Motion #1:
Limit Retribution to Occasions of Demonstrable Need and Effect

Return to the Model Penal Code Issue Page

The Reporter's DRAFT[1] decrees that sentencing should pursue "utilitarian" objectives [rehabilitation, deterrence, incapacitation, and restoration to victims and communities] only when "when reasonably feasible," - *i.e.*, when there is adequate support for an expectation that the pursuit will be productive. In contrast, the DRAFT would *always* pursue severity as a *purpose* [proportional to the offense, harm to victims, and blameworthiness of the offender]. It is entirely appropriate that proportionality limit all sentences, and this motion would provide substantially more effective limits on punitivism than would the Reporter's language. Almost all sentences include some retributive impact as an incident of pursuing some other, legitimate social purpose. But it is profoundly harmful, archaic, and destructive to allow proportional severity – *i.e.*, retribution – to serve as a sole or sufficient objective of sentencing. This error is especially pernicious in the purposes provision, by which the DRAFT pervasively organizes the energies, direction, and performance of sentencing judges, sentencing commissions, and appellate review.

This motion seeks to restrain retribution by identifying its social functions and by requiring that it be an objective of a sentence only when and to the extent that it is both not disproportionate *and* reasonably likely to further one or more of those functions.

Motion No. 1: Amend §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) <u>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</u> ; ~~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<u>;</u> ~~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); <u>and</u>

<u>(iv) 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</u>;

The essence of this proposal: The wording of §1.02 from TENTATIVE DRAFT NO. 1 has changed slightly since the drafts of these motions were first circulated. The motion as now

[1] References are now to TENTATIVE DRAFT NO. 1 (April 9, 2007).

articulated addresses the DRAFT as it presumably will be worded as it is considered at the Annual Meeting. By ALI policy, matters of style are not appropriate for resolution in an Annual Meeting. It is therefore important to look to the essence of this proposal:

> Retribution, in addition to being restrained by proportionality, should be further limited by prescribing it only when and to the extent that it serves some identified and appropriate purpose of punitive sanctions. The proposal rejects the notion that retribution is a legitimate purpose or measure of sentencing absent such a function. The DRAFT makes severity an end in itself, while this motion would reject severity as an end in itself.

Discussion – Limiting Retribution: The Reporter invokes "limiting retributivism" as theoretical underpinning of the revision, and has in the past suggested that I would reject limiting retributivism and authorize the pursuit of utilitarian purposes (primarily pursuit of public safety through rehabilitation, deterrence, or incapacitation) *regardless of proportionality*, and regardless of whether the pursuit is reasonably likely of success. These suggestions are wrong. I enthusiastically agree that proportionality should limit the severity of *all* sentences regardless of purpose. I also agree that utilitarian purposes should be constrained to efforts reasonably likely of success. But the DRAFT would deem retribution *per se* a purpose, and limit retribution only by a sentencing commission's abstract definition of moral equivalency regardless of its social function in any given application. In contrast, I propose the additional limitations that retribution should be imposed only when and to the extent that 1) it responds to actual needs of victims or pursues the other social functions of punitive sanctions,[2] and 2) attaining those ends is reasonably likely of success. [As of *Council Draft No. 1*, The Reporter bundled "reasonably likely of success" within "in appropriate cases," and in the present draft captures it with "when reasonably feasible." However this requirement of realistic expectation of performance is packaged, I would apply it to retributive as well as to those pursuits the Reporter categorizes as "utilitarian"].

Stated otherwise, the DRAFT would subject utilitarian purposes to meaningful performance measures, but would exempt retribution from meaningful performance measures. This motion seeks meaningful performance measures for both.

This amendment would also be more consonant with limiting retributivism (and more limiting of retribution) than the DRAFT without this amendment.[3] The DRAFT prescribes the

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[2] While I strongly reject the notion that retribution should be the defining purpose of sentencing, I agree with the primary proponents of that position that retribution can serve social functions in some applications. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw L Rev 453 (1997). Those functions are: to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others. *See also* Motion 3.

[3] "Limiting Retibutivism" is the concept attributed to Norval Morris. Nothing suggested by any of these motions is inconsistent with Morris's analyses.

