite advocates and participants to address the likely impact of the choices available to the judge in reducing future criminal conduct, and in otherwise pursuing public safety and public values. Judges shall seek and obtain training, education, and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct or otherwise achieving the purposes of sentencing.

⁸¹ For purposes of this code, "recidivist offender" sentencing schemes are those that trigger significant potential sentencing consequences by reason of an offender's previous criminal record beyond any consequence that may be built into a guideline or other sentencing statute that prescribes or advises a presumptive sentence based in part upon an offender's prior record. *Blakely v. Washington* recognized that the fact of a conviction need not trigger a jury trial right under a state's law, but it has become increasingly apparent that anything beyond the mere fact of a conviction—such as "persistent involvement" or "failure to benefit by previous supervision"—may well trigger a jury trial right and elevated standards of proof and burdens of persuasion. *E.g.*, *State v. Steele*, 134 P.3d 1054 (Or. Ct. App. 2006).

Considerations appropriate to the guilt phase of criminal proceedings are often quite different from those that should be operative at the sentencing or disposition phase of trial. This provision therefore directs judges to consider the purposes they are expected to pursue, the rights of the parties, and the type of evidence upon which they should rely. For example, only if fact finding not already accomplished at the guilt phase is a prerequisite to raising the maximum available sentence do criminal procedure rights, such as a jury trial and proof beyond a reasonable doubt, accompany the defendant to disposition.⁸² It is this code, and the efforts of appellate courts and the sentencing commission, which are the immediate source of rules regarding the sufficiency and necessity of evidence to support various sentencing considerations. The primacy of reducing recidivism is consistent with that established by Subsection 1.3.

Recognizing that judges do not inherently possess all of the information necessary for responsible performance of sentencing as contemplated by this code, this provision encourages them to obtain training and information, and to enlist and direct the efforts of other participants in sentencing so that it is evidence-based and furthers the public purposes that are to be pursued in sentencing.⁸³

§ 5.1 Analysis by the Sentencing Judge

A judge shall construct a sentence with legally and practically available components, within any limits required to maintain proportionality, and with appropriate consideration of risk and safety. A judge shall first determine what sentence is most likely to reduce the offender's subsequent criminal behavior, and shall then determine whether that sentence must be modified otherwise to pursue public safety or to promote public values. In all such respects, the judge shall employ the best available evidence.

This subsection prescribes a protocol for sentencing to be used by all participants, including the sentencing judge. The component considerations are mandated by this code, as is the requirement of evidence-based sentencing. This subsection stresses the priority of reducing future criminal behavior for the reasons explained in the commentary to Subsection 1.3.

The sentencing judge is directed first to consider whether a given sentence will prevent recidivism, and then to consider whether the given sentence requires some modification to further other purposes of sentencing. For example, considerations of general deterrence might require a corporate officer's crime of unlawful hazardous waste disposal to

⁸² *E.g.*, *Blakely v. Washington*, 542 U.S. 466 (2004).

⁸³ This language is similar to that adopted by resolution of the Oregon Judicial Conference. OR JUDICIAL CONFERENCE, SENTENCING POLICY RESOLUTION (1997), <http://ourworld.compuserve.com/homepages/SMMarcus/JCRESNO1.htm> (last visited Sept. 12, 2007).

result in a sentence of incarceration, even where the individual officer and corporation would be specifically deterred by a monetary fine. A child victim of sex abuse may have a therapeutic need for knowing that a severe sentence was imposed on the perpetrator, even when it was an “opportunistic” offense in which the particular offender poses no substantial risk of recidivism. The family of a victim of a social drinker’s deadly drunk driving incident may desire that the offender be given a substantial prison sentence to resolve and vindicate their loss, even if the offender will in fact never drink and drive again regardless of the sentence imposed.⁸⁴ The vast majority of sentences, however, will merit no such modification.

§ 5.2 Oversight of Plea Negotiation by the Sentencing Judge

Within limits established by law and regulation of judicial conduct, a sentencing judge may properly encourage negotiated resolution by parties to a criminal case, and may accept a sentence recommended as the result of such negotiation, provided the sentence is consistent with the purposes of sentencing declared by this code or the judge finds good cause for compromise of those purposes. The judge retains and may not delegate to the parties responsibility for assuring that sentences further the purposes of sentencing absent good cause and for assessing the existence and adequacy of cause for compromise of those purposes. Before accepting a sentence resulting from plea negotiation, the sentencing judge shall require that the parties state their understanding of whether or how the proposed sentence serves sentencing purposes, and their explanation for any compromise of those purposes. Any agreement restricting the ability of counsel to respond to such inquiries is void and unenforceable as contrary to public policy.

The majority of sentences are the product of plea negotiations in which a judge does not participate. This subsection does not displace existing law or rules limiting a judge’s participation in the process, but rather recognizes that judges may otherwise support the process, as is often justified by considerations of efficiency and practicality. This subsection declares the judge’s responsibility to ensure that plea bargains do not undermine the purposes of sentencing without good cause. Judges should query the participants concerning how the sentence serves the purposes of sentencing and the reasons for any compromise of those purposes. Telegraphing that issue back into the culture of plea negotiations creates profound potential for improving attention to public safety and other purposes.

Of course, both sides—particularly, but not exclusively, the defense—have issues other than the public purposes to be furthered by this code. Defense counsel properly defers to a client’s priorities as to the preferred

⁸⁴ See *supra* notes 37 and 38, and accompanying text.

outcome, but counsel also has the duty to exploit analysis aimed at sentencing purposes when that analysis promotes a result favored by the client. It is also surprisingly common that offenders will opt for a longer term or a higher level of supervision or custody because they have come to realize, with or without the input of counsel, that a longer sentence will more likely make effective treatment available to the offender.

Prosecutors traditionally aim at punishment for its own sake, but many also understand that the higher and more challenging calling is to serve public safety by preventing recidivism, and otherwise to accomplish more than mere punishment. But they, too, must consider other factors in plea negotiations. The parties may have good reasons to settle on something that is less likely to achieve public safety or to promote public values than would follow from a conviction after trial. The prosecution may choose the certainty of conviction in the face of a fragile or recalcitrant witness or a doubtful search and seizure, and the defendant may be relieved to escape a far less appealing outcome than that offered by compromise, but the judge's inquiry into purposes is still beneficial. Requiring a recital of how the sentence is intended to serve sentencing purposes does not require that all sentences optimally serve sentencing purposes. A judge may conclude that a compromise of a public purpose is entirely appropriate, for example, where there is a risk that a guilty and dangerous offender will be acquitted, and therefore that no public purpose related to sentencing will be served. It is important to note, however, that the judge cannot perform appropriate oversight without learning the basic reasons for the compromise.

