Motion #3:
Revise the DRAFT to Pursue Evidence-Based Harm Reduction

Return to the Model Penal Code Issue Page

Motions 1 and 2 would serve to restrain the retributive impact of the DRAFT[1] and to articulate that public safety is a primary purpose of sentencing. This motion would remand the DRAFT to the Reporter, with directions to restructure the DRAFT to the same ends. This motion would also provide a protocol to direct sentencing and sentencing commissions to pursue evidence-based harm reduction.

Motion No. 3:

The *Model Penal Code: Sentencing DRAFT* shall be rewritten and restructured to incorporate the following principles:

1. **The purposes of sentencing are to provide public safety and to promote public values**
2. **Sentencing pursues public safety through responsible allocation of correctional resources and alternatives. Thus sentencing choices may include rehabilitation, incapacitation, deterrence, restorative justice, and emerging modalities. Sentencing also pursues public safety by employing dispositions that promote human worth and dignity and values preclusive of crime: respect for legitimate authority, and for the persons, property, or rights of others**
3. **Sentencing promotes public values by responsibly employing a variety of means. These means include punishment, denunciation, serving the interests of crime victims, restorative justice, and therapeutic justice. Sentencing also promotes public values by employing dispositions that promote human worth and dignity and values preclusive of crime: respect for legitimate authority, and for the persons, property, or rights of others**
4. **In constructing a sentence from among legally and practically available dispositions, and within any limits required to maintain proportionality, 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 promote public values.**
5. **In all respects, a judge shall rely upon the best available evidence, research, and data to determine what sentence best serves the purposes of sentencing.**
6. **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 crime reduction or to promote public values.**

The essence of this proposal:

---

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

A rational sentencing scheme is one that directs judges to enlist evidence-based best practices to achieve a sentence, within limits of proportionality, resource, and priority, that is most likely to prevent an offender's future criminal conduct. In a rational sentencing scheme, a judge would deviate from such a sentence only when and to the extent that there is a sound basis for concluding that other legitimate purposes of sentencing – ultimately, some other aspect of public safety or public values – require such a deviation. Sentencing gains rationality when it selects means in pursuit of the ends of public safety and public values. It loses rationality and beneficial effect when it accepts the means as ends in themselves. Public safety is potentially served by reformation, incapacitation, specific or general deterrence, but it is also served by dispositions that honor proportionality as well as those that reflect the worth and dignity of victims, offenders, or both. Similarly, public values may be served by sentences that promote human worth and dignity as well as by those that extract retribution or seek denunciation. Sentencing must not rest on supposition but shall enlist evidence-based best practices to direct its efforts and measure its success in promoting public safety and public values. The roles of sentencing commissions and appellate review should be prioritized to serve these ends.

Discussion: This motion takes the principles underlying Motions 1 and 2 and proposes that the entire DRAFT be recast efficiently and deliberately to further those principles with evidence-based practices.[2] It requires that within the limits of proportionality, resource, and

---

[2] 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).
> * * * *
> 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.
>
> 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

priority, sentencing pursue best practices at preventing further criminal behavior by the offender. It allows deviation from such a pursuit only when and to the extent that there is a sound basis for concluding that some other legitimate purpose of sentencing should and cannot otherwise be served. It recognizes that all legitimate sentencing devices, whether punitive, restorative, reformative, incapacitative, or therapeutic towards victim or offender, ultimately find their value in their impact on public safety or public values.

The present DRAFT would direct sentencing commissions primarily to the tasks of promulgating and monitoring compliance with guidelines, and assessing the effects of sentencing practices *on sentencing guidelines and the criminal justice and corrections systems*.[3] Guidelines under the DRAFT are thus an end in themselves, rather than a means to a positive social purpose. In contrast, this proposal would direct commissions primarily to the tasks of gathering and deploying information and recommendations as to best practices and best evidence supporting the pursuit of public safety and public values through sentencing. It would focus on the effects of sentencing on the rational goals of sentencing – public safety and public values.

The Appendix to this motion consists of "A Harm Reduction Sentencing Code." It is not proposed by this motion that the ALI adopt that Code at the 2007 Annual Meeting, as that Code has not been vetted by the revision process, and it suggests approaches to a variety of less critical issues that are not essential to the essence of this proposal. The Appendix is intended to illustrate how the approach promoted by this motion could organize the functions of sentencing law, sentencing commissions, and appellate review to result in a coherent, evidence-based Code in meaningful service of the social purposes to which all sentencing efforts should be directed.

It is submitted that this Motion would resonate with the priorities of the public and policy makers. It would address parsimony, proportionality, and efficiency – measured by the appropriate social objectives of criminal sentencing. It would reduce harm to victims whose crimes would be prevented by smarter sentencing than that spawned by existing practice or promised by the existing revision's just deserts paradigm. It would reduce harm to offenders punished with no benefit to society or to themselves. It would embrace positive modern trends[4] in criminology, corrections, social sciences, and responsible government towards performance measures and evidence-based practices.

Relationship to the existing Model Penal Code: The Reporter's initial concern with the existing Code was its lack of guidance due to its "shopping list" of unprioritized sentencing purposes whose achievement is presumed but never measured.[5] The DRAFT would retreat to the

---

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).

[3] *See* §6A.05. Under the Reporter's approach, the sentencing commission directs enormous attention to how faithfully guidelines are implemented, while considering how well sentencing achieves any social purpose is an optional undertaking – which is further diluted by the inclusion of retribution *per se* as a sentencing purpose.

[4] See authorities cited note 1, *supra*.