> The concept of "just desert" 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.
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> Norval Morris, MADNESS AND THE CRIMINAL LAW 199 (U. Chicago Press 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

routine imposition of retribution in the form of sentences whose severity is gauged by the gravity of offenses, harms to victims, and offender blameworthiness. The result typically consists of prison sentences within a prescribed range. In the real world, however, only relatively rare cases call for retribution *per se*, such as a vehicular homicide committed by a non-recidivist drunk driver, or child sex abuse committed by an opportunistic offender amenable to effective treatment. Some cases call for punitive sanctions for purposes of general deterrence (as opposed to retribution for its own sake, and in addition to whatever collateral deterrent effect provided by a sentence crafted solely to reduce recidivism), such as an environmental crime that might be emulated by those who actually evaluate risk. In this manner, a small proportion of cases may call for a sentence that varies from that which represents best efforts at preventing recidivism. But the DRAFT would distribute retribution to a broad swath of far more common cases in which there is no victim who has any need for a punitive sanction, and no other social function to be pursued by punitivism – particularly when retribution is distinguished from the "utilitarian" functions of specific and general deterrence.[4]

> **Worst of all, the DRAFT allows criminal justice *"in all cases"* to measure the performance of sentencing by its proportional severity – regardless of any pursuit of any social function, and regardless of the likelihood of success of any such pursuit. By freeing retribution from any requirement that it reasonably further some purpose, the DRAFT allows sentencing culture to continue to evade responsibility for best efforts at serving social functions, particularly crime reduction and offender rehabilitation. It also enables useless cruelty to victims and offenders alike.**

When proportional retribution is allowed to function not just as a limitation but as a sufficient end in itself, sentencing participants (trial and appellate judges, advocates, and

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technology. See Norval Morris and Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 245, 138-44 (U. Chicago Press 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: Blind Sentencing*, 1 Int'l J. Punishment & Sentencing 1 (2005), available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf.

[4] Punitive and utilitarian sanctions overlap in the areas of general and specific deterrence in that punishment is often intended by its severity to dissuade both other potential offenders from criminal behavior and the punished offender from recidivism. An enormous quantity of our criminal caseloads have to do with drug addiction and public misbehavior evidencing mental illness. Members of the public who are concerned with these crimes overwhelmingly just want the offenders to stop committing the crimes – and are generally supportive of anything that will have that effect, whether or not punitive. The same is true of reactions to most variations of property crime, and even to drunk driving – except as to immediate victims of such crimes who may have interests in restitution or substantial justice in the form of some measure of just deserts – but these, too, commonly are most interested in avoiding recidivism. *See* authorities cited note 8, *infra*.

To the extent that severity is employed for purposes of general or specific deterrence, its selection should be evidence-based, limited by proportionality, and selected (in competition with other bases for crime reduction, such as rehabilitation) based on parsimony and priority – in a manner wholly consistent with the existing provisions of the DRAFT concerning utilitarian purposes (but more appropriately pursued with modifications proposed by motions nos. 2 and 3). This amendment is intended to restrain punitive sanctions not justified by the usual purposes bundled with "utilitarian" purposes, essentially general and specific deterrence. It may make sense to deem all punitive impacts beyond such utilitarian justification "retributive," but the distinction pales when the social purposes of retribution are articulated: they are justified by their effect on others, just not their *in terrorem* effect. Indeed, the Reporter invokes limiting *retributivism* both to support severity as a sentencing "purpose" and to restrain all purposes by proportionality.

sentencing commissions) are *not required to pursue any other social purpose*. That is why sentencing culture now largely ignores public safety, includes no performance measure tied to crime reduction even when it proclaims interest in public safety, and frustrates the information and resource needs of those who actually desire to pursue public safety. Advocates typically come to sentencing with a plea agreement forged without realistic reference to public safety, or with arguments focused on aggravation and mitigation – and without any useful information about what works on which offenders, or even which dispositions that might work are actually available in a given community at the time of a given sentence. This culture allows sentencing to ignore advances in our understanding of what works and what does not on various offenders, and to continue to evade growing trends in criminology, corrections, social sciences, and responsible government towards performance measures and evidence-based practices.[5]