Cooperation agreements are common in situations in which the offender is afforded some reduction in sentencing for assisting the state in prosecuting other offenders. Such agreements are a deeply entrenched and apparently necessary part of law enforcement. There are undoubtedly many common crimes that are essentially un-provable without some use of plea negotiations. Forcing the prosecution to leave courts out of the process by forgoing prosecution altogether may be a greater evil than accepting the pleas that result from such agreements. Involving the criminal justice system in the process, however, necessarily triggers some level of responsibility on the part of judges. Given that it is entirely appropriate for a judge to defer in large part to the judgment of law enforcement or prosecution professionals, there are many situations in which the prosecution has discretion which gives it great control over the alternatives. Therefore, it is essential that judges retain a meaningful oversight role. Responsible oversight requires information. Agreements to subvert oversight thwart the rule of law, undermine the purposes of sentencing, and should not be countenanced. When necessary to avoid increasing danger to a cooperating defendant or to law enforcement, a cooperation agreement and its justification in response to judicial inquiry can be kept from the public record.

Accordingly, in the majority of cases in which negotiated sentences are merely recommendations, the judge is free to vary the terms of the sentence when the judge finds a better balance of the purposes of sentencing with the

interests of the parties than that otherwise recommended by the parties.⁸⁵ Even where the judge has no discretion under an agreement in the nature of a plea “contract,” a judge always has the power to reject the agreement and return the parties to the trial docket.

§ 5.3 Findings by the Sentencing Judge

Whether or not the parties contest the sentence, a sentencing judge shall state in writing or orally on the record how the sentence imposed is intended to serve the purposes of sentencing. In addition, the sentencing judge shall state in writing or orally on the record the evidence upon which the sentence is based and the judge’s findings of fact and conclusions of law in any of the following circumstances:

- a. The sentence imposed is outside any applicable presumptive range established by law; or**
- b. The sentence imposed deviates from what the judge would impose solely to reduce the offender’s future criminal conduct within the limits of the law and available resources.**

This subsection balances the need for operational efficiency in high volume courts against the purpose of holding sentencing accountable for the responsible pursuit of sentencing purposes. In most sentencing occasions, this subsection does not require anything other than an oral or written statement on the record demonstrating how the sentence is intended to serve the purposes of sentencing. The requirement of some statement for all sentences is intended to encourage all participants to consider sentencing purposes when negotiating, debating, and imposing sentences. It should be noted that judges must still comply with this subsection even if they accept a sentence recommended by the parties.

⁸⁵ An example is provided by a recent sentencing in which the defendant, claiming at long last to have achieved some months of freedom from his drug addiction and persistent related convictions (drug and property), was assisted in his plea for what he deemed a “lenient” sentence by a drug enforcement officer who found him a particularly valuable “confidential reliable informant” through whom to catch drug dealers. The officer cared enough to come to sentencing and to argue for special leniency. I explained the tension between the officer’s needs for a productive informant and the defendant’s need to remove himself from the drug culture. The officer seemed to appreciate the tension. I gathered as much as I could about the offender’s recovery and criminogenic factors. I accepted the “deal,” heavily charged the sentence in the direction of treatment and supervision, and required as a (standard) condition of probation that the defendant has no contact with drug users or drug culture—expressly *not* excepting work with law enforcement. Regardless of the outcome, the inquiry is, I believe, required of a responsible sentencing judge. For the record, although it does not bear on the contentions made in this publication, I believe justice is best served by a protocol that advises defendants in advance that although the judge is not bound by the recommendation, the defendant will be permitted to withdraw the plea if the judge does anything different and worse than that recommended without the defendant’s consent. Except in two cases in seventeen years, the result has been the defendant’s concurrence in any modifications. The two exceptions resulted in conviction after trial and a sentence (in each case from another judge unaware of the rejected plea agreement) worse from the defendant’s point of view than what I had proposed.

There may be tension in mandatory minimum cases in which the judge does not believe sentencing purposes are best served by that mandatory minimum. On such occasions, a judge might simply explain, "I am constrained by law to impose at least seventy months; I defer to the legislative judgment that this serves the purposes of sentencing, and I believe no greater sentence is necessary to serve public safety or promote public values." The tension itself again serves some substantial purpose; a judge similarly serves a substantial purpose by stating the reasons that achieved or failed to achieve approval for sentence resulting from routine plea negotiations or an attempted cooperation agreement.

This subsection requires the judge to specify the evidence relied upon and to articulate appropriate findings of fact and conclusions of law (either orally or in writing) whenever the sentence either departs from any presumptive range established by law or deviates from a sentence derived solely for purposes of recidivism reduction. Since Section 3 permits, but does not require, the court to accept the stipulation of the parties to establish a fact, negotiated sentences that otherwise trigger Subsection 5.3(a) or (b) need not result in burdensome fact-finding. Requiring findings and vetting evidence furthers the purposes of this code both directly and indirectly, and facilitates appellate review. An appellate court is not to rely on evidence not previously relied upon by the trial court.

Applying these requirements to sentences that compromise recidivism reduction in pursuit of other sentencing objectives serves the purposes of this code through additional strategies. By imposing the burden of stating findings and conclusions on the record when a judge deviates from recidivism reduction, this subsection reinforces the notion that there must be an evidence-based reason for such a deviation. Moreover, in those cases in which an appeal is plausible for either side, even from a presumptive sentence in which this subsection requires only a statement of reasoning, the absence of findings will lead the appellate court to presume that recidivism reduction was the defining purpose, although not necessarily the only purpose, of the sentence. That presumption will facilitate analysis of the stated reasons for the sentence and of any contentions concerning the other bases of review.⁸⁶

Through a variety of paths this code would afford appellate courts more opportunities to evolve an effective common law of sentencing than if presumptive sentences were more broadly immunized from review.

This subsection does not prohibit findings and conclusions when a judge imposes a presumptive sentence.

§ 6 The Role of Victims of Crime

Sentences that pursue public safety and promote public values appropriately respond to the interests of victims. Accordingly:

⁸⁶ See discussion *infra* § 11.