[5] *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).

ordered just deserts of guidelines – and accept the propagation of guidelines that order just deserts as a sufficient objective for the American Law Institute. This proposal would urge the Institute to respond to the deficiencies in current law and practice correctly identified by the Reporter. In contrast to the Reporter's approach, this proposal would respond to those deficiencies in a manner that embraces rather than competes with our growing understanding of what works and what does not on various offenders, and growing trends in criminology, corrections, the social sciences, and responsible government towards performance measures and evidence-based practices.

While the Reporter's DRAFT sees guidelines as the preferred device for distributing the resources driven by sentencing decisions, this approach would remain neutral as to guidelines, although that neutrality is not an essential concept. As provided by the "Harm Reduction Sentencing Code" set out in the Appendix, a state may reasonably seek policy-level guidance of sentencing through a statement of sentencing principles or the promulgation of sentencing ranges, as effectively as by advisory or mandatory guidelines.[6] What matters is the purpose and effect of the structure – not how the choice fits with the preferences of those who support or oppose guidelines for their own sake. This neutral approach avoids diverting the real benefit of a revision into the guideline debate. Guidelines are controversial in states because they encourage heated debate over "judicial independence" in supposed competition with legislative policy making. This Motion ignores that debate, and focuses sentencing law revision on what matters: how more effectively than in the past to pursue harm reduction through sentencing.

Relationship to provisions before the ALI Council in October, 2006: The Reporter did not present motions concerning this proposal to the Council. The issues the Reporter posed to the Council that came closest to the principles at stake in this motion were those discussed in support of Motions 1 and 2.

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. 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. 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: Motions 1 and 2 would prevent the revision from perpetuating avoidable cruelty to victims and offenders, waste to taxpayers, and from "remain[ing] shackled to an approach that

---

[6] *Harm Reduction Sentencing Code*, §2.1.

will seem primitive and inefficient, the artifact of an abandoned theory."[7] This motion would accomplish those purposes, but would also transform the revision into a major benefit worthy of enthusiastic support among the states. This motion would allow the revision to reform a brutally dysfunctional and irresponsible sentencing culture, and to lead American sentencing law and practice toward tremendously improved, evidence-based, harm reduction.

Return to the Model Penal Code Issue Page

[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 (PLAN FOR REVISION, *supra* note 4), but his analysis applies with equal force to all drafts through *Council Draft No. 1*.

Appendix:

A Harm Reduction Sentencing Code

Michael Marcus

December 16, 2006

Introduction

The proposed revisions to the Model Penal Code sentencing provisions currently in circulation (Prof. Kevin Reitz, Reporter) derive from the proposition that sentencing should be organized around "limited retribution," with utilitarian objectives operative only occasionally and for only some crimes. This draft is intended to illustrate how a sentencing code oranized around evidence-based practices in pursuit of harm reduction might play out in terms of purpose and discretion, as well as in the role of sentencing commissions and appellate review. It is intended to illustrate the implications of issues arising from the competition between retribution as an organizing principle (as in the Reporter's drafts) and an organization stressing evidence-based practices in pursuit of harm reduction (including public safety and parsimony). It is as consonant with "limiting retributivism" as is the Reporter's approach, because both endorse the proposition that no sentence should be disproportionately severe.

The foundational propositions of this draft include:

- *The need for reform arises from the profound distance between the claimed objectives of sentencing on the one hand, and the existing culture of sentencing practices and their unacceptable public safety outcomes on the other;*
- *The Reporter's criticisms of existing sentencing law are correct insofar as they challenge the validity of mere suppositions that sentencing somehow serves public safety, but we should require validation for all suppositions about the effects of sentencing*
- *Founding a sentencing code upon ordered retribution distorts the actual social utility of punishment and ultimately enables rather than moderates punitivism and mass incarceration*
- *Accepting accountability for public safety outcomes is ultimately the most hopeful of strategies to moderate punitivism, and to effect 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 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") <u>per se</u> as the overriding function of sentencing while avoiding accountability for our public safety impact as well as the actual impact of retribution measured by <u>its</u> 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 crimes with actual victims, it rarely justifies departure from sentences most consistent with public safety*

- *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*

Note: *This version differs from an April, 2006, version in that I have eliminated express provision for rulemaking by sentencing commissions. Although a state may wish to invest its commission with some rule-making authority (at least for data gathering purposes), at the level of a national model it is sufficient that the commission's functions be advisory except to the extent that they result in legislation..*

§1 Purposes of Sentencing

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

Commentary: I agree with all who have addressed the issue 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 themselves. The two purposes of providing public safety and promoting public values are not mutually exclusive.

The qualification that these are purposes that operate "within the context of criminal justice" recognizes that public safety is a broad realm of which criminal justice addresses only part. 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, public safety includes crime prevention - not just at the level of law enforcement strategy, but also at the level of 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, incapacitation, reformation, and the devices of restorative or therapeutic justice), and of others who may be influenced by sentencing through the means of general deterrence or even the successful promotion through sentencing 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 a role of promoting social values. In the public sector, public education and educational publicity are common methods of promoting the values of a society. In the private realm, governmental agencies, 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 both immoral and criminal, but also serves the function of promoting values through a host of additional modalities. While deterrence employs fear 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 compassion toward an offender, or to enhance empathy on the part of an offender through counseling, 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 to the circumstances of mental illness, addiction, or homelessness in crafting an evidence-based sentence may have the opposite, pro-social impact. And 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.

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. Sentences justified on the basis of an ephemeral matrix of just desserts are just as harsh or lenient, and gain nothing in equity by avoiding utilitarian purposes. Worse, 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 to some presupposed universal need for retribution *per se.* 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. See §1.2.