The harm produced by the guidelines of the sort applauded by the Reporter and resulting from his approach is enormous. When guidelines distribute prison sentences based on proportionality alone moderated by a grid – which they most often do because they require no more from judges and advocates – they expend a substantial proportion of prison resources on offenders whose incarceration does not serve public safety, and reduce the use of prison beds on another substantial proportion of offenders for whom public safety considerations would demand

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[5] In contrast to "what works" and "best practices,"

> evidence-based practice implies that 1) there is a definable outcome(s); 2) it is measurable; and 3) it is defined according to practical realities (recidivism, victim satisfaction, etc.). Thus, while these three terms are often used interchangeably, EBP is more appropriate for outcome focused human service disciplines (Ratcliffe et al, 2000; Tilley & Laycock, 2001; AMA, 1992; Springer et al, 2003; McDonald, 2003).
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> The current research on offender rehabilitation and behavioral change is now sufficient to enable corrections to make meaningful inferences regarding what works in our field to reduce recidivism and improve public safety. Based upon previous compilations of research findings and recommendations (Burrell, 2000; Carey, 2002; Currie, 1998; Corbett et al, 1999; Elliott et al, 2001; McGuire, 2002; Latessa et al, 2002; Sherman et al, 1998; Taxman & Byrne, 2001), there now exists a coherent framework of guiding principles. These principles are interdependent and each is supported by existing research.
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> Brad Bogue, Nancy Campbell, Elyse Clawson, et al., Crime and Justice Institute, *Implementing Evidence-based Practice in Community Corrections: the Principles of Effective Intervention* (National Institute of Justice 2004), available at http://www.nicic.org/pubs/2004/019342.pdf.

See also, e.g., Edward J. Latessa, *The Challenge of Change: Correctional Programs and Evidence-based Practices*, 3 Criminology & Public Policy 547 (2004); Doris Layton MacKenzie, *Corrections and Sentencing in the 21st Century: Evidence-Based Corrections and Sentencing*, 81 The Prison Journal 299 (2001); Todd R. Clear, Scott H. Decker,Tony Fabelo, Darrel Stephens, David Weisburd, B. Diane Williams, Max Williams, *Evidence-Based Policies and Practices: Making the Case That Research Can Provide What Criminal Justice Policymakers Need*, Plenary Panel, National Institute of Justice Conference (2005), agenda available at http://www.ojp.usdoj.gov/nij/events/nij_conference/2005/agenda.pdf; Michael Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Exchange (Spring 2004), available at http://aja.ncsc.dni.us/courtrv/cr40_3and4/CR40-3Marcus.pdf; *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*,1 Ohio State Journal of Criminal Law 671 (2004), *and authorities cited*, available at http://moritzlaw.osu.edu/osjcl/Articles/Volume1_2/Commentaries/Marcus_1_2.pdf; *Justitia's Bandage: Blind Sentencing*, 1 Int'l J. Punishment & Sentencing 1 (2005), *supra* note 3.

greater use of incarceration.[6]

Staying this course will continue to dispense cruelty to victims whose crimes smarter sentencing would have prevented, and to offenders whose sanctions are merely punitive when smarter sentencing would have been either less severe or more successful at sparing them repeated punishments for repeated crimes – or both. This error is compounded by its tendency to convey to the public the destructively false notion that severity *is* the appropriate and comprehensive measure of our crime reduction performance. And it is this tendency that distorts funding and management away from best practices and programs and toward incarceration. At the same time, it fuels repeated attacks on judicial discretion ultimately based on our sustained inability to order sentencing around practices that best protect public safety.