- a. **Victims shall be afforded notice and an opportunity to be heard concerning the appropriate sentence and to submit a statement and evidence at sentencing hearings;**
- b. **In fashioning an appropriate sentence, the court shall give due consideration to the victim's interests, including without limitation, any interest in:**
 - i. **A sentence that appropriately reflects the offender's violation and the harm threatened or caused to the victim;**
 - ii. **Restitution for any economic loss;**
 - iii. **Any therapeutic impact the sentence may have.**

Because preventing future victimization is a major purpose of sentencing, the judge shall not, in responding to the interests of any victims of the defendant's crime, deviate from the sentence the court would impose primarily to reduce the offender's future criminal conduct without first finding, based on the best available evidence, research, and data, that:

- a. **The victim's interests cannot be adequately met by a sentence that also represents best efforts at reducing the offender's future criminal conduct; and**
- b. **The resulting sentence is consistent with the sentencing purposes set forth in Section 1 of this code.**

As set forth in Subsections 1.1 and 1.2, responding to the needs of victims is a means by which sentencing pursues public safety and promotes public values. Victims should be afforded the right to participate and be considered in sentencing, but they cannot ultimately make a sentencing decision. By way of example, a domestic violence victim in denial should not be permitted to prevent a sentence adequate to respond to the risk represented by a persistent violent offender. Likewise, an outraged victim of theft who demands a sentence crafted for punitive purposes alone should not be allowed to determine the ultimate sentence for the offender. The court should not place an immediate victim's often inflated expectations of receiving restitution above any available and appropriate means for preventing future victimizations; it is not unheard of for an offender to pay restitution to one victim by stealing from new victims.

Particularly with heinous crimes, and with crimes that do great harm or offend extremely vulnerable victims, the court should endeavor to respond to the victim's need for recognition of the significant harm inflicted. In less serious cases, however, restorative justice may best respond to the victim's needs, in which case the victim's informed input and choice may be crucial. The court should also consider restitution and the therapeutic interest the victim may have in the resulting sentence, but should rely upon evidence rather than assumption in all such tasks.

As further articulated in Subsections 1.3 and 1.4, the court should not deviate from the objective of reducing future criminal conduct to serve the interests of victims, or any other purpose of sentencing, without an evidence-based determination that the deviation is both necessary and reasonably likely to succeed. Of course, if a sentence can be modified to serve the needs of victims without substantially compromising the likelihood of reducing the offender's recidivism, such a modification is appropriate.

§ 7 The Role of Prosecuting Attorneys

Prosecuting attorneys represent the public in criminal proceedings, and are therefore charged with pursuing public safety and public values. Accordingly, unless otherwise required by law, and within the limits of applicable ethical rules:

- a. **Prosecuting attorneys who negotiate, propose, and advocate for sentences shall pursue the purposes of sentencing set forth in Section 1 of this code.**
- b. **As relevant to sentencing choices they negotiate, propose, or advocate, and within limits of practicality and standards of sufficiency consistent with their ethical obligations and official duties, prosecutors shall obtain the following information:**
 - i. **The offender's criminal history, including performance under supervision and in any alternative sanctions or programs in or out of custody;**
 - ii. **Any credit for time served, wants, holds, or other pending proceedings that may affect the availability to the offender of any period of incarceration, program, or alternative sanction;**
 - iii. **The existence and nature of any program in or out of custody, any alternative sanction, and any condition or mode of supervision that may be considered as a sentencing component or recommendation, and the actual likelihood that the offender would in fact participate in and benefit from such program, alternative component, or recommendation;**
 - iv. **The best evidence on how the expected length of any incarceration in combination with any likely impact of incarceration on post-incarceration recidivism would affect the total future criminal behavior of the offender; and**
 - v. **The interests of any victims as relevant to sentencing considerations under Section 6 of this code.**
- c. **In proceedings in which they appear as counsel,**

prosecuting attorneys shall advocate for the implementation of this code, and for reliance upon best available evidence in sentencing decisions.

- d. When so requested or permitted, prosecuting attorneys may assist courts in establishing procedures, dockets, and strategies by which to implement this code and to pursue the purposes set forth in Section 1 of this code.**
- e. As permitted or required by law, prosecuting attorneys shall assist victims in representing their interests in sentencing as provided in Sections 3 and 6 of this code.**

There is no more direct role for asserting the public interest in sentencing than that of the prosecutor. The defense is primarily responsible to the defendant's wishes. The judge's duties are two-fold—to pursue public safety and public values, while being mindful not to displace the duty to consider a defendant's arguments for limitation of sentencing based on issues of law or proportionality. The prosecutor's loyalties are more united—to pursue public safety and public values and, as necessary to that pursuit, to rebut defense arguments for limitation based on issues of law or proportionality.

Just as sentencing will fail to serve public safety or public values if it is held to no greater performance standard than achieving proportional severity, prosecutors who seek nothing other than just deserts subvert the pursuit of public safety and public values. Just as sentencing judges may not properly invoke just deserts to avoid accountability for public safety outcomes, prosecutors bear responsibility for evidence-based pursuit of public safety and public values.

Section 7(b) charges the prosecutor with responsibility for the same level of competent preparation in addressing sentencing issues as is required for preparation on the trial of issues of guilt. Prosecutors commonly amass criminal history information to negotiate and argue sentencing under existing practices. This section reflects that competent pursuit of public safety in sentencing cannot occur without practical information about the history of the offender, credit for time served, or immigration or other holds from other cases or jurisdictions. If the purpose of a negotiated or proposed sentence is to protect a victim of domestic violence, surely the prosecutor ought to know if credit for time served will result in the offender's immediate or proximate release after imposition of a proposed sentence. Similarly, if the defense is urging a sentence based on the notion that it will enable the offender to return to employment or treatment that is beneficial, surely the prosecutor ought to know of any wants, warrants, or holds that make the proposed scenario unavailable.

Information as to the availability and efficacy of any alternative, program, form of supervision, or any custodial treatment, counseling, or prisoner reintegration, is obviously relevant to any responsible evidence-

based pursuit of public safety when any of these dispositions is potentially in play, but the pursuit cannot be rational unless that information is both accurate and available to the court. It is simply irresponsible to argue for half an hour in a sentencing hearing about whether a defendant ought to be afforded or denied eligibility for an alternative incarceration program, or be released to an inpatient treatment program, without knowing whether either of those programs would be available to the offender regardless of the court's decision. Although prosecutors may argue these topics are exclusively the responsibility of the defense, they would be wrong. First, the prosecutor's choices and competence are relevant to the prosecutor's impact on the resulting sentence, and that sentence either will or will not best serve to promote public safety or public values—particularly in respect to whether it prevents future criminal conduct by the offender. Second, the prosecutor cannot competently or ethically fulfill the duties of advocate for the state without this sort of information, if those duties embrace pursuit of public safety and public values. Third, the prosecutor cannot perform the role of quality-assurance intrinsic to the adversary system if the prosecutor is not equipped to evaluate and, when appropriate, to challenge the assertions of the defense as to the availability and efficacy of programs and alternatives.

