Motion #2:
Articulate "Public Safety" as a Purpose of Sentencing

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While the Reporters DRAFT[1] decrees that sentencing should pursue the "utilitarian" objectives of rehabilitation, deterrence, incapacitation, and restoration to victims and communities, it quite intentionally avoids articulating that "crime reduction" or "public safety" is a reason (or *the* reason) to do so. Apparently, this avoidance is intended to suppress the notion that jail and prison serve public safety by focusing on ordered just deserts as the pervasive sentencing purpose. If intended to diminish our use of incarceration, this tactic is gravely misguided. We are far more likely to reduce overuse of jail and prison by recognizing expressly that rehabilitation, incapacitation, deterrence and even restorative justice are all means of achieving public safety, and by insisting on best efforts at evidence-based deployment of *all* of those means. Based on ordered just-deserts alone, sentencing guidelines grossly misuse prison resources from the perspective of public safety.[2] Avoiding the goal of public safety is also detrimental to the prospects of acceptance among the states, which have properly embraced the existing Model Penal Code's articulation of crime reduction as a major purpose of sentencing.

This motion would articulate that within limits of proportionality, we pursue rehabilitation, general deterrence, incapacitation and restorative justice to achieve public safety.

Motion No. 2: Amend a portion of §1.02(2)(a) as follows:

(ii) when reasonably feasible, to ~~achieve~~ <u>pursue public safety through</u> offender rehabilitation, ~~general~~ deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community . . .

> [*Note:* This motion would retain the limitation of proportionality currently articulated in the remainder of this subsection - "provided these goals are pursued within the boundaries of proportionality . . ." If Motion No. 1 were adopted, that limitation would be moved to a new subsection 1.02(2)(a)(iv); if not, that limitation would remain in this subsection. Motion No. 3 would retain the limitation, but in a substantially rewritten revision.]

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

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

[2] 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.

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:

> The Code must identify public safety in the form of crime reduction as a major purpose of sentencing. To do otherwise is to offend the Reporter's worthy objective of resonating with "the thoughts and impulses that are commonly felt by responsible officials."[3] *Responsible* officials do not pander to public fear and anger to avoid accountability for best efforts at crime reduction – they recognize that the public properly and persistently seeks public safety (and rehabilitation) before retribution *per se*.[4] Pursuing public safety does not compromise the limitations of proportionality.

Discussion: The Reporter apparently resists articulating "public safety" (or crime reduction) as a purpose for fear that to do so would accelerate rather than retard the use of prison.[5] This position assumes that the public interprets any failure of sentencing to produce

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[3] Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING - PRELIMINARY DRAFT NO. 1 (American Law Institute, August 26, 2002). To be fair, the Reporter's point in the text quoted was to assert that *limiting retributivism* must, for credibility, arrive at levels of desert consonant with those acceptable to "responsible officials." But that nuance hardly detracts from the argument in support of this Motion No. 2.

[4] 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, *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/.

[5] 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. His incorrect assumption that I would allow utilitarian purposes to "trump proportionality" (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)) lends further support to my expectation that he resists identifying public safety (or crime reduction) as express purposes largely for fear that acknowledging that prisons can

crime reduction as a failure of severity. The public is further along in its thinking than this cynical view suggests, as the public routinely favors rehabilitation and public safety over punishment for its own sake.[6] And if the public *equates* public safety with prison, the fault lies with a sentencing culture that continues to retreat behind just deserts to avoid accountability for outcomes.

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 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 occasions with an 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, the social sciences, and responsible government towards performance measures and evidence-based practices.[7]

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further public safety would accelerate their overuse. 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 Reporter's continued strong aversion to using prisons to protect society from the risk of future harm at the hands of offenders (*See, e.g.,* TENTATIVE DRAFT NO. 1 (April 9, 2007) at 34-35) demonstrates his comfort with deploying prison primarily to inflict proportional severity without any "utilitarian" objective.

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 (2003), available at http://wings.buffalo.edu/law/bclc/bclrarticles/7/1/rubin.pdf; 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).

[6] See sources cited note 4, *supra*.