As Edward Rubin, now Dean of Vanderbilt University Law School, put it:

> The Plan for Revision of the Model Penal Code rejects the original Code's choice of rehabilitation as the guiding principle for punishment, and proposes to replace it with the principle of retribution. This would be a serious mistake, both for the Code and for the country.
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> It would be a mistake for the Code because it would align the Code with the worst features of contemporary American penal practice. . . . [T]his trend has been justified, and sometimes exacerbated, by legislation that abandons the goal of rehabilitation and embraces the principle of retribution. If the Code were to embrace this principle as well, it would inevitably be seen as lending its support to all the irrationalities, immoralities, and inefficiencies of our current addiction to incarceration. Thoughtful American scholars who are urging alternative approaches will reject it. Policymakers and scholars in other democratic nations will regard the revised Code as part of America's morally unacceptable regime of indiscriminate and draconian punishment. When attitudes finally change—and there is a strong likelihood that they will change, not only because they always do, but also because the current approach is financially unsupportable—the revised Code will remain shackled to an approach that will seem primitive and inefficient, the artifact of an abandoned theory.[7]

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[6] Pursuing a project assigned by the 2005 Oregon Legislature, the Oregon Criminal Justice Commission is studying whether Oregon's guidelines – typical of those promoted by the DRAFT – could be improved in terms of their impact on public safety. Paul Bellatty, a researcher for the Oregon Department of Corrections, conducted a statistical analysis of various cohorts of Oregon offenders, validated a model associating risk factors with future recidivism, and, among other things, reported that for the cohort of offenders released from the Department of Corrections, guidelines *underestimate* risk by 31%, and *overestimate* risk by 30%. Even allowing for the limitations of proportionality, it is apparent to all that employing risk assessment within guidelines – as have Virginia and Missouri – could greatly increase the efficiency of prison as a means to reduce crime and unnecessary incarcerations.

[7] Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev 17, 17-18 (2003), available at http://wings.buffalo.edu/law/bclc/bclrarticles/7/1/rubin.pdf. Prof. Rubin (now Dean of Vanderbilt University Law School) was addressing an earlier version of the DRAFT (Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION 16-28 (American Law Institute, January 2002)), but his analysis applies with equal force to all drafts through *Council Draft No. 1*.

Although I agree with Professor Rubin that by embracing retribution as an organizing principle the DRAFT is profoundly mistaken, I recognize that retributive components in some circumstances are required and serve legitimate social purpose. A pervasive dysfunction of our continuing crime and punishment debate is the tendency of so many to view our choices as rehabilitation vs. punishment, or rehabilitation vs. public safety (typically equated with incarceration). In a rationally ordered and intelligent sentencing system, however, we must recognize that we rightly pursue rehabilitation *because* it serves public safety, that we best employ incarceration when it is the best means by which to serve public safety, and that the pervasive social purposes of sentencing justify punitive sanctions when they somehow serve pubic safety – all within limits of proportionality. Accordingly, the proposed amendment recognizes that retributive sanctions can have legitimate social functions, but rejects retribution as an organizing and pervasive purpose of all sentencing, or as a purpose that properly extends beyond those legitimate functions.

Some might argue that retribution relates to moral equivalency and cannot be captured within such a list of functions as this amendment proposes. Moral equivalency as the measure of retribution would still have a limiting role after this amendment in determining proportionality under subsection 1.02(2)(a)(iv). But, if the needs of victims of a crime do not require (and justify) a more punitive sanction, and a more punitive sanction is not required to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others, imposing a more severe sanction than necessary for serving any of these functions – or any utilitarian functions, including specific and general deterrence – is hardly consistent with *limiting* retributivism. If a more punitive sanction would be proportionate, there is no justification for imposing one *for that reason alone*. That the potential functions of punitive sanctions (including the legitimate needs of victims) may not justify severity that achieves proportionality is no argument against this motion.

Some might also argue that functions such as serving the needs of victims or seeking to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others cannot be measured with sufficient precision to serve the sort of limiting function contemplated by this amendment. Three considerations are dispositive.