Prosecutors may argue that maintaining competence in such a wide range of information is impractical in view of their heavy caseloads. It may be that a prosecutor who spends time on major crimes may not need to know about programs and forms of supervision generally unavailable to such offenders upon conviction, and those who handle only misdemeanors need not stay current on what is or is not available in prison. It may be practical within a larger office to rely on attorney or paralegal specialists who stay current on programs, alternatives, effectiveness, and availability. Additionally, depending on the type and number of cases a prosecutor handles, it may make sense to schedule some sentencing-related research before plea negotiations and to reserve the rest for after trial in the event of a conviction. Beyond such examples, however, the press of business affords no greater excuse in these endeavors than it does for trial preparation—in which the tension is no less real. This code would apply the same test to sentencing as to trial: whether any compromise between press of business and preparation adequate for competent performance meets “standards of sufficiency consistent with . . . ethical obligations and official duties.” That test recognizes that prosecutors have ethical duties as members of the bar, and they are also charged with public duties as part of the official office they serve.

Our present information about the efficacy of programs is far from perfect. We have barely scratched the surface in regards to learning how incapacitation and post-prison recidivism compete for public safety with different terms and conditions of incarceration for different cohorts of offenders.⁸⁷ Responsible sentencing, however, requires that we accept the

⁸⁷ See authorities cited *supra* note 46, and accompanying text.

challenge of improving our knowledge, and this code contemplates that the efforts of sentencing commissions under Subsection 12.1 will increase the availability of such information in the sentencing process. Those efforts will be of little value unless they are exploited by advocates as well as by judges.

Just as the prosecutor is charged with pursuing the correct interpretation and implementation of criminal law in criminal proceedings, the prosecutor is also charged with advocating for implementation of this sentencing code. This section recognizes that ethical obligations and laws apart from this code may limit a prosecutor's pursuit of public safety or public values in a particular case. Substantive and procedural provisions of applicable law, including laws governing the collection and presentation of evidence against an accused, and laws and ethical rules demanding disclosure of exculpatory evidence to the defense may prevent a conviction or require negotiating a lesser charge or sentence than public safety might otherwise demand. Similarly, risks to the success of a prosecution related to the availability or enthusiasm of witnesses, or the need to trade concessions to one defendant for assistance in prosecuting another, are part of a prosecutor's day-to-day reality. This section contemplates that prosecutors will assess such choices, within the bounds of law and ethical restrictions, in light of the ultimate goals of public safety and public values. Just as forgoing a prosecution altogether against one offender may be justified by the need to convict another offender who represents the greater risk to public safety, so can compromising a sentence—accepting a shorter jail or prison sentence, or placing a risky reliance on treatment—for one offender be consistent with a prosecutor's responsibilities if necessary to secure that offender's cooperation in convicting a more dangerous offender.

The purpose of this provision, however, is to make the guiding principle not administrative efficiency assessed by numbers of convictions per attorney per month, or numbers of jail months or years imposed, but the meaningful pursuit of the purposes of the enterprise of prosecution—public safety and public values.

In the same vein, courts frequently involve the prosecution as well as defense counsel in efforts to design procedures, dockets, and strategies for doing the work of criminal justice. Typically, these efforts capitalize on shared interests in efficiency—measured by processing cases as quickly and with as few resources as reasonably possible. Although such efficiencies are rightfully to be pursued, this section reflects the reality that unless they serve public safety and public values, means of speeding up the process do not improve safety or public values—and they do not even ultimately reduce workloads for courts, counsel, or law enforcement officials. Rather, without the meaningful metric of public safety and public values, mechanisms that speed up the process of criminal justice merely increase the frequency with which an individual offender becomes a subject of the process. This section directs the efforts of prosecutors in such undertakings towards the ends of public safety and public values.

Prosecutors do not represent victims, but have responsibilities to assist victims, to seek enforcement of victims' rights of participation, and to articulate the interests of victims to the court as provided in Sections 3 and 6.

§ 8 The Role of Defense Attorneys

Defense attorneys represent defendants in proceedings, and are therefore charged with loyalty to clients within the limits of applicable ethical rules. To properly serve the interests of their clients, however, defense attorneys should be equipped to recognize and invoke, in pursuit of a defendant's legitimate objectives, any means by which considerations of public safety or public values support the client's objectives. Accordingly,

- a. **Defense attorneys who negotiate, propose, and advocate for sentences shall be cognizant of the purposes of sentencing set forth in Section 1 of this code.**
- b. **As relevant to sentencing choices they negotiate, propose, or advocate, and within limits of practicality and standards of sufficiency consistent with their ethical obligations, defense attorneys shall obtain the following information:**
 - i. **The offender's criminal history, including performance under supervision and in any alternative sanctions or programs in or out of custody;**
 - ii. **Any credit for time served, wants, holds, or other pending proceedings that may affect the availability to the offender of any period of incarceration, program, or alternative sanction;**
 - iii. **The existence and nature of any program in or out of custody, any alternative sanction, and any condition or mode of supervision that may be considered as a sentencing component or recommendation, and the actual likelihood that the offender would in fact participate in and benefit from such program, alternative component, or recommendation;**
 - iv. **The best evidence regarding how the expected length of any incarceration in combination with any likely impact of incarceration on post-incarceration recidivism would affect the future criminal behavior of the offender; and**
 - v. **The interests of any victims as relevant to sentencing considerations under Section 6 of this code.**
- c. **Defense attorneys shall employ such information as described in Section 8(b) as appropriate to advocate for a disposition desired by the client or to advocate against a**

disposition the client disfavors.

- d. When so requested or permitted, defense attorneys may assist courts in establishing procedures, dockets, and strategies by which to implement this code and to pursue the purposes set forth in Section 1 of this code.**

Defense attorneys are obligated to serve the wishes of their clients. They have no duty to the public except duties owed as members of the bar. Thus, defense counsel vary in their styles as to whether they see it as part of their job to attempt to counsel a client toward effective rehabilitation, treatment, or other services—whether actually to address a client’s criminogenic circumstances or merely to impress a prosecutor for purposes of negotiation or a judge for purposes of sentencing. Where treatment courts or other programs exist, it is the responsibility of defense counsel with potentially eligible clients to be in a position to discuss knowledgeably with clients how the program may or may not work.

A defense attorney who does not pursue a potentially meritorious avenue of defense or challenge to the admission of evidence⁸⁸ may be providing ineffective assistance of counsel and violating ethical duties to the client. The same is true of an attorney who does not seek or possess the requisite information with which to negotiate a favorable plea or argue for a favorable sentence—including the sort of information covered by Section 8(b). Even if there is no occasion for supporting an outcome a client desires, familiarity with that information may be a prerequisite to competent response to a prosecutor’s argument in favor of a sentence. For example, a prosecutor may try to persuade a judge wavering between prison and probation that prison will provide the offender’s best hope of treatment; a defense attorney whose client prefers probation should be prepared to argue—if it is true—that the defendant cannot qualify for that treatment in prison within the available prison term and given the resources of the prison, or because the defendant is ineligible by reason of a local hold. Obviously, the defense attorney should also be armed with any evidence which demonstrates that an available community-based treatment program has a good track record for reducing recidivism for cohorts similar to the client.