The public safety and social value functions are not mutually exclusive. The traditional notion of proportionality, for example, is a limit on severity which *serves* public values, just as any 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 some burden of validation. Approaches that are satisfied with merely ordered just deserts, as in typical guideline schemes, would allow retribution to justify sentencing as long as it lands in some range of consensus, built by a sentencing commission with legislative endorsement or acquiescence. The Reporter's DRAFT would permit a role for deterrence, reformation, or incapacitation *only* if there is "reasonable prospect of success." Surely, we should not pursue sentencing goals when they are not reasonably likely of success. But to justify any sentence on *any* principle should require something more substantial than ordered sophistry. Whether a given level of severity is necessary to deliver substantial justice to an actual victim, or 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.

Stated otherwise, there is no less 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 for offenders. Retributive rationales for that allocation demand no less substantial a basis than do utilitarian rationales. In most sentencing scenarios, it is more reasonable to make our best evidence-based effort 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. It makes no sense whatever in the vast majority of sentencing occasions [*i.e.,* for the vast majority of offenses and offenders] to justify forgoing best efforts at crime reduction [meaning, here, attempting to reduce the likelihood of the offender's recidivism] on the 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 (on the outside) *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 resource – 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, responsible pursuit of public safety within limits of 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 career, and as compared with such alternative dispositions as may be available. 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**
- **b. Deterrence**
- **c. Reformation**
- **d. Alternative sanctions**
- **e. Restorative justice**
- **f. Therapeutic justice**
- **g. Dispositions promoting values preclusive of crime**
- **h. Dispositions allocating limited correctional resources to reduce harm consistently with public priorities.**

Commentary: 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. The subsection adds the components of 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).

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 no less than sentences that reflect compassion for victims can serve to reinforce social values that serve as 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 an analysis of whether and to what extent any available means of addressing an offender's risk is likely of success).

This list is expressly non-exclusive. And the inclusion of any means in this list is not to 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 limitations of resource require that sentencing choices be sensitive to prioritization of risk and resource.

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 incapacitative resources primarily for those offenders whose risk of harm is greatest, and directing at scarce treatment beds (in or out of custody) 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.

Prof. Reitz has called lists such as this "decoration," correctly criticizing existing sentencing statutes as providing no effective guidance for the exercise of sentencing discretion (although his most recent drafts are subject to the same criticism). This code responds by proposing a protocol (§1.3) that requires a sentencing judge first to pursue the sentence, within the range of

proportionality and the limitations of law and resource, 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 proportionate 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. Providing restorative justice**
- **f. Promoting values preclusive of crime**
- **g. 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.**

Commentary: 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 otherwise, punitive or nonpunitive dispositions may best promote public values 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 an offender whose crime was of low severity and risked or caused little harm. 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 of the offender, the offense, and any victims. It will also vary over time, based upon "the evolving standards of decency that mark the progress of maturing society." *See Trop v. Dulles*, 356 US 86 (1958).

Significantly, the extent to which severity is a socially productive or necessary response 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 that for any other sentencing rationale.

As with the Reporter's drafts, 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. [An offender's criminal history can certainly be part of responsible pursuit of public safety, as discussed in §1.1.]

In some scenarios commonly presented by criminal cases, restorative justice is far better at vindicating social values than retributive justice. Many victims of at least the more common and less heinous crimes often find nonpunitive, 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. 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 through one means or another to degrade and inflict pain. It is not just the death penalty that conflicts with the value it purports to further.

This list is expressly non-exclusive. And the inclusion of any means in this list is not to imply that it has a valid application in any particular sentencing. Whether any means is reasonably likely of producing 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 limitations of resource require that sentencing choices be sensitive to prioritization of risk and resource.

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 but one objective of sentencing – and can easily be overdone. Surely there is no virtue in consistency if the effect is to ensure the repetition of the mistakes of 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 – whether our purpose is to achieve the best crime reduction or to achieve moral equivalency. Judges should be sensitive to variations in culpability, harm, and susceptibility to reformation by available dispositions, and in the availability of resources. It makes no sense to deprive one offender of an available disposition that will prevent that offender's future crime just because that disposition is unavailable to another offender.

On the other hand, sentencing must consciously avoid oppressive discrimination based on ethnicity, gender, class or minority status. See §1.6.

§1.3 Method of Serving Sentencing Purposes

In constructing a sentence from among legally and practically available dispositions, and within any limits required to maintain proportionality with an offender's culpability, 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 promote public values.

In all respects, a judge shall rely upon the best available evidence, research, and data to determine what sentence best serves the purposes of sentencing.

This section assumes that a judge will be cognizant of legal and practical limits on available dispositions, and recognizes that in individual cases an offender's culpability may be limited sufficiently to reduce the available disposition for reasons of proportionality. As with the Reporter's DRAFT, this code assumes that concepts of proportionality will operate at a

"subconstitutional" as well as a constitutional level. The section then directs judges first to recidivism and then to remaining purposes for two reasons. First, the sentence that most effectively reduces recidivism in the vast majority of case *is* also the sentence that best serves all other sentencing purposes. Second, 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 whose crimes should have been prevented and for the offenders whose sentences would have been less punitive and more beneficial to the offender had crime reduction been responsibly pursued.

One critical proposition that sets this draft apart from others is that the greatest need for revision is the failure of sentencing rigorously to pursue best efforts at crime reduction. Unlike the Reitz revision, which responds to past utilitarian failures by largely abandoning crime reduction objectives, this code would demand accountability for outcomes under all sentencing purposes.

