Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-Fourth Annual Meeting on May 22, 23, and 24, 2017

Model Penal Code: Sentencing

Proposed Final Draft

(April 10, 2017)

SUBJECTS COVERED

ARTICLE 1 Preliminary (§ 1.02(2))
ARTICLE 6 Authorized Disposition of Offenders
ARTICLE 6X Collateral Consequences of Criminal Conviction
ARTICLE 6A Sentencing Commission
ARTICLE 6B Sentencing Guidelines
ARTICLE 7 Judicial Sentencing Authority
ARTICLE 305 Prison Release; Correctional Populations Exceeding Capacity
APPENDIX A. Principles for Legislation (for membership approval)
APPENDIX B. Reporters' Memorandum: Victims' Roles in the Sentencing Process
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APPENDIX D. Black Letter of Proposed Final Draft

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1600 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

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M. MARGARET MCKEOWN, U.S. Court of Appeals, Ninth Circuit, San Diego, CA
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Reporter
Professor Kevin R. Reitz
University of Minnesota Law School
229 19th Avenue South
Minneapolis, MN 55455-0400
Email: reitz027@umn.edu

Associate Reporter
Professor Cecelia M. Klingele
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Email: cklingele@wisc.edu

Director
Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Deputy Director
Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

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REPORTER

KEVIN R. REITZ, University of Minnesota Law School, Minneapolis, MN

ASSOCIATE REPORTER

CECELIA M. KLINGELE, University of Wisconsin Law School, Madison, WI [from 2012]

ADVISERS

ANDREW ASHWORTH, All Souls College, University of Oxford, Oxford, England
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DAVID BOERNER, Seattle University School of Law, Seattle, WA
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BEVERLY WINSLOW CUTLER, Alaska Superior Court, Third Judicial District (retired), Palmer, AK
RICHARD S. FRASE, University of Minnesota Law School, Minneapolis, MN
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BENJAMIN C. MCMURRAY, Utah Federal Defender Office, Salt Lake City, UT
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LOUIS H. POLLAK, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA [Deceased 2012]
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JUDITH RESNIK, New Haven, CT
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ROBERT J. RIDGE, Pittsburgh, PA
HENRY DUPONT RIDGELY, Wilmington, DE
IRA P. ROBBINS, Washington, DC
SIR BRUCE ROBERTSON, Wellington, New Zealand
JAMES L. ROBERTSON, Jackson, MS
MARGARET CASEY RODGERS, U.S. District Court, Northern District of Florida, Pensacola, FL
RONALD S. ROLFE, New York, NY
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ROBIN S. ROSENBAUM, U.S. District Court, Southern District of Florida, Fort Lauderdale, FL
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D. BROOKS SMITH, U.S. Court of Appeals, Third Circuit, Duncansville, PA
DOUGLAS G. SMITH, Chicago, IL
STEVEN R. SMITH, San Diego, CA
MARGARET POLES SPENCER, Richmond Circuit Court, Thirteenth Judicial Circuit, Richmond, VA
ARTHUR B. SPITZER, Washington, DC
EDWIN H. STERN, Newark, NJ

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JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
VIOLA J. TALIAFERRO, Bloomington, IN
MICHELE TARUFFO, Pavia, Italy
ELIZABETH G. TAYLOR, Washington, DC
WILLIAM H. THEIS, Winnetka, IL
CINDY G. THYER, Arkansas Circuit Court, Second Judicial District, Paragould, AR
JON S. TIGAR, U.S. District Court, Northern District of California, San Francisco, CA
H. WOODRUFF TURNER, Pittsburgh, PA
STANLEY A. TWARDY, JR., Stamford, CT
GARY A. UDASHEN, Dallas, TX
VICTOR D. VITAL, Dallas TX
MICHAEL VITIELLO, Sacramento, CA
RONALD FREDERICK WATERMAN, Helena, MT
WILLIAM WOODWARD WEBB, Raleigh, NC
SARAH N. WELLING, Lexington, KY
LESLEY BROOKS WELLS, U.S. District Court, Northern District of Ohio, Cleveland, OH
KATHLEEN M. WILLIAMS, U.S. District Court, Southern District of Florida, Miami, FL
SAMUEL BROWN WITT III, Richmond, VA
MARK L. WOLF, U.S. District Court, District of Massachusetts, Boston, MA
JOHN A. WOODCOCK, JR., U.S. District Court, District of Maine, Bangor, ME
DOUGLAS P. WOODLOCK, U.S. District Court, District of Massachusetts, Boston, MA
ROBIN E. WOSJE, Arlington, VA
RONALD F. WRIGHT, Winston-Salem, NC
WILHELMINA M. WRIGHT, U.S. District Court, District of Minnesota, St. Paul, MN
LINDA R. YAÑEZ, Texas Thirteenth Court of Appeals, Edinburg, TX
MELVYN ZARR, Portland, ME

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The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Draft is indicated on the front cover and title page.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

The Council approved the start of this project in 2001. Tentative Draft No. 1 on the goals and institutional structure of the sentencing system was approved by the membership at the 2007 Annual Meeting. A Tentative Draft containing material on sentences of imprisonment and mechanisms for prison release was approved at the 2011 Annual Meeting. Tentative Draft No. 3, covering the authorized disposition of offenders and collateral consequences of criminal conviction, was approved at the 2014 Annual Meeting. Tentative Draft No. 4, on authorized disposition of offenders and sentencing guidelines, was approved at the 2016 Annual Meeting

Earlier versions of most of the material in this Proposed Final Draft can be found in Tentative Draft Nos. 1, 2, 3, and 4 (2007, 2011, 2014, and 2016). This draft includes 10 new provisions (§§ 6B.08, 7.02, 7.03, 7.04, 7.07, 7.07C, 7.08, 7.09, 6.14, and 305.8) that have been approved by the Council and are presented for membership approval. For more information, see the Reporters' Memorandum at p. xxxix and the Reporters' footnotes accompanying each Section.