[7] 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 ironic result of the evasion of responsibility for "public safety" is that we do a worse job of crime reduction than we could and should, inviting frequent pressure for draconian sentencing and reduction in judicial sentencing discretion. The Reporter and I both oppose draconian sentencing and loss of judicial sentencing discretion; we disagree on how to combat them.[8]

Motion No. 2 insists that our mission is predominantly one of public safety; that we pursue it appropriately in some cases with rehabilitation, and in others with general or specific deterrence, restorative justice, or jail or prison – or with a combination of several of these

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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), available at http://www.sandstonepress.net/ijps/IJPS_sample.pdf.

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).

[8] *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. 1* (Submitted to the 2006 ALI Council meeting of October, 2006), available at http://ourworld.compuserve.com/homepages/SMMarcus/cmntsCnclDft1.pdf.

tactics.[9] Our responsibility is to enlist informed best efforts in the allocation of the entire range of sentencing options, within limits of proportionality, resource, and priority. Accepting this responsibility is far more likely to resist punitivism than endorsing even "limiting" retribution as a sufficient performance measure for all sentences.

Of course we use incarceration for public safety – otherwise, most rational thinkers would prefer caning– at least at the offender's option.[10] The problem is that we deploy incapacitation largely blindly. The DRAFT would codify the continued domination of just deserts as the metric for deploying incapacitation. The DRAFT would rely on the essentially liturgical function of a sentencing commission to distribute incapacitation based on blameworthiness, rather than to limit it by proportionality and distribute it through evidence-based best practices. The result is cruelly and irresponsibly imprecise. The result is also profoundly self-defeating, if the goal is rationality, parsimony, and harm reduction. Properly measured by public safety, resource, priority and proportionality, incarceration is just as moderated by science as is rehabilitation;[11] its

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[9] Note that this Motion would cure the DRAFT's omission of specific deterrence – which seeks to persuade the sentenced offender to avoid further crime through fear of further sanction – from the list of devices by which we seek crime reduction. Restorative justice serves public safety in two ways – by restoring psychic or financial loss through such means as restitution, and by communicating the human costs of crime effectively to offenders. *See* William R. Nugent, Mark S. Umbreit, Lizabeth Wiinamaki, & Jeff Paddock, *Participation in victim-offender mediation and reoffense: Successful replications?*, 11 Research on Social Work Practice 5 (2001); William Bradshaw, David Roseborough, *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism* (University of Minnesota), available at http://www.sswr.org/papers2003/615.htm; William Bradshaw, Mark S Umbreit, and David Roseborough, *The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-Analysis* 24 Conflict Resolution Quarterly 87 (2006).

[10] Anyone who argues caning is more degrading than prison is in serious denial about the reality of prison culture. *E.g.*, Michael G. Santos, INSIDE: LIFE BEHIND BARS IN AMERICA (St Martins Press 2006). *See generally* 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.

[11] Ironically, the Reporter's qualification of "when reasonably feasible" is *least* questionable as to incarceration, which generally can be relied upon to reduce criminal behavior during its term, as compared with rehabilitation, deterrence (whose reasonable likelihood of success is probably far more restrained in practice than generally presumed), or other measures of performance. The catch, of course, is that incarceration is properly limited in its availability (by resource, proportionality, and priority) in the vast majority of sentencing occasions, and as to any given cohort, its effect on recidivism may or may not exceed its temporary reduction through incapacitation. *The Effectiveness of Community-Based Sanctions in Reducing Recidivis*m (Oregon Department of Corrections September 5, 2002), available at http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf
Smith, P., Goggin, C., & Gendreau, P. (2002), *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (User Report 2002-01) Ottawa: Solicitor General Canada, available at http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf, cited in *The Effects of Punishment on Recidivism*, 7 Research Summary No. 3 (May 2002), Office of the Solicitor General of Canada, available at http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf; Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates*, 1975-1999, 15 Crim Justice Policy Rev 212 (2004); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, 1996 Journal of the Oklahoma Criminal Justice Research Consortium 2; Lin Song, Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served* (Washington State Institute for Public Policy 1993), available at http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf. The DRAFT's retreat from direct exploration of the efficacy of incapacitation for crime reduction has, with tragic irony, impeded the assistance science would provide, and the public largely willing to accept, in reducing brutally misallocated prison resources. Without

cruel misuse is furthered rather than reduced by disguising its obvious purpose.