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 generally and best 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. Note that in any given case, a sentence that relies upon incapacitation, specific deterrence, reformation, or restorative or therapeutic justice, or upon a combination of these ingredients, 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 find that the public values crime reduction and reformation ahead of punitivism, yet sentencing politics continue to support the fallacy that the public uniformly demands harshness for all sentencing. Most sentences that presume an offender's capacity for reformation and actually accomplish that reformation also best promote human worth and dignity and the 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 or amends to a victim is most likely both to reduce the offender's likelihood of recidivism and to satisfy the victim's need for substantial justice.

The sentencing judge is directed first to consider preventing recidivism, then to consider whether other purposes of sentencing, which are usually also served by such a sentence, require some modification in a given case. For example, considerations of general deterrence might require a corporate officer's crime of unlawful hazardous waste disposal to result in some incarceration sentence, even where the individual officer and corporation were reliably

specifically deterred by a fine. A child victim of sex abuse may have a therapeutic need for knowing that a severe sentence was imposed on the perpetrator to help the victim understand that the victim shared no fault for the crime, even as to an "opportunistic" offense in which a particular offender poses no substantial risk of recidivism. The family of a victim of a social drinker's deadly drunk driving episode may require a substantial prison sentence to resolve their loss and to vindicate the value of a life lost, even if the offender will in fact never drink and drive again regardless of the sentence.

Often, there are a variety of means which each 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.

The second critical proposition that sets this code apart from others is that even with the best proclamation of principles, only with rigorous and enforceable pursuit of the best evidence, research, and data upon which to base sentencing decisions can sentencing emerge from the fog of ineffective liturgy to assume a socially responsible role. Thus judges are required to base sentencing decisions on the best available evidence, research, and data. *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 DRAFT would protect that fog of ineffective liturgy for another generation - unless, of course, it is simply ignored by the states that might otherwise be guided by the American Law Institute.*

The formulation "best available evidence, research, and data" recognizes the paucity of validated information currently accessed in sentencing analysis, and anticipates an evolution towards regular reliance on more substantial and reliable evidence. It is to be hoped that 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 – will be replaced by rigorous analysis and social science research – 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 much use of evidence without intermediate academic interpretation (though they should also benefit from such interpretation, again subject to rigorous analysis and validation). Such data would include the collected experience indicating which sentences best correlated with reduction of what species of recidivism with respect to which cohort of offenders sentenced for similar crimes – as is presented by Multnomah County's sentencing support tools.

Thus, in considering the likelihood that a given offender would or would not 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 (for example, in weighing a community-based probationary sentence against a term of imprisonment), a judge should be provided by advocates or by sentencing support tools or both with evidence about the efficacy of various dispositions for various offenders, and with risk and needs assessments 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, or is necessary to uphold respect for the law, or to prevent private retribution or vigilantism, or to promote values of empathy, compassion, or respect for the persons, property, or liberties of others.

The nature of appropriate evidence, research, and data with which to address this vast range of sentencing analyses varies widely along that range. 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. Of course, the court rather than the victim has the 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 are to be considered; it is entirely appropriate that the prosecution 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 sustain a particular value calling for the denunciation of the offender's crime, are issues susceptible to some level of social science research – as is the question whether such values as respect for the persons, property, and liberties of others are promoted or undermined by severity or leniency in a given class of cases. And even what punishment or other sanction imposed on the offender will actually serve a given victim's needs for substantial justice may be susceptible to social science input.

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 maturing society."

§1.4 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 crime reduction 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**
- **c. the harm risked or caused by the crime.**

Moral culpability is enhanced by such factors as

- **a. 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**
- **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 defense
c. remote or minimal participation in an offense primarily committed by others

For what it may be worth, I believe this to be entirely consistent with Norval Morris' notion of limiting recidivism. Whether or not that is correct, this code expresses that 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 resource allocations in general. A guideline scheme may impose or suggest lower limits based on crime seriousness and [optionally] criminal history variables. As with the Reporter's drafts, 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. [An offender's criminal history can certainly be part of responsible pursuit of public safety, as discussed in §1.1.] In any event, a sentencing court also has a responsibility to ensure that a sentence is not excessive in light of an offender's culpability in a specific case.

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 actual victims of a crime, for example, require a more severe sanction than resulting from a recidivism-reduction analysis alone in light of the offender's culpability. But, as with any other deviation from mere recidivism reduction, 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..

§1.5 The Role of Victims of Crime

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

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
iii. restitution for any economic loss
iiii. 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 §1 of this code.

Commentary: As set forth in sections 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 participation and consideration in sentencing, but they cannot be given ultimate responsibility for a sentencing decision. Just as 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, so must the court choose the sentence most likely to prevent future thefts by a thief whose outraged present victim demands a sentence crafted for punitive purposes alone (assuming the punitive sentence does not also efficiently serve crime reduction). Nor should the court place an immediate victim's often inflated expectations of receiving restitution above any available and appropriate means for preventing a multiplicity of 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 vulnerable victims, the court should endeavor to respond to the victim's need for recognition of the extent of violation or harm. At least in less serious cases, however, restorative justice may best respond to the victim's needs, a question that may call for the victim's informed input and choice. 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 (see section 3).

As more generally articulated in section 1.3, 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 of success. 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 rather than abandoning public safety to meet the needs of victims or any other sentencing purpose..

§1.6 Ethnicity, Gender, Class and Minority

Because social values condemn oppressive 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
b. 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.