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PROJECT STATUS AT A GLANCE

Part I. General Provisions

Article 1. Preliminary

§ 1.02(2) (TD No. 1) – approved at 2007 Annual Meeting; revised and approved at 2016 Annual Meeting

Article 6. Authorized Disposition of Offenders

§ 6.01, 6.06, 6.11A (TD No. 2) – approved at 2011 Annual Meeting

§§ 6.02-6.04, 6.04B-6.04D, 6.09, 6.15 (TD No. 3) – approved at 2014 Annual Meeting

§ 6.04A (TD No. 3) – approved at 2014 Annual Meeting; revised (TD No. 4) and approved at 2016 Annual Meeting

§ 6.07 (TD No. 4) – approved at 2016 Annual Meeting

§ 6.14 (TD No. 4) – approved at 2016 Annual Meeting

Article 6x. Collateral Consequences of Criminal Conviction

§§ 6x.01-6x.06 (TD No. 3) – approved at 2014 Annual Meeting

Article 6A. Authority of the Sentencing Commission

§§ 6A.01-6A.09 (TD No. 1) – approved at 2007 Annual Meeting

Article 6B. Sentencing Guidelines

§§ 6B.01-6B.04, 6B.06, 6B.10, 6B.11 (TD No. 1) – approved at 2007 Annual Meeting

§ 6B.07 (TD No. 1) – approved at 2007 Annual Meeting; revised (TD No. 4) and approved at 2016 Annual Meeting

§ 6B.09 (TD No. 2) – approved at 2011 Annual Meeting

Article 7. Authority of the Court in Sentencing

§ 7.XX, 7.07A, 7.07B (TD No. 1) – approved at 2007 Annual Meeting

Part III. Treatment and Correction

Article 305. Prison Release and Postrelease Supervision

§§ 305.1, 305.6, 305.7 (TD No. 2) – approved at 2011 Annual Meeting

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Foreword

Model Penal Code: Sentencing is the ALI's most senior ongoing project. It was launched in 2001 under the direction of Professor Kevin R. Reitz of the University of Minnesota Law School. Professor Cecelia M. Klingele of the University of Wisconsin Law School joined him in 2012 as Associate Reporter. Over the last 15 years, the Reporters, aided by their Advisers and Members Consultative Group, have done a prodigious amount of work and deserve our collective gratitude. During this period, the subject matter of this project has also received sustained attention in the public policy arena, which has focused on the outlier status of the United States in terms of the proportion of individuals who are incarcerated and on the significant racial disparities that make this statistic even more troubling. Mass incarceration has emerged as one of the few issues in our divided political discourse in which liberals and conservatives can find common ground.

This project has been previously discussed at 10 Annual Meetings and the bulk of it has already been approved. The remaining 10 new sections, primarily in Article 7 on judicial sentencing authority, are presented for approval at this Annual Meeting, as are amendments to four previously approved sections.

At this Annual Meeting, we will also seek final approval for the whole project. Fifty-five years after the completion of the magisterial handiwork of Professor Herbert Wechsler, who served as the Model Penal Code Reporter before becoming the enormously distinguished ALI Director, our nation's criminal justice system will then be able to benefit from new Sentencing provisions in the Model Penal Code.

RICHARD L. REVESZ
Director
The American Law Institute

March 28, 2017

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Model Penal Code: Sentencing
Proposed Final Draft

March 15, 2017

Kevin R. Reitz, *Reporter*

Cecelia M. Klingele, *Associate Reporter*

REPORTERS' MEMORANDUM

This Proposed Final Draft is the last installment of the Model Penal Code: Sentencing project. It reproduces four Tentative Drafts approved by the Council and membership in 2007, 2011, 2014, and 2016. These previously approved materials make up roughly 80 percent of the current draft. Aside from revisions to reflect amendments by vote of the membership in 2014 and 2016, there have been no substantive changes in the content from earlier Tentative Drafts.[i]

This draft includes 10 new provisions, listed below, which have been approved by the Council in 2016-2017. They are now presented for vote of the membership.

- **§ 6B.08. Multiple Sentences; Concurrent and Consecutive Terms**
- **§ 7.02. Choices Among Sanctions**
- **§ 7.03. Eligible Sentencing Considerations**
- **§ 7.04. Sentences Upon Multiple Convictions**
- **§ 7.07. Sentencing Proceedings; Presentence Investigation and Report**
- **§ 7.07C. Sentencing Proceedings; Victims' Rights**[ii]
- **§ 7.08. Sentence Modification**
- **§ 7.09. Appellate Review of Sentences**
- **§ 6.14. Victim-Offender Conferencing; Principles for Legislation**
- **§ 305.8. Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation**

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[i] All black-letter provisions are reproduced together with their original Comments and Reporters' Notes. The Comments and Reporters' Notes from earlier Tentative Drafts have not been updated for this draft, but will be comprehensively revised before publication of the Code's hardbound volumes.

[ii] For background on the Code's general approach to victims' roles in the sentencing process, see Appendix B to this draft ("Reporters' Memorandum: Victims' Roles in the Sentencing Process").

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Finally, the draft contains amendments to four previously approved Sections, listed below. The amendments have been approved by the Council, and are now brought forward for vote of the membership.

- **§ 6.06. Sentence of Incarceration**
- **§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law**
- **§ 7.07B. Sentencing Proceedings; Jury Factfinding**
- **§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation**

****

If this Proposed Final Draft is approved by the membership at the Institute's 2017 Annual Meeting, the Model Penal Code: Sentencing project will be complete.

Following final approval, the numbering of all provisions will be changed to reflect their actual sequence at project's end.

****

The Reporters thank the Institute for its enormous faith and investment in this project, and give personal thanks to the many people who devoted years of effort to its completion. We dedicate our work to Norval Morris and Marvin E. Frankel, who laid the groundwork.

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PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

1 **§ 1.02(2). Purposes of Sentencing and the Sentencing System.**[1]

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

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

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

8 **(ii) when reasonably feasible, to achieve offender rehabilitation, general**
9 **deterrence, incapacitation of dangerous offenders, restitution to crime victims,**
10 **preservation of families, and reintegration of offenders into the law-abiding**
11 **community, provided these goals are pursued within the boundaries of**
12 **proportionality in subsection (a)(i);**

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

15 **(iv) to avoid the use of sanctions that increase the likelihood offenders will**
16 **engage in future criminal conduct.**

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

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

20 **(ii) to produce sentences that are uniform in their reasoned pursuit of the**
21 **purposes in subsection (2)(a);**

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

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

25 **(v) to ensure that all criminal sanctions are administered in a humane fashion;**

26 **(vi) to promote research on sentencing policy and practices, including the**
27 **effects of criminal sanctions on families and communities; and**

[1] This Section was originally approved in 2007; see Tentative Draft No. 1. Several amendments were approved in 2016; see Tentative Draft No. 4.