Although the defense attorney is not charged with pursuing the interests of victims and will frequently serve a client by attempting to dispute causation or damage or minimize the amount of restitution, the attorney cannot be properly prepared to represent the defendant without being familiar with the interests of any victim(s) in the case. Apart from merely being prepared to dispute restitution, a defense attorney who considers the interests of any victims may be able to formulate an argument for choosing community-based dispositions that allow the offender to keep

⁸⁸ Attorneys need not prepare every conceivable defense for all cases. For example, a client may make a knowing choice whether to pursue a plea bargain in spite of defenses the attorney lists, and may for any number of reasons spare defense counsel the obligation even to make any defense at all.

working to pay restitution, or for restorative dispositions that may be preferred and beneficial to both the victim and offender.

Although the defense bar in many communities is becoming increasingly familiar with alternatives, programs, and the realities of prison, some defense attorneys will make an argument similar to that raised by many prosecutors—that the stress created by their heavy caseloads impede them from acquiring and maintaining the requisite information, or that this task belongs to the probation or corrections department and not to them. As with prosecutors, a defense attorney's specialization may narrow the scope of information with which the attorney may be conversant, and it may be practical within a larger office to rely on attorney or paralegal specialists who stay current on programs, alternatives, effectiveness, and availability. Depending on the type and number of cases a defense attorney handles, it may make sense to schedule some sentencing-related research before plea negotiations and to reserve the rest for after trial in the event of a conviction. Beyond such examples, however, the complaint that heavy caseloads prohibit defense attorneys from compiling information listed in Section 8 rings hollow, especially in light of the fact that such information is often needed for trial preparation. As with prosecutors, the test is the same for trial, plea negotiation, and sentencing proceedings—whether any compromise between the stress of a heavy caseload and preparation adequate for competent performance meets “standards of sufficiency consistent with ethical obligations.” The only difference is that the defense attorney has no duties distinct from those that attach to all members of the bar.

Defense attorneys, like prosecutors, may be asked or permitted to assist courts in efforts to design procedures, dockets, and strategies for doing the work of criminal justice. Typically, these efforts capitalize on shared interests in efficiency—measured by processing cases as quickly and with as few resources as reasonably possible. Just as prosecutors will be looking for advantages as well as efficiencies from their perspective, so will the defense attorneys; each is typically vigilant in protecting against an unwarranted advantage being awarded to the other side. Defense attorneys tend to be supportive of dockets, procedures, and specialty courts that they consider offer some clients a more acceptable outcome by sentencing offenders to programs designed to prevent future crimes related to addiction, anger control, mental health, or compulsion. Defense attorneys may properly assist in promoting such responses to categories of crime and offenders, and may invoke available evidence to persuade the courts, any funding sources, and prosecutors as to the desirability of such efforts.

The risk in all such endeavors is that the ultimate winner is administrative convenience rather than the public missions of courts, prosecutors, or even defendants. This code is committed to the furtherance of public safety and values through sentencing, and relies upon the collection of the best available evidence as support for sentences which serve the purposes of sentencing under this code.

§ 9 The Role of Probation Officers

Probation officers shall supervise and direct offenders on probation, report violations of the terms of probation to the court, and advise and advocate to the court the best means of reducing the offender's future criminal conduct. To this end, probation officers shall:

- a. Employ the best available data, research, and assessment instruments by which to assess an offender's needs, risks, and susceptibility to reformation;**
- b. Employ the best available data and research by which to determine which correctional devices work best for which offenders to reduce their future criminal conduct;**
- c. Maintain information concerning:**
 - i. The offender's criminal history, including performance under supervision and in any alternative sanctions or programs in or out of custody;**
 - ii. Any credit for time served, wants, holds, or other pending proceedings that may affect the availability of any period of incarceration, program or alternative sanction to the offender;**
 - iii. The existence and nature of any program in or out of custody, any alternative sanction, and any condition or mode of supervision that may be considered as a modified term of probation or, in the event of revocation, as a sentencing component or recommendation, and the actual likelihood that the offender would in fact participate in and benefit from such program, alternative component, or recommendation;**
 - iv. The best evidence regarding how the expected length of any incarceration in combination with any likely impact of incarceration on post-incarceration recidivism would affect the total future criminal behavior of the offender; and**
 - v. The interests of any victims as relevant to sentencing considerations under Section 6 of this code.**

In most jurisdictions, sentencing occurs at least as frequently as a result of probation violations as it does as a result of convictions following a plea or trial. A judge's discretion upon finding a violation of probation is usually unhampered by any plea agreement. Any sentencing law should therefore adequately address the role of probation officers.

Most probation officers are far more conversant with the literature and science of criminology and corrections than are lawyers and judges, and yet

under current sentencing practice rarely are they permitted to share any of their expertise with the court. This subsection reflects a reform implemented in Multnomah County (Portland, Oregon) to exploit the expertise of probation officers to improve dispositions in probation violation hearings.⁸⁹ In essence, this section demonstrates that just deserts can no longer be the sole rationale driving sentencing decisions. This section makes it clear that we want probation officers to share with us risk and needs assessments regarding offenders and knowledge of relevant literature whenever the officer communicates with us about a defendant's performance on probation. Thus, a violation report should summarize both the risk factors and performance of the probationer, and recommend a sentencing disposition based upon the best evidence of what action will most likely reduce recidivism. In doing so, the probation officer should consider the actual availability of dispositions to the offender in question. When a hearing is held to determine whether the defendant is in violation of probation, upon a finding of violation, the probation officer is expected to update this analysis and to assume the role of expert in advocating for a disposition that is most likely to reduce the offender's future criminal conduct.

§ 10 The Role of Pre-Sentence Investigations

Pre-sentence investigations, when available, shall gather and present to the court all evidence concerning the offender and the offense, and legally and practically available dispositions, to assist the court in fashioning a sentence that is most likely to reduce the offender's future criminal conduct and serve the purposes of sentencing. To this end, pre-sentence report writers shall:

- a. Gather evidence concerning the offender's background, including family history, mental and physical health, employment history, criminal history, previous experience with correctional sanctions and treatment, any pending charges or terms of supervision, and present needs and criminogenic factors;**
- b. Gather evidence concerning the interests of any victim of the offender's crime;**
- c. Employ the best available data, research, and assessment instruments by which to assess an offender's needs, risks, and susceptibility to reformation;**
- d. Employ the best available data and research to determine which correctional devices work best on which offenders to reduce their future criminal conduct;**
- e. Maintain information concerning:**

⁸⁹ *Sentencing Support Tools*, *supra* note 67.