Commentary: Although it is typical to reject any consideration of ethnicity, gender, class and minority (including sexual minorities and minorities based on national origin, religion or

handicap), 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, and are thereby 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 may reduce (but may not increase) and offender's moral culpability.

And, 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 discrimination; this section is a proposal for addressing this dilemma.

[A "hate crime," in which the offender is motivated by an intent to cause harm because of the *victim's* ethnicity, gender, class or minority, is of course not covered by this section 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 of the offender to the fair and accurate determination of facts relevant to sentencing**
- **e. To ensure a range of judicial sentencing discretion that is sufficient to permit sentences that best further the purposes of sentencing under the circumstances of individual offenses, offenders, resources, and the interests of crime victims**
- **f. To establish evidentiary standards for sentencing proceedings.**

Commentary: Most of this should need no further explanation than the text. It is clearly the role of the legislative authority (the legislature and any legislative power reserved to the people under the laws of states) 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 (including, at the option of the legislative authority, 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 [see§§ 1.1 and 1.2], and the priorities implied by allocating resources to perceived levels and species of risk.

Consistent with the theme of this code, the purposes of sentencing laws also critically include establishing *strategies* for ensuring that 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 subconstitutional requirements). Equally critical for 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 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, Blakely v. Washington*, and their progeny.

Consistently with the approach of other drafts, this code recognizes the essential role of sentencing discretion in the trial court, as no generalized proclamation can accurately achieve best efforts at accomplishing the purposes of sentencing under the 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*, 337 US 241 (1949), to the sort of proof required to establish a fact necessary for an increased sentence within the realm of *Blakely v. Washington*. 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.

§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 8 of this code**
- **b. Establishing a sentencing commission with the functions described in Section 9 of this code**
- **c. Establishing ranges and modalities of sentence in categories of offenses and offenders**
- **d. Optionally, establishing advisory or enforceable guidelines or sentencing ranges for sentencing based on crime seriousness and criminal history**
- **e. Optionally, establishing minimum sentences deemed essential for sentencing purposes**

Commentary: In common with other drafts, this code proposes a substantial role for appellate review and for sentencing commissions. The distinction between the approach of this code and other drafts is that this code emphasizes that the purposes of appellate review and of the sentencing commission are to ensure that sentencing actually pursues its purposes. Other drafts, in my view, compromise that pursuit by exaggerating the role of just deserts beyond its proper application, and pretend that a well glossed structure of ordered retribution actually performs a social function, when it serves only to retard the accountability of criminal justice for socially useful outcomes. Under this draft, sentencing begins with reducing recidivism within the limits

of proportionality and resource, and deviates only as actually necessary to achieve public safety more broadly or social values not adequately served by a sentence that best pursues reduction in 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 though they compete with higher callings of sentencing in the formulation of guidelines as they exist in most states, the federal jurisdiction, and the current DRAFT of the Model Penal Code revision – they do reflect the reality that simply modifying marching orders cannot avoid the necessity 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 in most circumstances 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. It is to be anticipated that legislative support for broad discretion will increase as sentencing demonstrates its competence and effectiveness to pursue the purposes of sentencing.

It is also appropriate for the legislative authority to encourage dispositions in the form of modalities of correction that are generally appropriate for 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 by a condition of probation) to participate in indicated treatment. Analogs for theft, domestic violence, and gambling-driven crimes are obvious and appropriate. 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 department of mental health 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 should call for exceptions in the interests of 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 so 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 case cannot persuasively refute the case for minimum sentences. Ideally, where and when something like this code is implemented, and responsible sentencing analysis actually serves public safety, the legislative authority will conclude that criminal justice has earned the discretion to depart from what have been mandatory sentences. This route is also the most practical as a political matter.

This code recognizes that presumptive ranges, as in Ohio, enforceable guidelines, as in

Oregon, and advisory guidelines, as in Virginia, may all adequately serve to promote pursuit of sentencing purposes. It is a political reality that ALI and the Model Penal Code are unlikely to achieve a nation-wide choice among these approaches. To achieve the purposes of a 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, coupled with properly aimed appellate review and sentencing commission functions, can meaningfully accomplish sentencing reform – and none does so inherently (*i.e.*, without effective reference to the goals pursued or the strategies adopted to pursue them). Any version that insists on 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 the decisions of appellate courts, or in the 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 on 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 unsworn 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 the therapeutic interest of a victim in the sentence, 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 on 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 on the conduct of other potential offenders**

vi. **The impact of any sentence on 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**

h. **As to any fact not admitted by the defendant and required to increase the severity of a sentence available following a conviction, any evidence admissible under the rules of evidence applicable to the trial of the issue of guilt**

The court shall not rely on 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 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 on the best evidence provided by the parties or otherwise reasonably available to the court.

Commentary: "Evidence," except as otherwise provided, incorporates information of any form. One of the central purposes of this code, and one it shares with Prof. Reitz's approach to 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 (if the prosecutor has actually talked with or otherwise ascertained the actual intent of the victim) 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. Inherently, evidence concerning the relationship between sentences and community values is less likely of quantification than, for example, data concerning the percentage of like offenders who remained free of recidivism after receiving a given sanction for the same or a similar offense.

The court may, of course, rely on any evidence that the parties know the court is considering but do not dispute. And – subject to the offender's right to notice and an opportunity to contest facts – the court may employ sources traditionally relied upon – such as presentence reports, probation reports, and reports concerning the conduct of an offender before trial in or out of custody, and in any previous cycles through the criminal justice and corrections system.