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

Comment: [2]

a. Scope. This provision lays out the general purposes of the sentencing system and is intended to regulate all official actors in the system. Section 1.02(2) likewise supplies the primary criteria for evaluation of the system and each of its component parts.

Revised § 1.02(2) reorients the foundations of sentencing law throughout the Model Penal Code. The 1962 Code emphasized the interlocking utilitarian goals of offender rehabilitation and incapacitation, and posited few constraints upon the severity of sentences that could be fashioned in pursuit of those objectives. The original Code's indeterminate-sentencing system allowed for shortened prison terms for those offenders deemed by the parole board to be rehabilitated during incarceration, but significantly extended terms for offenders perceived by the board to be resistant to rehabilitation. See Model Penal Code and Commentaries, Part I, §§ 1.01 to 2.13 (1985), Comment to § 1.02 at 17-18, 24-25.

Subsection (2)(a) sets forth goals for decisions affecting the sentencing of individual offenders. It continues the original Code's endorsement of utilitarian crime-reductive purposes, including offender rehabilitation and the incapacitation of dangerous offenders, but incorporates meaningful proportionality limitations not envisioned in the original Code. The revised provision adds goals of "restitution to crime victims" and the "preservation of families," not included in the original Code. These are important utilitarian goals independent of their effects on future criminal behavior; see § 6.04A (Victim Restitution). Under the new Code's scheme, no crime-reductive or other utilitarian purpose of sentencing may justify a punishment outside the "range of severity" proportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender. See Comment *b* below.

Subsection (2)(b) sets forth general purposes affecting the administration of the sentencing system as a whole. American sentencing systems are composed of many interrelated parts that cannot work well together in the absence of systemwide planning, coordination, oversight, and assessment.

New § 1.02(2) is cross-referenced frequently in the revised Code, and is made a required basis for decisionmaking and explanation by identified officials throughout the sentencing system. See §§ 6A.01(2)(e), 6A.04(3)(a), 6A.05(2)(e) and (4)(b), 6A.06(2)(a), 6A.09(1)(a), 6B.03(1), (3), (4), and (5), 6B.06(1), 7.XX(1), (2), (3), and (5) (Tentative Draft No. 1, 2007); §§ 6.11A(a), (b), (c), and (k), 305.6(4), 305.7(7) (Tentative Draft No. 2, 2011); §§ 6.02(1)(e) and

[2] This Comment has not been revised since § 1.02(2)'s approval in 2007, except for changes relevant to the provision's 2016 amendments; see Tentative Draft No. 4. All Comments will be updated for the Code's hardbound volumes.

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(4), 6.02B(3), 6.11A(a), (b), (c), and (k) (Tentative Draft No. 3, 2014); § 6B.07(1) (Tentative Draft No. 4, 2016) (provision not yet approved); §§ 7.02(2), 7.03(1), 7.07(e), 7.08(3), 7.09(1), (2), and (4) (Council Draft No. 5, 2015) (provisions not yet approved).

b. Utilitarian purposes within limits. Subsection (2)(a) provides a framework for consideration of multiple sentencing purposes in individual cases. It borrows from the writings of Norval Morris.

Subsection (2)(a) is addressed to all official actors within the sentencing system empowered to make "decisions affecting the sentencing of individual offenders." These include decisionmakers at the case-specific level as well as policymakers concerned with the governance of whole categories of cases, to the extent that their policy decisions affect the sentencing of individuals. Subsection (2)(a) thus sets out fundamental policy bases for the actions of sentencing courts, appellate courts, the sentencing commission, correctional officials, probation departments and other community corrections agencies, the agencies charged with prison-release decisions and postrelease supervision, and those officials who fix sanctions upon sentence violations. Although a legislature cannot tie its own hands through a statute of this kind, the recommendations of the Code will be best realized if all legislation affecting criminal sentences is crafted in light of the purposes in § 1.02(2)(a).

Illustrations:

1. A sentencing court, when pronouncing sentence in a particular case, must select a sentence that comports with the purposes in § 1.02(2)(a). See § 7.XX(1) and Comment *b* (Tentative Draft No. 1, 2007).

2. An appellate court, when reviewing the sentence in a particular case, must do so in light of the purposes in § 1.02(2)(a). See § 7.09(1) and Comment *b* (Council Draft No. 5, 2015) (provision not yet approved).

3. A sentencing commission, when promulgating sentencing guidelines, must effectuate the purposes of § 1.02(2)(a) to the extent that the guidelines will be applied in individual cases. See § 6B.03(1) and Comments *b* and *c* (Tentative Draft No. 1, 2007).

The conceptual framework of subsections (2)(a)(i) and (ii) is that utilitarian goals such as rehabilitation, incapacitation, general deterrence, victim restitution, preservation of families, and offender reintegration are legitimate and desirable purposes of the criminal-sentencing system, which should be pursued "when reasonably feasible" and within limits of justice and fairness. The utilitarian objectives named in subsection (2)(a)(ii) are not applicable in every case, and are not realistically achievable in some cases even when desirable. For example, restitutionary goals are not operative for victimless crimes, general deterrence is surprisingly hard to effect through individual sentencing decisions, and incapacitation is not a fairly realizable goal for defendants who pose little or no danger of recidivism. The Code therefore requires a reasonable grounding

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in factual potential before a utilitarian purpose may be the basis of a criminal sentence. Without such a requirement, the Code would invite misuses of utilitarian rationales that are based on hunches, intuitions, bare optimism, fear, or animosity. At the same time, the Code's rule should expand the "market" for utilitarian sanctioning strategies that can be shown to have reasonable factual foundations and chances of success.