> **The Reporter properly advises caution when we try to predict future dangerousness when deciding who (within limits of proportionality) to incarcerate, but the implication that it is better to distribute years in prison based on abstract notions of just deserts than to engage in a cautious pursuit of risk assessment when allocating prison beds[12] (within limits of proportionality) is cruel to victims and offenders alike, irresponsible as a matter of management of public resources, and profoundly dangerous.**

Equally important, this amendment combats a pervasive and destructive fallacy that sentencing poses a choice *between* public safety and rehabilitation. In a rational system, we pursue rehabilitation in the interests of public safety, just as we should seek public safety when we use incarceration or any other available correctional disposition.

This motion or its equivalent is essential to making the revision responsive to the legitimate priorities of the public. It is also concordant with the growing and laudable trend towards performance measures and evidence-based practices in corrections, criminology, the social sciences, and responsible government.[13] Only with such a modification is the revision worthy of promulgation as a model for the law of sentencing well into the future – as opposed to a regression into archaic and retributive cruelty.

Relationship to the existing Model Penal Code: The existing Code provision identifies as purposes "prevent the commission of offenses" and "promote the correction and rehabilitation of

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science, and directed only by ordered just deserts as promoted by the DRAFT, guidelines are woefully inadequate at distributing prison resources as a device for harm reduction. See note 2, *supra* .

[12] *See, e.g.,* TENTATIVE DRAFT NO. 1 (April 9, 2007) at 34-35), at which the Reporter impliedly expresses his comfort with deploying prison primarily to inflict proportional severity without any "utilitarian" objective. *See also* Marcus, *Post-Booker Sentencing Issues for a Post-Booker Court*, 18 Fed Sent Rptr 227 (2006)

[13] *See* 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; 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 8.

offenders," among others.[14] The Reporter set out on this revision to the Code by suggesting that scrutiny had undercut the medical model, that the existing Code provided "decoration" rather than real guidance for sentencing, and that public and policy making attitudes demanded recognizing retribution as the first purpose of sentencing, while insisting that any utilitarian purpose not be pursued without some reasonable basis for expecting success.[15] It is true that we have allowed sentencing culture merely to *deem* some or all of the articulated 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. It is profoundly mistaken to continue to assign even limited retribution the cruelly dysfunctional role of allocating prison resources *without responsible consideration of the public safety consequences*.

This Motion would recognize that incarceration and rehabilitation (and all correctional tools) are to be employed within limits of proportionality, resource, and priority, for the purpose of public safety – clearly an improvement upon the existing Code, which enables the dangerous fallacy that rehabilitation *competes with* public safety,[16] and clearly an improvement over the

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[14] The existing Model Penal Code provides:

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].

[15] *See* Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION 16-28 (American Law Institute, January 2002); Kevin R. Reitz, Reporter, MODEL PENAL CODE: SENTENCING - PRELIMINARY DRAFT NO. 3 (American Law Institute, May 28, 2004).

[16] Oregon's version of the 1962 Model Penal Code is superior in these respects to both the existing Code and the version promoted by the DRAFT:

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*. [*emphasis added*]

DRAFT – which refuses to concede that the primary justification for incarceration is public safety and that incarceration is cruelly misallocated when enlisted for no other purpose than retribution – however that retribution is ordered.

Relationship to provisions before the ALI Council in October, 2006: The Reporter posed the issue whether public safety ought to be expressly designated as a sentencing objective in a motion which bundled the proposition with "offender reintegration," arguing against the straw man proposal as follows: 1) the revision would "lengthen § 1.02(2)(a)(ii), yet would not add meaningful content," as the "mechanisms for the pursuit of public safety (rehabilitation, general deterrence, incapacitation) are enumerated in the existing draft;" and 2) "'Public safety' is a term [that] may not be equally in vogue a few years from now."[17]

As argued in my written submission to the Council,[18] whatever might be said of "prisoner reintegration,"– and the DRAFT incorporates "reintegration of offenders" in spite of its shorter tenure – the term "public safety" is hardly a fad. It has been ubiquitous in appellate discussions since at least 1900.[19] As to the impact on meaning, I submit that it is most likely to *avoid* associating incarceration with "public safety" that the Reporter resists including those words in the DRAFT.[20] Regardless of intent, without the qualification that "incapacitation" is to be used to pursue public safety,[21] the DRAFT literally and necessarily directs that incarceration (and

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

> **(ii) <u>to advance public safety through means appropriate to specific cases, including</u> ~~in appropriate cases, to achieve~~ offender rehabilitation, general deterrence, <u>and</u> incapacitation, and <u>to further the</u> restoration of crime victims and communities <u>and the reintegration of offenders into the law-abiding community</u>, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i) . . .**

[18] 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 8.