- i. The offender's criminal history, including performance under supervision and in any alternative sanctions or programs in or out of custody;**
 - ii. Any credit for time served, wants, holds, or other pending proceedings that may affect the availability of any period of incarceration, program, or alternative sanction to the offender;**
 - iii. The existence and nature of any program in or out of custody, any alternative sanction, and any condition or mode of supervision that may be considered as a sentencing component or recommendation, and the actual likelihood that the offender would in fact be able to participate in and benefit from such program, alternative component, or recommendation; and**
 - iv. The best evidence regarding how the expected length of any incarceration in combination with any likely impact of incarceration on post-incarceration recidivism would affect the future criminal behavior of the offender.**
- f. Provide to the court an analysis of what disposition is most likely to reduce the offender's future criminal conduct and why, and if that disposition includes a program, an assessment of the actual availability of the program to the offender, and if it is available in or out of custody; and**
- g. If any purpose of sentencing is not adequately served by a sentence that is most likely to reduce the offender's criminal conduct, recommend whether and how that sentence should be modified to pursue such other purposes, and indicate what research or data supports the need for and likely success of any such modification.**

The writers of pre-sentence reports have traditionally collected background information about the crime and the offender, but usually either fail to make any recommendation about the sentence or they make a recommendation based primarily on the rationale of just deserts and avoid any attempt at analyzing the collected information in light of available data and research to recommend a sentence that is most likely to reduce recidivism. Multnomah County has found success in adding a box to the form by which judges order a pre-sentence investigation report that requests the information described in Section 7(f), and the Oregon Legislature has recently required all pre-sentence investigations in Oregon to include that information.⁹⁰

⁹⁰ ORS 144.791, as amended by 2005 Or. Laws ch. 473 (2007 OR. SB 914).

As with probation officers, pre-sentence report writers are routinely trained in compiling research, data, and utilizing instruments of the criminology and corrections communities. Any rational sentencing law would attempt to exploit that training by mandating that it be a component of pre-sentence investigations. This draft does not state what types of cases should employ pre-sentence investigations.

§ 11 The Role of Appellate Review

Appellate review of sentences exists to ensure that sentencing decisions pursue the purposes stated in Section 1. To this end, appellate courts shall:

- a. Enforce and interpret the provisions of this code and other laws relating to sentencing to promote public safety and public values;**
- b. Establish and evolve thresholds for reliance upon evidence which sentencing decisions are based on under Section 3;**
- c. Establish and evolve thresholds for what constitutes “best available data, research, and assessment instruments” within the meaning of this code with respect to the various methods by which courts pursue sentencing purposes; and**
- d. Assess the adequacy of findings, conclusions, and reasoning by sentencing judges in rendering sentencing decisions as contemplated by Section 5.**

This section recognizes that appellate review is a critical mechanism both for promoting compliance with sentencing laws and for improving the evidentiary and analytical bases of sentencing. This section also recognizes that thresholds for reliance on evidence will vary with the sentencing objectives in question, but also contemplates that those thresholds will evolve as sentencing culture becomes more evidence-based, and the research, corrections, and criminology communities respond to the anticipated demand for improved data about what works (and when) to achieve which sentencing objectives. Subsequent subsections describe the means by which appellate review promotes the pursuit of sentencing objectives.

§ 11.1 Review of Sentencing Decisions

The defendant and the state may appeal from a judgment imposing a sentence on any basis that could result in reversal or modification of a sentence under this subsection. The appellate court shall reverse or modify a sentence if the trial court committed error:

- a. By imposing a sentence that is inconsistent with this code or otherwise contrary to law;**

- b. By failing to follow procedures applicable to sentencing under this code or any other provision of law;**
- c. By imposing a sentence without stating reasons or making findings of fact and conclusions of law as required by Section 5 of this code;**
- d. By relying on findings of fact not supported by evidence as required by Section 3 of this code;**
- e. By imposing a sentence that is not rationally supported by the trial court's reasons or findings of fact and conclusions of law; or**
- f. By failing to find a fact proposed by a party and compelled by the evidence in the record, if that fact could reasonably affect the sentence in light of any reasons, findings, or conclusions that withstand review.**

This subsection is intended to provide review sufficient to enforce the provisions of this code. It also contemplates a steady increase in the extent to which sentencing decisions are based upon the best available evidence and effectively pursue public safety and the other purposes of sentencing.

The distinction between sentences “contrary to law” and those “inconsistent with this code” is that the former are those not available as a matter of law regardless of the sentencing purposes, and the latter are those that are lawfully available except to the extent that they conflict with provisions of this code. For example, a five year sentence is “not authorized by law” when the maximum sentence authorized for the crime in question is three years. A maximum sentence that is otherwise lawful, but is imposed on an offender with minimal culpability as assessed under Subsection 1.5, and who has no prior offenses and presents no other reason for imposing a harsh sentence under this code, is “inconsistent with this code,” pursuant to Subsection 1.2.

Sentencing procedures contemplated by Subsection 11.1(b) include the protocol prescribed by Subsections 1.3 and 5.1 as well as any other provision related to sentencing procedure, such as Section 4.

Subsection 11.1(c) is intended to enforce the requirement of stating reasons or findings and conclusions as prescribed by Section 5. Subsections 11.1(d) and (e) invite the appellate court to determine both whether the evidence relied upon by the trial court was properly relied upon as the best available evidence as provided in Section 3, and whether it was sufficiently rational to support the sentencing disposition. This standard is intended to subject the evidentiary basis of findings to a “substantial evidence” test only after it passes the requirements that it be “sufficiently reliable to warrant its use in sentencing” when so required by Section 3, and, in all cases, that it be the best evidence available to the court in light of what the parties presented, what was reasonably accessible to the judge, and evolving standards of tolerance for evidence supporting the various

objectives of sentencing. The appellate court also has a role in scrutinizing the rationality of a trial court's reasoning in arriving at a sentence from the evidence in the record.

Subsection 11.1(f) contemplates that a party may assert a fact potentially significant to sentencing and may prove that fact to the extent that the evidence compels that the fact be found. If that fact could affect sentencing in light of any reasons, findings, or conclusions that withstand review, a trial court's failure to find the fact may result in a reversal on appeal.