In addition to the Code's threshold concern of "reasonable feasibility," subsection (2)(a)(i) states a basic rule of fairness: that pursuit of utilitarian goals should not go so far as to produce disproportionate sentences. The reference points by which proportionality is judged are stated in subsection (2)(a)(i) as "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." Across nearly all theories of criminal punishment, as voiced by judges, practitioners, and academics, there is consensus that disproportionate penalties are undesirable if not impermissible, and should not be consciously fostered by a just system of laws. Deontological concerns of justice or "desert" place a ceiling on government's legitimate power to attempt to change an offender or otherwise influence future events. So too, an appeal to utilitarian goals should not support a penalty that is too lenient as a matter of justice to reflect the gravity of an offense, the harm to a victim, and the blameworthiness of the offender. The operation of proportionality as a "floor" on punishments is clear, for most people, when sanctioning the most severe offenses in the criminal code. Along with Kant, the Code would mete out serious punishment to the culpable murderer, even if no utilitarian benefit were realistically in sight.

While the reasonable feasibility of utilitarian goals is at root a question of empirics, experience, and probabilities, subsection (2)(a) embraces Norval Morris's observation that human moral intuitions about proportionate penalties in individual cases are almost always rough and approximate. Even when a decisionmaker is acquainted with the circumstances of a particular crime and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is precisely *x*. In Morris's phrase, the "moral calipers" possessed by human beings are not sufficiently fine-tuned to reach exact judgments of condign punishments. Instead, most people's moral sensibilities, concerning most crimes, will orient them toward a range of permissible sanctions that are "not undeserved." Outside the perimeters of the range, some punishments will appear clearly excessive on grounds of justice, and some will appear clearly too lenient—but there will nearly always be a substantial gray area between the two extremes.

Subsection 1.02(2)(a)(i) codifies the conception of latitude in morally permissible sentences when it speaks of a "range of severity" of proportionate punishments. Subsection (2)(a)(ii) makes further reference to the idea of a permissive range when it refers to "the boundaries of proportionality in subsection (a)(i)." Responsible decisionmakers in each sentencing system must strive toward informed moral judgments concerning those sentences that fall within, or outside, acceptable boundaries of proportionality.

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The Code's drafters recognize that "proportionality" as an applied legal doctrine is hazy and subjective, just like many other legal constructs that separate the permissible from the impermissible, including "probable cause," "proof beyond a reasonable doubt," a "substantial and unjustifiable risk," or a "reasonable" standard of care for an actor "in the defendant's situation"—all of which do regular work in American criminal-justice systems that have adopted the original Model Penal Code.

There are no tools in law or philosophy that can render proportionality doctrine an exact science. Indeed, different communities, and different jurisdictions, may be expected to arrive at divergent judgments about the ranges of punitive severity that will be deemed proportionate in specific cases, or across classes of cases. Short of constitutional limitations on cruel or unusual sentences, which are generally quite distant, prudential—or "subconstitutional"—proportionality limitations in a democratic society are best derived through cooperative and collective assessments of community sentiment.

Recognizing the inevitability—and desirability—of jurisdictional variations in a federalist system, the revised Penal Code does not recommend a single, lockstep approach to be followed in all states. Nor does the Code propound detailed benchmarks for the penalties that may be considered proportionate for specific crimes. Instead, the Code gives conceptual and institutional structure to the moral reasoning process for the derivation of proportionality limits.

The division of institutional authority within the sentencing system (that is, "who" is to decide "what") lends clarity to the task of defining proportionality limitations. The Code gives the sentencing commission initial responsibility to set "presumptive" standards for proportionate punishments through the creation of sentencing guidelines. See Comment *c* below. (The commission is also empowered to create guidelines that further utilitarian goals within proportionality limits; see § 6B.03(1) and Comment *c* (Tentative Draft No. 1, 2007).) The commission's value judgments are entitled to respect by later-in-time decisionmakers so long as the commission is well-constituted, with a balanced membership of diverse stakeholders from inside and outside the criminal-justice system. See Comment *c* below. Even so, the ranges of penalties expressed in sentencing guidelines must not be viewed as fixed statements of the boundaries of proportionality for all cases. No matter how sagacious a commission may be, it does its work in the abstract, without exposure to the textured facts and circumstances of individual cases. At the end of the day, the trial and appellate courts must hold dispositive authority in particular cases to ratify the judgments of proportionality reflected in sentencing guidelines—or to rule that the considerations in subsection (2)(a)(i) move an individual case above or below the range of penalties specified in guidelines; see Comment *d* below. In short, the sentencing guidelines should be viewed as "first drafts" of proportionate sentences for ordinary cases, not as final pronouncements for all cases.

The proportionality limitations stated in subsection (2)(a)(i) are intended to allow generous room—an acknowledged "range" of sentence severity—for the consideration of utilitarian goals

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in most cases. Subsection (2)(a)(ii) recognizes the fundamental importance and broad applicability of goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding society. Many of these goals serve interests of public safety through crime avoidance, while others are directed toward victim restitution, offender reintegration, and the effects of criminal sanctions on families. These are compelling objectives in a humane society. Inclusion of crime victims' interest in restitution, and preservation of families as a sentencing consideration, go beyond the utilitarian palate of the original Model Penal Code. All 50 states currently have provisions in their sentencing codes for the restitution of crime victims; see § 6.04A. Offender reintegration—or "reentry"—is occasionally made an explicit statutory goal of American sentencing systems. When not enumerated, it is proper to view reintegration as a dimension of rehabilitation.

Most existing sentencing codes incorporate the utilitarian crime-preventive goals of offender rehabilitation, the incapacitation of dangerous offenders, and general deterrence, in wording that approximates that of 1.02(2)(a)(ii). Sometimes these goals are collected under generic rubrics like "crime prevention," "public safety," or "protection of the public." While not derogating these broad goals, § 1.02(2)(a)(ii) prefers language that specifies the mechanisms through which crime avoidance may be sought. More specific terminology adds clarity to policy debate: When two or more people speak of "public safety," they may be envisioning very different means toward its accomplishment—and they could be expressing very different attitudes toward criminal-justice policy in general.

Another somewhat common term of art in sentencing theory is omitted from subsection (2)(a)(ii): The revised Code does not include "specific deterrence" as a distinct mechanism of crime avoidance. Specific deterrence is understood within the Code as one variant of offender rehabilitation. If an ex-offender is reformed because he found conviction and punishment to be painful and worth avoiding in the future, he is still reformed. The Code does not limit its understanding of rehabilitation to interventions that are voluntary, administered with kindness, or enjoyable.