First, the type of showing as to the need or efficacy of a punitive sanction to serve any of the listed functions is no more elusive or challenging than demonstrating that general deterrence, or restoration to a crime victim or to a community, is "reasonably feasible" – showings contemplated by the present DRAFT because of its appropriate insistence that such "utilitarian" functions be pursued only when they are "reasonably feasible." If a sentence must be shown reasonably feasible when it pursues general deterrence or community restoration, why shouldn't a sentence whose severity is supposedly required to promote respect for the law require a similar demonstration? There are ample examples of studies that address such issues[8] – and they

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[8] Princeton Survey Research Associates International, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS (National Center for State Courts, July 2006), available at www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf ; US Department of Justice, National Institute of Corrections, "*Promoting Public Safety Using Effective Interventions*," Section 1 (February 2001), available at http://www.nicic.org/Library/016296, citing, *e.g.,* B.K. Applegate and F.T. Cullen, and B.S. Fisher,

repeatedly establish that the public is far more supportive of rehabilitation and crime reduction as contrasted with punitivism than the DRAFT seems to assume.[9]

Second, the point of any worthy revision is to lay the foundation for the evolution of evidence-based, rational sentencing by policy makers, sentencing commissions, appellate courts and sentencing judges, and to guide the advocacy of those who seek to influence the corresponding decisions. The ALI presumably drafts for the future, and modern trends towards evidence-based practices contemplate that we will evolve our standards of evidence, scientific validity, and rationality. In the province of this Code, these would be among the important tasks assigned to sentencing commissions, legislatures, and appellate review – and academia. Any role for punitivism within the Code should accommodate "the evolving standards of decency that

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Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal, 77 Prison Journal 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; Belden, Russonello & Stewart, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION (Washington, DC 2001); Judith Green and Vincent Schiraldi, CUTTING CORRECTLY - NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 5-8, and authorities cited (Justice Policy Institute, February 7, 2002), available at http://www.justicepolicy.org/article.php?list=type&type=24.

> 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.
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> John Halliday, Director, Review Team, Cecilia French, Team Member, Christina Goodwin, Team Member, MAKING PUNISHMENTS WORK REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES (Home Office, July 2001), available at http://www.homeoffice.gov.uk/documents/halliday-report-sppu/.

[9] While the Reporter's references to extreme incarceration rates in the United States do not expressly convey his hope that the revision will moderate punitivism, I believe that combating "mass incarcerationism" is, ironically, his purpose – a purpose which I also endorse. I have posed such questions directly (see *Letter to Professor Reitz* (October 4, 2003), available at http://ourworld.compuserve.com/homepages/SMMarcus/LttrToProfReitz10-03.pdf), but the Reporter has exercised his option of not responding. American Law Institute, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 19 (2005), available at http://www.ali.org/ali/ALIStyleManual.pdf.

The irony is that in pursuit of moderating punitivism, the Reporter has insisted on a formulation that makes retribution, however limited, the lodestar of sentencing. *E.g.*, Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev 17 *supra* note 7; James Q. Whitman, *A Plea Against Retributivism*, 7 Buffalo Crim L Rev 85 (2003) available at http://wings.buffalo.edu/law/bclc/bclrarticles/7/1/whitman.pdf. The Reporter has thus adopted a strategy that is far less likely of success than urging rigorous, evidence-based practices in pursuit of crime reduction. *See, e.g.,* Kristin L. Caballero, *Blended Sentencing: a Good Idea for Juvenile Sex Offenders?* 19 St John's . Legal Comment 379 (2005); Steven L. Chanenson, *Sentencing and Data: the Not-so-odd Couple*, 16 Fed Sent Rptr 1 (2003); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me L Rev 569 (2005); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed Sent Rptr 76 (2003); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the next Generation of Reform*, 105 Colum L Rev 1351 (2005);Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand L Rev 121 (2005);Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw U L Rev 1 (2003); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal*, 17 St Thomas L Rev 743 (2005).

mark the progress of a maturing society."[10]

Third, with respect to punitive functions in general and particularly with respect to the needs of crime victims for substantial justice, it would be worthwhile to require a rational articulation of purpose even if we should not expect an evidentiary demonstration.[11] The DRAFT would permit a judge to accept an argument that would withstand review that a level of severity greater than that reasonably necessary for pursuit of *any other function* should be imposed *solely* because it is proportionate in severity to the seriousness of the crime, the harm to victims, or the blameworthiness of the offender. Even without development of some standards for such a showing, requiring at least some articulation of a relationship to legitimate needs of a victim, preventing vigilantism or private retribution, maintaining respect for legitimate authority, or enhancing respect for the persons, property, or rights of others should restrain the blind use of retribution. Without the amendment, the existing limitation of "no more severe than necessary" would not restrain any sentence as long as it were "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." This is because the limitation is "no more severe than necessary *to achieve the applicable purposes,"* and proportional *severity is* the *only* "purpose" that the DRAFT applies to all sentencing.[12]