[19] "An all-state search of criminal cases on WestLaw (excluding "public safety officer" and "department of public safety") exceeded the application's 10,000 record limit for "public safety"9 – with cases dating from at least as early as 1900 to the present – and for "rehabilitation." "Crime control," the Reporter's common label for this function of sentencing, amassed 1,050 "hits" in the same cohort; "incapacitation" produced 689. And the existing and unquestioned "restoration of crime victims and communities" is a usage of far more recent vintage. Surely, the staying power of the phrase "public safety" is no argument for its avoidance. *E.g.,*

> "There is no provision in the constitution demanding that murder and rape shall be so punished. Nor has the legislature, since the constitution was adopted, so declared by legislative enactment; and yet such is the law with us. So, too, in all other crimes and misdemeanors. They are not mentioned or defined in the constitution, yet they are punished by imprisonment in many cases. Thus, both life and liberty are interfered with. These laws look to the public safety."
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> *Stehmeyer v. City Council of Charleston*, 53 S.C. 259, 31 S.E. 322, 330 (1898)

[20] *See* note 4, *supra*, and accompanying text.

[21] As above, it is equally important to articulate that rehabilitation does not compete with public safety, but is a means for achieving it.

deterrence) may properly be employed *for the sole purpose* of inflicting "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." As the DRAFT now stands, then, incapacitation when proportionate is "appropriate" *even when unnecessary for any purpose other than retribution*.[22] The meaning of this debate is profound.

The notion that "public safety" would add no meaning is no more persuasive than the notion that "public safety" is a term whose meaning will fade like a fad. Critically, the real issue posed by this motion is whether the ALI will endorse modern, evidence-based pursuit of public safety and other pro-social performance. ALI should endorse this pursuit, in hopes that by enlisting science we will improve the efficacy and combat the cruelty of sentencing that has so far relied on blind supposition in the allocation of prison and other correctional resources. The DRAFT's present alternative – endorsing retribution modulated by the deliberations of a sentencing commission as the lodestar of sentencing and the competing rationale for prison – is regressive, archaic, cruel in its application, and divorced from modern thinking in all social sciences and responsible government.[23] It is also far less likely of success as a means of reducing punitivism. Just deserts, fanned by such inflated legitimacy, has repeatedly demonstrated its ability to trump the moderating influences of sentencing commissions and guidelines.[24]

Relationship to other motions: Motion No. 1 would constrain retributive purposes to cases in which they might reasonably be expected to serve real and legitimate social functions. 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

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[22] As discussed within the presentation of Motion No. 1, this argument assumes that legitimate victim needs or evidence-based attempts to maintain respect for legitimate authority, or to enhance respect for the persons, property, or rights of others, *are* legitimately the basis of sentencing consideration – but the DRAFT embraces retribution – including typically in the form of imprisonment – even when none of these considerations support its exaction.

[23] I have no problem with commissions attempting to set limits of proportionality for categories of offenses and offenders, but that is a very different matter than allocating sentencing resources for the purpose of exacting retribution. When ranges are set without regard to science and the objective of crime reduction, we overuse prison on many offenders and underuse it on many others. See note 2, *supra.*

[24] 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)..

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 cruelty to victims and offenders, and waste to taxpayers. The amendment is necessary so that the revised Model Penal Code not "remain shackled to an approach that will seem primitive and inefficient, the artifact of an abandoned theory." [25]

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[25] Edward Rubin, *Just Say No to Retribution*, 7 Buffalo Crim L Rev 17 *supra* note 5, at 18. Prof. Rubin (now Dean of Vanderbilt University Law School) was addressing an earlier version of the DRAFT (PLAN FOR REVISION, *supra* note 15), but his analysis applies with equal force to all drafts through *Council Draft No. 1*.