Finally, § 1.02(2)(a)(ii) avoids the enumeration of "restoration of crime victims" as one of the core purposes of the sentencing system, and includes the more achievable objective of "victim restitution." (For a full discussion of the Code's approach to restitution as part of criminal sentences, see § 6.04A.) In contrast with restitution for economic losses, victim "restoration" is seldom a defined or achievable goal, and has no clear starting or stopping points for implementation. If taken seriously as enforceable statutory language, it is a dangerously open-ended term. See Reporters' Memorandum, Victims' Roles in the Sentencing Process (Council Draft No. 5, 2015).

That is not to say that the Code dismisses the diverse innovations that have grown up in the United States and elsewhere, usually at the local level, under the colors of "restorative justice."

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Despite reservations about word choice, the revised Code encourages such experimentation (see § 6.14), so long as it is consistent with the Code's general approach to victims' rights in sentencing proceedings. See Reporters' Memorandum, Victims' Roles in the Sentencing Process (Council Draft No. 5, 2015, at xxv-xlvii): Restorative-justice processes should be consistent with the goals set out in § 1.02(2), including proportionality, and may pursue additional interests of victims and communities only to the extent they may be furthered without material sacrifice to the general purposes of the system. In other words, the Code treats "restorative justice" as a professional term of art that has entered the mainstream of policy debate, rather than as a literal statement of a systemic objective.

Read together, the Code's provisions on proportionality and utilitarianism in sentencing are intended to encourage rather than stamp out the pursuit of utilitarian ends, in an expanding universe of cases, and with ever-greater attention to proper implementation and evaluation; see Comment *n* below. The Code's reluctance to cut instrumentalism free of the moral constraint of proportionality is central to this effort. A free society should not tolerate the open proclamation that noble aims such as "offender rehabilitation," or "deterrence," or "incapacitation," or the satisfaction of crime victims' interests, may be pursued though unjust sentences. Proportionality limitations do not demean, but legitimate, investment in a strong utilitarian agenda.

Illustrations:

4. In a barroom-assault case with no serious victim injury, the judge is persuaded that the goals of offender rehabilitation and victim restitution can realistically and most effectively be pursued through a combination of intermediate punishments tailored to supervise the defendant in the community (perhaps a period of home confinement with electronic monitoring will enter the judge's thinking), address the defendant's alcohol problem (if he has one and appears amenable to an outpatient treatment program), and keep the defendant employed so there is an improved chance that he will maintain an ability to support himself and his family, and pay any restitution owed to the victim. If the judge is also persuaded that such a package of sanctions would fall within the range of sentences that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender, subsection (2)(a) would allow the judge to impose such an order. This is true even if the judge would ordinarily have imposed a sentence of incarceration for an offense of this kind, or if the sentencing guidelines in the case set forth a presumptive sentence of incarceration. The trial judge's judgment about the proportionality of the resulting sentence is subject to appellate review under § 7.09(5)(b) (Council Draft No. 5, 2015) (provision not yet approved).

5. In a barroom-brawl case otherwise similar to Illustration 4, the defendant is remorseless and combative; he has a prior history of convictions for violent

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offenses; he refuses to acknowledge his serious alcohol addiction and evinces no willingness to participate in a treatment regime. If the judge has realistic grounds to think that a substantial term of confinement will protect the public from the defendant's future criminality, the revised Code would allow such a sentence unless it falls outside the range of penalties that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender. This is true even if the judge would ordinarily have imposed a lighter sentence for an offense of this kind, or if the sentencing guidelines in the case set out a lighter presumptive sentence.

6. A sentencing commission has promulgated guidelines for certain classes of theft, fraud, and drug offenses that make a term of incarceration the presumptive sentence in each case. Based on empirical research into the recidivism rates of such offenders, however, the commission has generated instruments that may be used by sentencing judges in particular cases to identify offenders who present unusually low risks of future recidivism. The sentencing commission may recommend to sentencing judges that identified low-risk offenders should receive community sanctions rather than terms of confinement, provided those community sanctions fall within the range of penalties that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender in each case. The trial judge's judgment about the proportionality of the resulting sentence is subject to appellate review under § 7.09(5)(b) (Council Draft No. 5, 2015) (provision not yet approved).

c. The sentencing commission and benchmarks of proportionality. An inescapable difficulty, in any sentencing policy that incorporates moral intuitions or constraints, is that people of good faith often disagree about what justice demands in particular cases. Systemwide benchmarks for the determination of proportionate sanctions provide a useful starting point for reasoned case-specific analysis in the criminal courtrooms.

In the revised Code, the sentencing commission is instructed to create presumptive sentencing guidelines for most felonies and misdemeanors based on the commission's best collective assessments of proportionate sanctions in "typical" or "ordinary" cases. See § 6B.03(2) and Comment *b* (Tentative Draft No. 1, 2007). When a commission is properly constituted, it brings unique credibility to the task, due to its diverse membership drawn from all sectors of the criminal-justice system and from the broader community. See § 6A.02 (Tentative Draft No. 1, 2007). There is no formula for a commission to derive such valuations—but a commission brings diverse and informed judgments to the task, and its members are well positioned to think comparatively about offenses throughout the criminal code. These are fundamental improvements over a system that requires such judgments to be made anew in each case—or at each decision point in each case.

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d. Subconstitutional proportionality analysis in the courts. In the revised Code's sentencing structure, the sentencing commission is not the sole, or even the most powerful, actor with responsibility to make proportionality determinations. The commission's sentencing guidelines hold only "presumptive" legal authority; they are not mandatory. Judicial precedent carries legal force superior to that of sentencing guidelines. See § 6B.02(1) and (7) (Tentative Draft No. 1, 2007). The final arbiters of proportionality in individual cases, under the revised Code, are the courts.