Relationship to the existing Model Penal Code: Ironically, although the Reporter apparently intends the revision to moderate punitivism, the present purposes provision, by embracing retribution (however limited) as a pervasive purpose of sentencing would take ALI far backwards from the existing Model Penal Code provision:

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[10] *Trop v. Dulles*, 356 US 86, 101 (1958). The National Center for State Courts studies court trends, and publishes FUTURE TRENDS IN STATE COURTS, now available from NCSC for 2006. Included in FUTURE TRENDS (2006) at 56 is Michael Marcus, *Smart Sentencing: Public Safety, Public Trust and Confidence Through Evidence-Based Dispositions*, also separately available on line at http://www.ncsconline.org/WC/Publications/Trends/2006/SentenSmartTrends2006.pdf. To the same effect is Crime & Justice Institute, EVIDENCE-BASED PRACTICES: A FRAMEWORK FOR SENTENCING POLICY (2006).

[11] As developed in support of Motion No. 3, the Evidence-Based, Harm-Reduction Code (available at http://ourworld.compuserve.com/homepages/SMMarcus/HarmReductionDraft.pdf) I offer by way of example contemplates that a court can properly respond (within limits) to a victim's own subjective assessment of need offered by the victim or a representative (or survivors of a victim of homicide), including a prosecutor who discloses a basis for knowing the victim's needs or desires, while encouraging any therapeutic rationales to be supported by opinions of counselors or mental health providers.

[12] *Compare* DRAFT §1.02(2)(2)(a)(iii) *with* §1.02(2)(2)(a)(i):

(2) The general purposes of the provisions on sentencing are:

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

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

(ii) in appropriate cases, to achieve offender rehabilitation, general deterrence, incapacitation, and restoration of crime victims and communities, 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);.

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].

The Reporter set out on this revision project by suggesting that scrutiny had undercut the medical model, that this provision provided "decoration" rather than effective guidance for sentencing, and that public and policy making attitudes demanded recognizing retribution as the first purpose of sentencing. The Reporter responded by organizing the revision around retribution, while insisting that any utilitarian purpose not be pursued without some reasonable basis for expecting success.[13] It is true that we have allowed sentencing culture merely to *deem* some or all sentencing's purported purposes served by any punishment, with no accountability for actual results. But the correct answers are to insist on rigorous validation for the pursuit of all sentencing objectives, to exploit much improved knowledge about what works or not on which offenders (including both programmatic and incapacitative tools within limits of proportionality, resource, and priority), to provide a protocol for the rational pursuit of sentencing objectives (see Motion No. 3), and to respond to what citizens correctly demand (public safety) rather than to enable irrational insistence upon retribution – particularly retribution that is not demonstrably necessary to serve social purposes that are not captured by utilitarian purposes.[14]

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[13] *See* MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION (2002), *supra* note 7; Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING - PRELIMINARY DRAFT NO. 3 (American Law Institute, May 28, 2004).

[14] *See* Michael Marcus, *Comments on the Model Penal Code: Sentencing: Preliminary Draft No. 1*, 30 Am J Crim Law 135 (2003); *Comments on Preliminary Draft No. 4, Model Penal Code: Sentencing* (Distributed at the September, 2005, meeting of the ALI Members Consultative Group on the Model Penal Code Revision), available at http://home.comcast.net/~smmarcus1/CommentsOnMPCDraft4.pdf; *Focusing Sentencing on Public Safety, and the Role of Sentencing Commissions*, a presentation at the 2006 Conference of the National Association of Sentencing Commissions, available at http://www.pasentencing.org/nasc/Marcus2006NASC.pdf; *Model Penal Code Sentencing Revisions: ALI Faces Critical Issues* (Distributed at the 2006 ALI Annual Meeting), available at https://www.ali.org/ali/am2006/2006-Marcus-MPC.pdf; *Comments on Model Penal Code: Sentencing, Council Draft No.*