§ 11.2 Scope of Review

The appellate court shall review de novo any issue of law, including an issue regarding the meaning of any provision of this code. The appellate court shall review issues of fact for substantial evidence in the record, except that it shall exclude any evidence that is insufficiently reliable or is not the best available evidence, pursuant to Section 3.

This subsection modifies the typical distinction between de novo review on questions of law and substantial evidence review on questions of fact to ensure that the appellate court plays an adequate role in the evolution of thresholds for the use of information in the analysis of various sentencing objectives as explained in Section 3. As compared with some proposals,⁹¹ this code does not skew standards of review to favor light sentences. Instead, this code promotes evidence-based sentences in responsible pursuit of public safety and public values, as stated in Section 1 and as guided by the protocol established in Subsections 1.3 and 5.1. A proper implementation of sub-constitutional limits of proportionality, and the express rejection of sentences that either punish without some evidentiary basis requiring such punishment or fail responsibly to seek crime reduction, should accomplish the objective of avoiding punitivism without risking unnecessary opposition to the proposed code because of perceptions of unwarranted leniency.

Review for "substantial evidence in the record" defers to trial court fact finding on disputed questions of fact as long as the evidence, properly admitted and relied upon under the provisions of this code, is sufficient to support the fact finding. The net result is that appellate courts are to defer to the trial court's sentencing result as long as the trial court has complied with the provisions of this code, including any applicable requirements for reasoning, findings, and conclusions under Subsections 5.1–5.3, found facts

⁹¹ One unpublished version shared by Ohio Senior Judge Burt Griffon, for example, would have appellate courts defer to trial court discretion whenever a court selected a non-prison sanction, and require a substantial showing on appeal to sustain any sentence over ten years. *See generally* Griffon & Katz, *supra* note 50. Whether either is reasonably appropriate in pursuit of legitimate social purposes depends upon far more variables than severity alone, and there is nothing to be achieved by promoting evidence based practices by an approach that takes sides in the severity debate *before* vetting the evidence.

based on substantial evidence, and reached a result that is permitted under this code and applicable law and which is rational in light of any findings and reasoning recited by the trial court.

§ 11.3 Reversal, Remand, and Modification

As to any judgment imposing a sentence that must be reversed or modified pursuant to Section 11, the appellate court shall remand the case to the trial court for re-sentencing consistent with the opinion or directions of the appellate court, unless the appropriate sentence is necessarily determined by the appellate court's analysis, in which case the appellate court shall modify the sentence without a remand. In either case, the appellate court shall either cause its opinion to be published or delivered to the sentencing judge and to the parties.

If the appellate court remands a case for re-sentencing, it may in its discretion suspend all or any portion of the sentence pending re-sentencing or otherwise determine whether the defendant shall be released from any custody pending re-sentencing.

In most cases of reversal, the appellate court will remand for re-sentencing. Where the appropriate sentence follows as a matter of law from the appellate court's analysis, modification rather than remand is appropriate. In either case the appellate court's analysis shall be provided to the sentencing judge and counsel to inform the parties involved, and to educate the trial bench and members of the bar.

The last sentence of this section recognizes that an appellate court may be convinced that justice requires that a previously sentenced offender be relieved of all or part of a sentence, or potentially released from jail or prison, pending re-sentencing. However, if the defendant is serving a sentence that is not precluded regardless of the trial court's findings and decisions on remand, the defendant shall continue to serve that sentence pending re-sentencing.

§ 12 The Role of the Sentencing Commission

The sentencing commission exists primarily to recommend to the legislative authority and to sentencing judges strategies and policies for ensuring that sentencing serves the purposes prescribed by Section 1. The sentencing commission also shall monitor, and report to the legislative, judicial, and executive departments the performance of the criminal justice and correctional systems measured in light of those purposes and the allocation and utilization of criminal justice and correctional resources.

This section addresses the primary flaw in laws and proposals that prescribe the mission of sentencing commissions. Instead of directing such commissions primarily to the tasks of monitoring the flow of cases and offenders for purely managerial purposes such as alerting managers and policy-makers to prison capacity issues and available prison resources, this section directs sentencing commissions primarily to the task of pursuing strategies which ensure that sentencing actually fulfills its intended purposes—to provide public safety and to promote public values. Sentencing commissions should attend to administrative matters as a secondary priority.

Reports should frequently be submitted to all three branches of government. Reports and recommendations concerning sentencing law appropriately go to the legislature; reports concerning correctional budgets appropriately go to the executive branch; and reports concerning judicial procedures and resources appropriately go to the judicial branch. All reports should be freely available to all branches and to the public.

§ 12.1 Functions of the Sentencing Commission

The sentencing commission shall

- a. Conduct research, collect and assess data and research, and disseminate to sentencing judges and to policy-makers such research and data, concerning:**
 - i. Which dispositions and correctional modalities best reduce recidivism for which offenders and offenses;**
 - ii. Which terms and conditions of incarceration, prisoner reintegration, and supervision best reduce recidivism for which offenders and offenses;**
 - iii. Which instruments best assess risk and susceptibility to reformation of which offenders;**
 - iv. Under what circumstances and for what crimes sanctions serve the purposes of general deterrence, and whether and when any interests in general deterrence are consistent with or require adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;**
 - v. Under what circumstances and for what crimes sanctions promote public trust and confidence in the criminal justice system, and whether and when promoting public trust and confidence is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;**
 - vi. Under what circumstances and for what crimes sanctions promote human dignity, compassion, and**

- respect for the persons, property, and rights of others, and whether and when promoting such values is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct;**
- vii. Under what circumstances and for what crimes sanctions prevent private retaliation and vigilantism, and whether and when preventing private retaliation and vigilantism is consistent with or requires adjustment of dispositions that are most likely to reduce a sentenced offender's future criminal conduct; and**
 - viii. The nature, reliability, and validity of evidence and data relevant to Subsection 12.1(a)(i)–(viii).**
- b. Recommend to the legislative authority the creation or modification of presumptive ranges and modalities of sentence for categories of crimes and offenders;**
 - c. Recommend to the legislative authority the modification of maximum sentences for categories of crimes and offenders;**
 - d. Recommend to the legislative and executive authority changes in the utilization and allocation of correctional resources;**
 - e. Recommend to the legislative and judicial branches the adoption of strategies to further the purposes of sentencing prescribed by Section 1;**
 - f. Collect, interpret, and report to the legislature, the judicial department, and the executive branch data concerning:**
 - i. Sentencing patterns;**
 - ii. The allocation and utilization of correctional and criminal justice resources;**
 - iii. The nature and efficiency of the processes and procedures of sentencing; and**
 - iv. The impact of new or proposed legislation on sentencing purposes, processes, and correctional and criminal justice resources.**
 - g. Review new and proposed legislation regarding crimes and sentencing as relevant to the commission's functions under this subsection.**

To perform its function of promoting strategies that ensure that sentencing dispositions accomplish their purposes, the commission is directed to conduct and assemble research and data on the issues listed in this subsection—each of which is expressly relevant to crafting an

appropriate sentence at the trial level, and to recommending the appropriate allocation of resources and presumptive ranges and modalities of sentencing at the policy level. To this end, the commission is expected to make recommendations concerning existing laws as well as proposed or newly adopted laws. It is not critical that the commission itself conduct all research, as there is a wealth of untapped research that should be vetted and employed by judges and policy-makers alike in their pursuit of furthering sentencing purposes. As stated above,⁹² “data” includes feedback on the correlations between sanctions and outcomes, in terms of crime reduction.