When the court adjusts a sentence to meet the supposed needs of a victim, such as when punishing an intrafamilial, 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 own assessment of the victim's needs), but otherwise should

have some basis beyond the inherent wisdom of judges for the notion that an elevated level of severity is required to serve some therapeutic needs. 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.

Specifically, the court must base assessments of an offender's risk of future crime, the likelihood that the risk can be reduced by available dispositions (through reformation, treatment, counseling, alternative sanctions, and even specific deterrence), and the availability of any sanction considered – unless the parties otherwise agree – on some meaningful evidence. Courts should not be making decisions that so substantially impact the offender, so affect risk of future harm to potential victims, and so substantially 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 on faulty assumptions that a given component of the sentence is actually 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 achievable unless there is some hope that the offender will get into the program in custody under the realities of bed space and institutional priorities for admission to the program.

In all of these areas, the court is expected to rely on the best evidence provided or reasonably available to the court (See §1.3). This imposes some obligation of quality control by the court even within the standards of mere availability of the evidence, and it acknowledges that there may be routinely available sentencing aids or evidence (such as on-line information supplied to a judge's desktop computer) provided by a sentencing commission or otherwise – but it does not remove the first obligation from the advocates, or impose upon judge the duty to do research for the advocates.

As in all of this effort, it is anticipated and hoped that, through appellate review and the properly directed and supported efforts of the sentencing commission, the quality and availability of evidence will steadily improve, and the thresholds will be raised. This extends beyond the obvious need to assemble, to make available to the process, and vastly to improve the evidence about what works or not on which offenders 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, 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, the function of sentences in promoting human dignity, compassion, empathy, and respect for the persons, property, and rights of others. Some research has been done in these areas, much along the lines of sophisticated public opinion studies, but social science can be far more useful to us if we actually build in an attempt to access social science research.

A minimal beginning is a requirement that judges base sentencing analysis on rationally considered information subject 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 proclamation – however vehement.

§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, whether within or without a presumptive range of sentence, the proponent of the fact bears the burden of persuasion to a preponderance of the evidence.

Commentary: This section 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 v. Washington*, 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 offender schemes and, perhaps, and depending upon the relevant statutory language, to consecutive sentences. This section 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 (see §3).

§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 available evidence available to the court as prescribed by Section 3.

Commentary: Unless the sentencing judge states to the contrary, a presumptive sentence is deemed responsibly to pursue sentencing purposes including best attempts at reducing the offender's recidivism. Such a 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.

§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 otherwise 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 jury 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 empaneling a separate sentencing jury, in a separate sentencing hearing unless the defendant waives jury 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 not be deemed established.**
- **h. Unless otherwise provided by law, 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.**

Commentary: 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 provides for jury trial rights. It is intended to adopt the same approach as I understand Prof. Reitz's DRAFT to take after the September 11, 2005, meeting of the Members Consultative Group. This section is intended

to accommodate any sentencing provision that may trigger the right to a jury trial, including dangerous offender provisions and any consecutive sentencing scheme that may 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 provision 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 the election as to any fact in dispute be made with respect to all offense-related facts and with respect to all offender-related facts. For these purposes, offense-related facts deferred to avoid prejudice under §4(e) are grouped with offender-related facts.

If the jury does not find the fact, it is not established; there is no mistrial and 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 necessary to convict a defendant.

This section departs from the Oregon approach of requiring a defendant to waive jury on all sentence enhancement facts if the defendant waives jury on the issue of guilt, as it is plausible, for example, that a defendant may have good reason for asking for a jury on an issue essential to dangerous offender sentencing while preferring a court trial on an issue of guilt involving, for example, a technical defense.

This section also departs from Oregon's requirement that (except for cases on remand for resentencing in light of *Blakely*) at least those jurors who convicted the defendant decide sentencing enhancement facts on the sentencing jury (Oregon permits convictions by 10 of 12 jurors except for murder). Depending on the circumstances, it may well make sense to empanel a separate jury.

Finally, this section departs from the Reitz DRAFT in expressing no preference that sentencing facts *not* be submitted to juries except as constitutionally required. Juries are fully capable of resolving issues of fact and of competing expert opinion, and ALI should not discourage their use. 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 to the judge the exercise of sentencing discretion not specifically delegated to juries by other provisions of law.

§5 Findings by the Sentencing Judge

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 relies and the judge's findings of fact and conclusions of law in any of the following circumstances:

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

Commentary: This section balances the need for operational efficiency in high volume courts against the purpose of holding sentencing accountable for responsible pursuit of sentencing purposes. The section does not require anything other than an oral statement on the record (or a written statement) of 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.

I recognize some possible tension in mandatory minimum cases in which the judge does not believe sentencing purposes are best served by that mandatory minimum, but I would predict explanations such as "I am constrained by law to impose at least 70 months; I defer to the legislative judgment that this serves the purposes of sentencing, and I believe no greater sentence necessary to serve public safety or promote public values." The tension itself serves some purpose.

This section imposes the additional requirements of specifying the evidence relied on, and of articulating findings of fact and conclusions of law (orally or in writing), whenever the sentence either departs from a presumptive range established by law *or* deviates from a sentence derived solely for purposes of recidivism-reduction. Requiring findings and vetting evidence furthers the purposes of this code both directly and by facilitating appellate review. The appellate court is not to rely on evidence not relied upon by the trial court. See §8.2.

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 findings and conclusions when a judge deviates from recidivism reduction, the section reinforces the primacy of that function of sentencing and reminds all participants that there must be an evidence-based reason for such a deviation. Moreover, in those cases in which appeal is plausible for either side even from a presumptive sentence, the absence of findings will enable 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. See§8.