Allowing even limited retribution with no tie to social function (including the legitimate needs of victims) to serve as a sufficient sentencing purpose excuses failure to pursue any other purpose. It perpetuates precisely the same social evil as does the "decorative" lists of sentencing purposes the Reporter initially assailed: it allows sentencing to justify itself by presuming its own purposes, with no accountability for actual social performance, and with brutal, costly, and tragically unnecessary results for victims, offenders, and taxpayers. And just deserts, fanned by such inflated legitimacy, has repeatedly demonstrated its ability to trump the moderating influences of sentencing commissions and guidelines.[15]

The proposed amendment would avoid the present DRAFT's lamentable regression from the "progress of a maturing society," to "an approach that [should] seem primitive and inefficient, the artifact of an abandoned theory."[16]

Relationship to provisions before the ALI Council in October, 2006: Although the Reporter's written presentations to the ALI Council touched on the issue of restraining severity,

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1 (Submitted to the 2006 ALI Council meeting of October, 2006), available at http://ourworld.compuserve.com/homepages/SMMarcus/cmntsCnclDft1.pdf.

[15] Oregon adopted sentencing guidelines initially by 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 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 13 and 19 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); NC Gen Stat §15A-134016 (Lexis 2003); 204 Pa Code §303, *et seq* (2004), reproduced following 42 Pa Cons Stat Ann §9721 (Purden Supp 2004).

[16] Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev at 18, *supra* note 7. The proposed approach is also regressive as compared with Oregon's version of the 1962 Model Penal Code:

> **ORS 161.025 Purposes; principles of construction. (1) The general purposes of chapter 743, Oregon Laws 1971, are:**
> **(a) To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.**
> **(b) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.**
> **(c) To give fair warning of the nature of the conduct declared to constitute an offense and of the sentences authorized upon conviction.**
> **(d) To define the act or omission and the accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault.**
> **(e) To differentiate on reasonable grounds between serious and minor offenses.**
> **(f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.**
> **(g) To safeguard offenders against excessive, disproportionate or arbitrary punishment.**
> ****

they did so in a manner wholly antithetical to the proposal embodied in this Motion No. 1. Those presentations raised the issue whether the subsections should "be revised so that the goal of proportionality of sentencing does not operate as a constraint in every case," providing the obvious answer: proportionality should not be abandoned. Thus the Reporter's strawman proposal would have used the qualification "*in appropriate cases* to render sentences within a range" of proportionate severity to suggest that my proposal is to allow utilitarian pursuits to *exceed* proportionality[17] – for example, to serve public safety by disproportionally severe incarceration.[18] That has never been my position,[19] but the Reporter's DRAFT without Motion No. 1 (or its equivalent) would contemplate routine use of incarceration simply because it is deemed in the abstract by a commission to be proportionate in its severity – even in cases in which incarceration serves the interest of no victim and has no demonstrable social purpose.

In the Reporter's discussion in the present DRAFT, he suggests that my focus on public safety so distances proportionality limits that they would "seldom operate as meaningful checks

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[17] I have argued that it is a mistake to restrain utilitarian purposes to only some cases (those "appropriate" because achieving the purpose is "reasonably likely of success") while allowing even limited retribution to be the goal of *all* cases. Apparently (see note 18, *infra*), the Reporter concluded that I was criticizing limiting utilitarian pursuits, and thus read my position as urging pursuit of utilitarian objectives with even disproportionately severe sentences. Of course, my position is that *both* utilitarian *and punitive* objectives should be limited by proportionality and also should be limited to cases in which they are "appropriate" because they are reasonably likely to achieve some useful public purpose or legitimate need of a victim.