Dissemination need not be limited to traditional (and traditionally ignored) annual reports, but may be in a form that is more accessible and more likely to assist judges, advocates, and policy-makers. One example is Multnomah County’s sentencing support tools.⁹³ Another is the Virginia sentencing commission’s incorporation of risk assessment into sentencing guidelines to allocate incarceration resources, at least in part, according to risk levels.⁹⁴ Missouri is also pursuing a similar effort, which has recently reported a resulting significant reduction in recidivism.⁹⁵

To a similar purpose is the modest charge by the Oregon legislature to our sentencing commission (the “Criminal Justice Commission”) that it: “conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission’s sentencing guidelines and, if it is possible, the means of doing so.”⁹⁶

The commission also has a critical role in evolving standards for evidence concerning the relationship between sentences and their purposes. Of course the commission should address what sorts of evidence are probative for determining which sentences are most likely to reduce crime by which offenders sentenced for which crimes. But commissions should also consider what sorts of evidence legitimately support analysis of the relationship between sentences and general deterrence, public satisfaction with the justice system, prevention of private retaliation and vigilantism, and respect for the persons, property, and rights of others. Since it is charged with conducting and assessing research in these areas, the commission should recommend standards for determining when information is sufficiently reliable to affect sentencing decisions in all of these areas.

⁹² See *Sentencing Support Tools*, *supra* note 67, and accompanying text.

⁹³ See *id.*

⁹⁴ See authorities cited, *supra* note 78.

⁹⁵ Missouri Sentencing Advisory Commission, *Recommended Sentencing Report and Implementation Update* (June 2005), available at <http://www.mosac.mo.gov/Documents/final%20report21June%202005.pdf>, and *Biennial Report 2007* (September 2007), available at <http://www.mosac.mo.gov/Documents/MOSAC%20Commission%20Report%202007%20Final.pdf>.

⁹⁶ 2005 Or. Laws ch. 474 (SB 919). This effort produced a bill that would have broadened discretion under some of Oregon’s sentencing guidelines blocks while encouraging judges to consider a risk assessment instrument in exercising that discretion. 2007 Or. SB 276–4. The bill failed in the 2007 Oregon Legislature when its design promised a fiscal impact and late numbers shifted the likely impact on prison bed demand. The project may continue.

The commission properly provides copies of the results of its research and data both to sentencing judges, to encourage more informed sentencing, and to policy-makers, to support recommendations for the modification of sentencing laws, policies, and strategies. Under this draft, the commission retains the less critical but still significant role of monitoring and reporting on sentencing patterns and impacts on correctional resources for managerial purposes.

§ 12.2 Access to Data by the Sentencing Commission

State and local criminal and juvenile justice agencies shall afford the sentencing commission unfettered access to the agency's electronic data for purposes of performing the commission's functions. The commission shall abide by any existing lawful restrictions on access to or dissemination of data to which it gains access. Except as otherwise expressly provided by law, however, the commission is free to conduct analysis of all data it acquires, and disseminate reports, conclusions, and aggregate data resulting from such analysis to sentencing judges and to other recipients of the commission's reports and recommendations, as long as it does not thereby disclose or allow access to individual or law enforcement information subject to such restrictions. Data which is subject to public access shall not lose that status by its transmission to or receipt by the commission.

Those who have worked with sentencing in a research capacity are likely to recognize the utility and the need for this provision. Modern data warehousing, business intelligence, and query tools make it unnecessary to achieve uniformity of hardware and software among databases to provide the benefits of integrated criminal justice data. This subsection is intended to provide the commission legal access to all state and local criminal justice agency data, so that it may extract the data automatically to assist the commission in performing the tasks mandated by Subsection 12.1⁹⁷

IV. CONCLUSION

Profound revisions to the Model Penal Code sentencing provisions are working their way through the American Law Institute. These revisions are likely to accomplish great harm if states adopt them without modification. Instead of repairing the faults of existing sentencing codes by replacing feigned accomplishment with rigorous pursuit of public safety and public values, the proposed revisions would abandon public safety as a

⁹⁷ One example is Multnomah County's sentencing support tools, but this access also facilitates the automated receipt of sentencing reports which have proved troublesome to sentencing commissions and trial courts involved in monitoring sentencing patterns. *See, e.g.*, 2005 OR. LAWS CH. 10 (SB 124), available at <http://www.leg.state.or.us/05orlaws/sess0001.dir/0010ses.htm> (stating that courts shall submit sentencing information to the commission as provided by rules of the commission, which shall be adopted with the approval of the chief justice).

dominant purpose of sentencing, and enshrine the socially corrosive fallacy that proportional punishment is a wholly adequate accomplishment. The result would be continued brutality to victims whose crimes smarter sentencing would prevent and to offenders whose punishment furthered no demonstrable social purpose.

Early adopters can avoid these harms by modifying the proposed revisions to require that all sentencing be accountable to its purposes—whether those purposes be crime reduction or any of the legitimate social functions bundled within notions of just deserts. Such an approach is entirely consistent with the “limiting retributivism” invoked by the revisions’ author, and with the principle that proportionality should limit the severity of all sentences.

While these modifications would permit early adopters to reap the modest benefits of the revisions—some control of sentencing disparity and managerial predictability—they would fail to remedy the major flaws that cripple the ability of criminal justice to serve the purposes that citizens rightfully expect it to serve.

Accordingly, this article proposes a harm-reduction sentencing code that undertakes to transform the archaic litany of just deserts into the evidence-based pursuit of public safety and promotion of public values. The strategy of this code is to prescribe purposes and protocols, and to assign roles to trial and appellate courts, prosecution and defense attorneys, probation departments, and sentencing commissions. Again, this proposal is entirely consistent with notions of proportionality, but it demands of participants that they be accountable for performance consistent with their roles and measured by the extent to which sentences actually serve legitimate social purposes.