Both the trial and appellate courts are ceded responsibility to ensure that sentences are not disproportionately lenient or severe on the criteria of § 1.02(2)(a). See § 7.XX(2)(a) (Tentative Draft No. 1, 2007) ("A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines."); § 7.XX (3)(b) (Tentative Draft No. 1, 2007) ("Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a)."); § 7.09(5)(b) (Council Draft No. 5, 2015) ("The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.") (provision not yet approved). These statutory powers are intended to be more robust than the narrow judicial authority to invalidate "grossly disproportionate" penalties under the Supreme Court's Eighth Amendment jurisprudence.

e. Assessment constraints on utilitarian purposes. Aside from proportionality limitations, the utilitarian goals arrayed in subsection (2)(a)(ii) will not all be applicable, or appropriate to pursue, in every individual case. Sometimes utilitarian goals will be wholly inapposite (such as victim restitution in a victimless crime) or may conflict with one another (a sentence best calculated to rehabilitate an offender may sacrifice interests of incapacitation or deterrence of the offender). Subsection (2)(a)(ii) therefore includes the proviso that utilitarian goals are operative "when reasonably feasible." This proviso is intended to require that a utilitarian end may be pursued when reasonable, through reasonable means, and when there is a reasonable prospect for success in employing those means.

One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through administration of a criminal sanction. Thus, for example, the intuition that a defendant will be dangerous in the future (formed, for example, by a judge or a parole board) would not be enough to support an extended prison term on incapacitative grounds. There must be some reasonable ground for the prediction of future criminal behavior. Alternatively, a sentencer should not be allowed to vary a

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penalty based on an unsupported hope that a defendant can be rehabilitated. There should be a reasonable basis for believing that an appropriate intervention exists and that a particular offender (or class of offenders) has a realistic chance of success under its auspices.

One important expression of the "reasonable feasibility" limitation on utilitarian penalties is the Code's view that a trial judge should not be authorized to impose an especially severe sentence in an individual case on the belief that the individualized increase in punishment will act as a deterrent to prospective offenders in the community. The Code takes the view that sentencing courts lack credible information that would support a conclusion that general deterrence would result from an incremental increase in the severity of punishment in a particular case. In the Code's view, general deterrence policy is best evaluated at the systemic level, subject to factfinding and assessment research. A legislature or sentencing commission is best situated to weigh the evidence in favor of general deterrence policy—and would likely be called upon to do so with respect to specific offenses or classes of offenders. When the evidence supplies a reasonable basis of feasibility, that is, the actual deterrability of community members at large through increased punishment severity, the legislature or commission may build the deterrence policy into the sentencing structure.

The question of whether a particular utilitarian end is reasonably feasible is at root an empirical one. A priority of the revised Code is to promote assessment research within the sentencing system; see subsection (2)(b)(vi). Still, for years to come, there will remain a shortage of basic knowledge on the effectiveness of criminal sanctions. Evaluation studies do not currently exist for many programs or are of poor quality. Funding for research addresses only a small fraction of the need. Some forms of programming—for example, those with multiple overlapping interventions—defy straightforward evaluation. New and experimental programs, whatever their nature, require time in operation before initial assessments can be performed.

The threshold of reasonable feasibility in subsection (2)(a)(ii) does not require scientific proof that a given sanction imposed on a particular offender will yield a known result. It demands only that there be grounds that support a reasonable belief that the utilitarian benefit will be realized.

Subsection (2)(a)(ii) does not prioritize its enumerated objectives. Guidance in parsing among utilitarian purposes may be provided to courts in sentencing guidelines; see § 6B.03(5) (Tentative Draft No. 1, 2007) ("The guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes"). The commission may also play a useful role in making research on offender risk assessment or the effectiveness of criminal sanctions accessible to sentencing courts, or in crafting guidelines that are built on improving empirical knowledge. Because the commission's guidelines carry only presumptive force, however, the ultimate responsibility to develop a jurisprudence of utilitarian sentencing lies with the courts.

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f. Prohibition on unnecessary severity. Subsection (2)(a)(iii) incorporates the principle of "parsimony" in the selection of criminal punishments. It articulates a goal that sentences should be "no more severe than necessary" to serve their authorized purposes. The principle embodies a policy preference for use of the least restrictive alternative in individual criminal sentences, but also guards against the needless expenditure of correctional resources. Few can disagree with the principle's content, yet it provides a useful algorithm for the exercise of sentencing discretion.

Once utilitarian goals and considerations of proportionality have been consulted in individual cases, the penalties imposed should be sufficient but not excessive to serve those objectives. In part, the rule of parsimony states a logical truism—punishments beyond those "necessary" are by definition gratuitous. But the principle also interacts with Norval Morris's central claim that human calculations about sentencing are often fraught with doubt; see Comment *b*, above. If a sentencer is uncertain whether a sentence of *x* will suffice to serve defined goals, or whether a harsher sentence of *2x* is needed, the rule of parsimony resolves the doubt in favor of the less severe option.

The parsimony principle also operates in cases in which a decisionmaker has no basis to suppose that any utilitarian goal can be furthered with reasonable prospect of success—a circumstance that is all too common. In such cases, the parsimony principle counsels selection of a penalty at the low end of the range of proportionate sentences in subsection (2)(a)(i).

g. The principle of "do no harm." One of the most powerful insights gained over the years of the Model Penal Code: Sentencing project is that it is distressingly easy for criminal sanctions to do more harm than good. It has been repeatedly impressed on the drafters that this is not an abstract or occasional worry, but a primary concern in the routine administration of correctional interventions.

Subsection (2)(a)(iv) provides that, among the general purposes of sentencing in individual cases, there is an important negative precept that all official decisionmakers should "avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct." No existing state code, to our knowledge, expresses the principle of "do no harm" or "do less harm" as a basic tenet of criminal sentencing. Yet no one would dispute the principle. It is included prominently in the Code's purposes provision, not because it is a debatable policy, on which the Institute must take a stand, but because it is an obvious and consensus principle that is too easily forgotten in the daily machinery of criminal sentencing systems.

For decades, empirical research has shown that, while some rehabilitative programs administered in the community work well to reduce offender recidivism, some programs have no good effects and others make participants more likely to reoffend. A series of recent studies suggest that community-supervision resources are best targeted at high-risk and medium-risk offenders, who stand to benefit from intervention, and such efforts should not be wasted on low-risk offenders, whose prospects for rehabilitation may actually be harmed.