[18] Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING, COUNCIL DRAFT NO. 1, *Issues for the Council* at xiv-xv (American Law Institute, September 27, 2006). This piece presented but recommended against an amendment to §1.02(2)(a)(i) and (ii)as follows:

> **(i) <u>in appropriate cases,</u> to render sentences within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders**
>
> **(ii) in appropriate cases, to achieve offender rehabilitation, general deterrence, incapacitation, and <u>the</u> restoration of crime victims and communities~~, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i) . . .~~**

The Reporter presented this reformation as "responsive to the criticisms of Michael Marcus," which is incorrect, as it would allow "utilitarian purposes to trump proportionality at least some of the time (e.g., the pursuit of incapacitation of an offender [when] a disproportionate sanction)." Note that existing qualification "in appropriate cases" when applied to utilitarian purposes serves to prevent their presence or excuse their absence as sentencing objectives in other than "appropriate cases," while the Reporter insists that adding "in appropriate cases" as applied to proportional severity would remove the protection of proportionality in other than "appropriate cases." To the contrary, my point is not to free utilitarian objectives from the limitation of proportionality, but to seek "severity" *only* in "appropriate cases" and not in others, just as the Reporter and this motion would pursue utilitarian objectives only in "appropriate cases."

I appreciate the reasons for not requiring a Reporter to respond to all criticisms (see note 8, *supra*), but this dysfunctional discourse illustrates one downside. Only Council members (and, presumably officers and the Reporter) were permitted to attend the Council meeting, so I must rely on the written materials for the Reporter's reasoning. I did respond to the invitation to submit written comments. *Comments on Model Penal Code: Sentencing, Council Draft No. 1*, supra note 14.

[19] See materials cited note 14, *supra*.

upon sentence severity."[20] This suggestion profoundly misunderstands my analysis, which is that a rational system responsibly focusing on best efforts at crime reduction need not often depart to serve the goals legitimately bundled with any strain of retribution. As this motion should indicate, I would impose more restrictive limits on proportionality by insisting not only that no sentence exceed those limits, but *in addition* that retribution have no further role in sentencing than can be justified by reference to the articulated functions of retribution.

The Reporter also argues that criticisms such as mine "conflate" "limiting retributivism" with "just deserts" theory.[21] Again, this gravely misses the point. Regardless of the Reporter's intentions and theoretical liturgy, the purposes provision of the DRAFT imposes feasibility prerequisites on everything *except* proportional severity, renders severity a "purpose," and refuses to require any justification for imposition of punishment other than its proportionality. Without this motion, that provision in the real world of criminal justice yields everything to just deserts – whether named "retribution," "proportional severity" or "punitivism."

Relationship to other motions: Motion No. 1 would constrain retributive sanctions to cases in which they might reasonably be expected to serve real and legitimate social functions. By removing the notion that retribution is itself adequate sentencing performance, the amendment would help to prevent just deserts from avoiding accountability for evidence-based, best practices in pursuit of some real purpose. The motion would provide a basis for evolving wisdom about what actually serves the needs of victims and how and when sentencing serves to prevent vigilantism or private retribution, to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others. Motion No. 2 would add "public safety" as an express purpose of sentencing, because rigorous pursuit of best efforts at crime reduction, within limits of proportionality, resource, and priority, is far more likely to produce harm reduction than attempting to use ordered just deserts to deploy prison. Motions 1 and 2 are complimentary. I propose both, but each alone would greatly improve the revision. Motion No. 3 would contemplate a more comprehensive rewrite of the revision to produce a code centered around evidence-based harm reduction and a supporting protocol. Motion No. 3 recognizes that the purpose of sentencing is to enhance public safety and public values, while what the DRAFT deems purposes are but means of seeking that purpose. Motion No. 3 directs sentencing practices, commissions, and appellate review primarily at supporting and improving sentencing as measured by harm reduction, while the DRAFT would direct those functions primarily at the deployment of retribution and the management of guidelines, but only secondarily at the pursuit of sentencing purposes, which it captures as proportional retribution and, optionally, utilitarian objectives. Motion No. 3 incorporates the functions of Motions 1 and 2.

Conclusion: This amendment should be adopted to prevent the revision from perpetuating avoidable victimizations, purposeless brutality to offenders, and waste to taxpayers. The amendment should also be adopted to avoid "remain[ing] shackled to an approach that will seem

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[20] TENTATIVE DRAFT NO. 1 (April 9, 2007) at 32.

[21] *Id.*, at 30-31.

primitive and inefficient, the artifact of an abandoned theory." [22]

Return to the Model Penal Code Issue Page

[22] Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev 17 *supra* note 7, at 18.