Through a variety of paths, then, this device 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 section does not prohibit findings and conclusions when a judge imposes a presumptive sentence.

§6 The Role of Probation Officers

Probation officers shall supervise and direct offenders on probation to the court, 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 on which offenders to reduce their future criminal conduct

c. Maintain information concerning the availability of appropriate dispositions in and out of custody

Commentary: In most jurisdictions, sentencing occurs at least as frequently as a result of probation violation hearings as it does as a result of convictions following plea or trial. Any sentencing law should appropriately 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, yet the sentencing culture results in their rarely sharing any of their expertise with the court. This section reflects a reform we have instituted in partnership with the probation authority in Multnomah County (Portland, Oregon) to exploit the expertise of probation officers to improve dispositions in probation violation hearings. In essence, we have changed the message that we are about just deserts. We have made it clear that we want probation violation reports to share with us the risk and needs assessments that probation departments commonly employ, and the officer's knowledge of relevant literature, whenever the officer communicates with us about a defendant's performance on probation. Thus, a violation report will summarize the risk factors and performance of the probationer, and will recommend a disposition based on the best tools and evidence, measured by likely reduction in recidivism, and in light of 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 the analysis and to perform the role of court's expert in advocating for a disposition that is most likely to reduce the offender's future criminal conduct. It is of course critical to this role that probation officers remain informed as to the actual availability of any disposition – including waiting lists, financial and other eligibility criteria, the impact of "holds" on other cases or from other jurisdictions (including immigration matters) , and, in the case of incarceration, credit for time served and any matrix release or other likely reduction in actual time available.

And, because probation violation dispositions are typically free of the constraints of plea bargains, they provide a particularly hopeful occasion for the improvement in the culture of sentencing.

§7 The Role of Presentence Investigations

Presentence 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 otherwise to serve the purposes of sentencing. To this end, presentence 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 by which to determine which correctional devices work best on which offenders to reduce their future criminal conduct
e. Maintain information concerning the availability of appropriate dispositions in and out of custody
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 in or out of custody
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

Commentary: Presentence reports have traditionally collected background information about the crime and the offender, but either fail to make any recommendation at all about the sentence or, as previously was so in our jurisdiction, make a recommendation that is all about just deserts and avoids 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 we order a presentence investigation requesting the information described in §7(f), and the Oregon Legislature has recently required all presentence investigations in Oregon to include that information. 2005 Oregon Laws ch 473 (SB 914).

As with probation officers, presentence report writers are routinely trained in the research, data, and instruments of the criminology and corrections communities. Any rational sentencing law would attempt to exploit that training in providing for pre-sentence investigations.

This draft makes no attempt to determine what types of cases should employ presentence investigations.

§8 Purposes of Appellate Review

In addition to and consistently with the general role of providing a mechanism for the correction of error and the interpretation of law, appellate review of sentences exists to ensure that sentencing pursues the purposes stated in Section 1. To this end, appellate courts shall:

a. Enforce and interpret the provisions of this code and of other laws relating to sentencing
b. Evolve thresholds for reliance upon evidence upon which sentencing decisions are based under Section 3
c. 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

d. Assess the adequacy of findings, conclusions, and reasoning by sentencing judges in rendering sentencing decisions as contemplated by Section 5

Commentary: This section recognizes that appellate review is a critical mechanism both for promoting compliance with sentencing law and for improving the evidentiary and analytical bases of sentencing. The section 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.

§8.1 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 section. 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

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 conclusion that withstand review.

Commentary: This section is intended to provide review sufficient to enforce the provisions of this code, including those contemplating an evolution in the thresholds for reliance on evidence and in the extent to which sentencing decisions are based on evidence and responsibly pursue of the 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 sentencing purposes, and 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 §1.4, and who has no prior offenses and no other basis for a harsh sentence under this code, is "inconsistent with this code," specifically §1.2.

Sentencing procedures contemplated by §8.1(c) include the protocol prescribed by §2.1 as well as any other provision related to sentencing procedure (such as §4).

Section 8.1(d) is intended to enforce the requirement of stating reasons or findings and conclusions as prescribed by §5, and §8.1(e) invites the court to determine both whether the evidence relied upon by the court was properly relied on as the best available evidence (§3) and was sufficient rationally to support the relevant findings. 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 §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.

Section 8.1(g) contemplates that a party may assert a fact potentially significant to sentencing and may prove that fact to the extent that compels that the fact be found. If that fact could affect sentencing notwithstanding any reasons, findings, or conclusions that withstand review, a trial court's failure to find the fact may be the basis of a reversal. A fact that could not affect sentencing under the law (such as an enhancement fact of which notice was not provided by the state or a jury trial right not afforded to the defendant), is not one that "reasonably could affect the sentence."

§8.2 Scope of Review

The appellate court shall review *de novo* any issue of law, including an issue as to the meaning of any provision of this code. The appellate court shall review issues of fact for substantial evidence, except that it shall exclude under §3 of this code as a basis for a finding of fact any evidence that is insufficiently reliable for the purposes for which it was used or which was not the best available evidence.

Commentary: This section 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 has an adequate role in the evolution of thresholds for the use of information in the analysis of various sentencing objectives as explained under §3. As compared with Judge Griffin's draft, this version does not skew standards of review to prefer lighter sentences, but prefers the approach of crafting sentencing purposes (§§ 1 and 2) and directing sentencing protocols (§2.1). A proper implementation of sub-constitutional limits of proportionality, and the express rejection of sentences that punish without some evidentiary basis that punishment is necessary, or not sufficiently accomplished by a crime reduction sentence, should accomplish the objective of avoiding unnecessary punitivism without risking unnecessary opposition to the proposed code.