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Everyone is familiar with the claim that "prisons are schools of crime." Preparation of Tentative Draft No. 3 (draft devoted to "offenders in the community") (approved with amendments, 2014), underscored the fact that community sanctions can likewise be generative of crime. Probationers who struggle with intrusive sentence conditions, for example, may have difficulty holding a job. Required meetings with a probation officer can make it hard to be at work—especially if the probation office is a great distance away, the probationer has no car, public transportation is lacking, etc. Conditions such as random drug testing can interrupt probationers' routines with no advance warning. Likewise, the burden of unrealistic economic sanctions can make it difficult for offenders to get on a stable footing financially. Where the justice system should be encouraging ex-offenders to succeed, much as it is in society's interest to see debtors in bankruptcy succeed, the cumulative effect of financial penalties can block offenders' efforts to reintegrate, and may even drive them into the underground economy to make required payments. One expression of the policy of subsection (2)(a)(iv) is found in § 6.04(6) (Tentative Draft No. 3, 2014) ("No economic sanction [other than victim restitution] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."); and Comment *b* (id.) ("This principle of restraint is required not because criminals deserve society's munificence, but because it is a proven route to increased public safety"). As the recent ethnographic work of sociologist Alice Goffman has shown, probationers or parolees who are in arrears in the payment of fines, restitution, or correctional fees can become fugitives in their own communities—avoiding work, their own homes and families, medical care, and important family events like weddings and funerals.

When the unintended effect of a sentence is to compromise public safety, everyone loses. Offenders who recidivate are in a worse position than those who do not. Crime victims whose victimizations could have been avoided are needlessly harmed. The public suffers because scarce correctional resources have been devoted to the creation and not the prevention of crime; crime rates in the aggregate are higher than they otherwise would be; belief in the effectiveness of the criminal-justice system is undermined; and fear of crime is more likely to infect community life. Governments and their officials should have the responsibility, when presented with evidence of counterproductive outcomes, to exercise diligence to shut down those effects.

Criminal sentences that are criminogenic are not entirely forbidden in the Code's scheme, however. In some cases of serious criminal behavior, the gravity of the offense alone will require a significant punishment even if the result is to increase the risk that the offender will recidivate. One example of this would be a probation sentence chosen solely for punitive reasons. Judges sometimes impose lengthy probation terms because, in their view, this is the only sanction other than a prison term that sufficiently holds the defendant accountable for his criminal conduct. In searching for a minimally severe proportionate sentence, a judge may find the interest of crime reduction to be subordinate.

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As with other parts of § 1.02(2)(a), subsection (2)(a)(iv) speaks not only to sentencing courts, but to all other official actors in the sentencing system, including the sentencing commission, prosecutors, appellate courts, corrections officials, prison-release decisionmakers, agencies charged with the community supervision of offenders, and agencies with power to revoke community sentences.

h. Systemic purposes. While § 1.02(2)(a) speaks to the purposes of the sentencing system as applied in individual case decisions, § 1.02(2)(b) addresses purposes applicable to the administration of the system as a whole. The systemic purposes are matters of potential concern to every governmental actor within the system, and not only those with policymaking authority. Like subsection (2)(a), subsection (2)(b) speaks to all official actors whose powers may be exerted to advance—or frustrate—the stated objectives.

To give several examples: A sentencing court in the daily discharge of its duties is called upon to honor the goal of uniformity—or consistency of analysis—when sentencing individual offenders (see subsection (2)(b)(ii)), to be alert to the goal of the elimination of inequities in punishment across population groups (see subsection (2)(b)(iii)), and to further the transparency, accountability, and legitimacy of the sentencing system as a whole; see subsection (2)(b)(vii). The appellate courts must be cognizant of all these purposes, and must exert their authority in a way that ensures the preservation of substantial judicial discretion to individualize sentences, see subsection (2)(b)(i). The sentencing commission must likewise be sensitive to the legislative mandate to preserve judicial sentencing discretion—and, indeed, bears responsibility to further the aspirations laid out in nearly every subdivision of § 1.02(2)(b). For example, the sentencing commission is expressly charged with monitoring and addressing inequities in sentencing across racial and ethnic groups; see §§ 6A.05(4), 6A.07(3), 6B.07(4) (Tentative Draft No. 1, 2007). It is also given special responsibility to ensure that sentencing policies make the best use of available or funded correctional resources (see id. §§ 6A.07, 6B.02(9)), and to conduct ongoing research on sentencing policy and practices; see id. § 6A.05(2)(c).

i. Preservation of judicial discretion. Subsection (2)(b)(i) announces a central institutional philosophy of the revised Code: that substantial judicial discretion to individualize penalties within a framework of law must be preserved in a sound sentencing system. All contemporary sentencing-guidelines systems at the state level have been designed and implemented in recognition of this principle. A frequently voiced complaint about the federal guidelines system, before it became an advisory system in 2005, was its failure to provide adequate room for judicial sentencing discretion. In this respect and others, the Code has been drafted to emulate and build upon the best practices of state guidelines systems, and to avoid serious problems experienced under the early federal guidelines. See Model Penal Code: Sentencing, Report (2003), at 115-125.

The drafters of the revised Code view judicial discretion as an essential feature of the sentencing structure, not an unwanted element. It is not desirable to dispense criminal penalties

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with cookie-cutter regularity according to formal criteria. Sentences prescribed in advance by a legislature or agency may be fitting in many cases, but no prefabricated punishment will be appropriate for all cases. For this among other reasons, the revised Code continues the original Code's condemnation of all statutory mandatory punishments; see § 6.06(3) and Comment *d* (Tentative Draft No. 2, 2011). What should not be done through mandatory penalties should not be done through sentencing guidelines or other means.

Moreover, close controls on trial courts' sentencing discretion serve no good purpose. Experience in state guidelines systems has shown that judges tend to make use of presumptive-guidelines penalties in the large majority of cases, even in systems that allow considerable latitude for deviations from the guidelines. This history teaches that the goals of policymaking, planning, resource management, and proportionality in punishment can be furthered without tight constraints on the authority of sentencing judges.