§8.2 Reversal, Remand and Modification

As to any judgment imposing a sentence that must be reversed or modified pursuant to §8, the appellate court shall remand the case to the trial court for resentencing 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 resentencing, it may in its discretion suspend all or any portion of the sentence pending resentencing or otherwise determine whether the defendant shall be released from any custody pending resentencing.

Commentary: In most cases of reversal, the appellate court will remand for resentencing. 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, and to the end of educating the trial bench (and the bar in the case of published opinions), the appellate court's analysis shall be provided to the sentencing judge.

The last sentence recognizes that an appellate court may be convinced that justice requires that a sentenced offender be relieved of all or part of a reversed sentence, or at least released from jail or prison, pending resentencing, but the default is to the contrary: 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 resentencing.

§9 Purposes 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 concerning, the performance of the criminal justice and correctional systems, and the use and deployment of criminal justice and correctional resources.

Commentary: This section addresses the primary flaw in laws and proposals prescribing the mission of sentencing commissions. Instead of directing such commissions overwhelmingly at the task of monitoring the flow and processing of cases and offenders for purely managerial purposes [alerting managers and policy makers to the load on prisons and the implications of sentencing adjustments on prison bed space], this section directs the sentencing commission primarily to the task of pursuing strategies for ensuring that sentencing actually fulfills its purposes – to provide public safety and to promote public values. Only as a secondary priority do commissions properly serve the managerial role of advising the relevant branches of government on how sentencing conforms to policy and how it affects systems and the need for adjusting the deployment of resources in criminal justice and correctional budgets.

Reports are appropriately to all three branches of government. Reports and recommendations concerning sentencing law appropriately go to the legislature; those concerning correctional

budgets appropriately go to the executive branch; and those concerning judicial procedures and resources appropriately go to the judicial branch.

§9.1 Functions of the Sentencing Commission

The sentencing commission shall

a. Collect and assess data and research, conduct research, and disseminate to sentencing judges and to policy makers such research and data, concerning

i. Which dispositions and correctional modalities best reduce recidivism by which offenders and for which offenses

ii. Which terms and conditions of incarceration and of supervision best reduce recidivism by which offenders and for which offenses

iii. Which instruments best assess risk and susceptibility to reformation among classes of 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

vi. 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

viii. The nature, reliability, and validity of evidence and data relevant to §9.1(a)(i - vii).

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 deployment and allocation of correctional resources and of the criminal law itself

e. Recommend to the legislative and judicial branches the adoption of strategies for

improving the product of sentencing as measured by the purposes 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 deployment of correctional and criminal justice resources
   iii. The nature and efficiency of the processes and procedures of sentencing
   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 section

Commentary: To perform its function of promoting strategies that ensure that sentencing accomplishes its purpose, the commission is directed to conduct and assemble research and data on the issues listed – each of which is expressly relevant to crafting an appropriate sentence at the trial level, and to recommending priorities for the 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 exiting 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 research to which we almost never refer which should be vetted and employed by judges and policy makers in pursuit of sentencing purposes. As stated above, "data" includes feedback on the correlations between sanctions and outcomes (in terms of crime reduction). Dissemination need not be limited to the traditional (and traditionally ignored) annual report, but may be in a form that is more accessible and more likely to assist judges, advocates, and policy makers. An example of one form of such data dissemination is Multnomah County's sentencing support tools.

Another example of this role of sentencing commissions is the validation by the Virginia sentencing commission of risk assessment tools, and the incorporation of risk assessment into sentencing guidelines as a means of more accurate allocation of incarceration to respond to risk levels. Missouri has followed a similar path.

Yet another is the modest charge by the Oregon legislature to our sentencing commission [the "Criminal Justice Commission" that it:

> [C]onduct 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.
>
> [2005 Oregon Laws ch 474 (SB 919)]

The commission also critically serves to evolve standards for relying on evidence concerning the relationship between sentencing and a wide range of outcomes – not just reducing the offender's criminal conduct, but such supposed impacts as general deterrence, public satisfaction, values that prevent crime (respect for the persons, property, and rights of others), and the prevention of private retaliation and vigilantism. Because it is charged with conducting and

assessing research in these areas, the commission is a logical source of standards for determining when information is sufficiently reliable to affect sentencing decisions in all of these areas.

The commission properly publishes the results of its research and data both to sentencing judges, to support more informed sentencing, and to policy makers, in support of recommendations for the modification of sentencing laws, policies, and strategies.

The commission under this draft retains the less critical but significant role of monitoring and reporting on sentencing patterns and impacts on correctional resources for managerial purposes.

§9.2 Access to Data by the Sentencing Commission

State and local criminal justice agencies shall afford the sentencing commission unfettered access to, and the ability to receive copies of, the agency's electronic data for purposes of performing the commission's functions. The commission shall maintain any existing lawful restrictions on access to or dissemination of data to which it gains access, and the data does not lose any such lawful protection by its transmission to or receipt by the commission. 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.

Commentary: 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 and query tools make it unnecessary to achieve universality of databases to provide the benefits of integrated criminal justice data, although the commission retains an advisory role to establish minimum data standards to facilitate analysis under §9.2(e). This section is intended to provide the commission access by law to all state and local criminal justice agency data, to the end that it may extract and receive copies of the data automatically and electronically to assist the commission in performing the tasks contemplated by §9.1. One example of the result 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) [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].

Return to the Model Penal Code Issue Page