Elsewhere, the Code gives operational force to the injunction in subsection (2)(b)(i). The Code's approach can best be grasped through a combined reading of three provisions that apportion authority between the courts and the sentencing commission: § 6B.04 (Presumptive Guidelines and Departures), § 7.XX (Judicial Authority to Individualize Sentences) (Tentative Draft No. 1, 2007); and § 7.09 (Appellate Review of Sentences) (Council Draft No. 5, 2015) (provision not yet approved).

j. Consistency of analysis. Subsection (2)(b)(ii) states the goal of uniformity in criminal punishment. "Uniformity" is an end that is easily voiced, but seldom defined. Without explicit reference points, uniformity is an empty concept. It is possible, but not desirable, to set formalistic markers for uniform punishments. All felons of the third degree, for instance, could be assigned "uniform" sentences of four years in prison, with no exceptions. No one defends such a proposal, but a comparable rigidity of response has been built into other, more sophisticated, programs. The original federal sentencing guidelines, for example, achieved high levels of sentence uniformity—but only when assessed against formal guidelines criteria. Uniformity as tautology elides the questions of whether the measurement criteria are just and useful.

Subsection (2)(b)(ii) orients the system toward consistency *of analysis*, rather than consistency of result, and requires that sentencing laws, guidelines, and discretionary actions be applied evenhandedly to all defendants, through the same "reasoned pursuit" of the purposes in subsection (2)(a). Uniformity, thus understood, is an aspiration that may be approached but never entirely realized. An analytic framework for criminal punishment that relies upon imprecise borderlines of proportionality and utilitarian motives supported by insufficient knowledge, that is administered in thousands of cases by hundreds or thousands of human beings, and that must play out in an environment of scarce resources will never achieve the mathematical uniformity of a rule that "all third-degree felons are imprisoned for four years." Instead, a system that aspires

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to consistency of analysis must develop institutional tools and professional habits that can best effectuate a more subtle program.

Presumptive guidelines, if they are the product of reasoned consideration by the commission, go a substantial way toward establishing uniformity of analysis as envisioned in the Code. At first glance, the trial courts' departure power may appear to subtract from the system's uniformity—but this need not be so if departures are well-founded in the purposes of § 1.02(2)(a) as applied to individual cases. Faithfully administered, departures draw actual sentences closer to the aspired-for goal of consistency of analysis, rather than compromising that goal. Indeed, the Code sees the departure power as necessary to effectuate § 1.02(2)(b)(ii)'s conception of uniformity. To protect against idiosyncratic decisions, departing trial courts must give reasons for their actions, which are then reviewable. See § 7.09 ("Appellate Review of Sentences") (Council Draft No. 5, 2015) (provision not yet approved). The appellate courts are charged with development of a common law of sentencing—a web of judicial precedent to coordinate trial courts' decisionmaking processes, and "correct" trial court decisions that are not supportable as reasoned applications of the Code's purposes.

k. Elimination of inequities in sentencing. Subsection (2)(b)(iii) states that it should be the goal of all official actors in the system to eliminate inequities in sentencing across population groups. The provision is worded broadly to extend to "population groups" of many different kinds. The language is intended to include racial and ethnic minorities, as well as groups defined by gender, religious belief, sexual orientation, national origin, or other personal characteristics. The open-ended wording allows for application to vulnerable groups not recognized today as the subjects of discrimination.

The original Code made no official statement on the subject of race, ethnicity, and criminal punishment. Experience suggests that this was an unfortunate omission. Without firm guidance in legislation—or in model legislation—there are many built-in incentives for policymakers to avoid this complex and politically explosive area of concern. The revised Code speaks repeatedly to the subject.

The goal of subsection (2)(b)(iii) is implemented in more specific provisions elsewhere in the Code. See § 6A.05(2)(f) (Tentative Draft No. 1, 2007) (requiring that, on an ongoing basis, the sentencing commission investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities); § 6A.07(3) (id.) (requiring sentencing commission to prepare demographic impact projections, including the race, ethnicity, and gender of persons projected to be sentenced, whenever new sentencing laws or guidelines are formally proposed); § 6B.06(2)(a) (id.) (forbidding sentencing commission, when formulating guidelines, from giving weight to an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief); § 6B.07(4) (id.) (imposing special duty on sentencing commission to monitor the effects

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of the use of criminal history in sentencing guidelines upon punishment disparities among racial and ethnic minorities, and other disadvantaged groups).

l. Correctional resource management. Subsection (2)(b)(iv) states elementary principles of fiscal responsibility that ought to be self-evident and uncontroversial—but in practice have been followed in very few American jurisdictions. One reason the revised Code recommends a sentencing-commission structure is the record of success that state sentencing commissions have had in bringing deliberate controls to prison population growth and, in some states, the use of intermediate sanctions.

A small number of commissions have deployed a resource-management capability toward planned increases in sentence severity—usually at the direction of the legislature in their jurisdiction. The United States Sentencing Commission, in the first 20 years of its history, provides the best-known example of this deliberate policy choice. Among state commissions, the Pennsylvania Commission on Sentencing, in the initial years after its inception in 1982, likewise pursued the legislature's declared policy of prison growth.

Most state sentencing commissions, however, have not followed high-prison-growth policies throughout their institutional lives, which was a notable feat in the 1980s, 1990s, and 2000s. If we work backward from peak American prison populations in 2009, sentencing commissions in Minnesota (starting 1980), Washington (starting 1984), Delaware (starting 1987), Oregon (starting 1989), North Carolina (starting 1995), Virginia (starting 1995), and Ohio (starting 1997), all produced multi-year rates of prison growth slower than average rates for state prison populations nationwide. An important tool used by these states was the correctional-population forecasting model recommended in § 6A.07 (Tentative Draft No. 1, 2007). Emulating legislation in some guidelines states, and practice in others, the revised Code also instructs commissions to promulgate sentencing guidelines that may be accommodated by existing or funded correctional resources of state and local governments; see id. § 6B.02(9), Comment *i*.

Subsection (2)(b)(iv) addresses not only the question of the aggregate use of correctional resources, but also the rational prioritization of their use. Most state sentencing commissions, for example, have implemented policies of longer prison terms for violent offenders that are offset by reduced terms for nonviolent offenders. In a number of jurisdictions, such reallocations have been effected while slowing or reversing preexisting trends of prison population growth. Subsection (2)(b)(iv) is not meant to endorse any one scheme of prioritization, however. To add a hypothetical example, a future sentencing commission may conclude that there is reasonably strong evidence that harsher sentences for driving under the influence can reduce the overall number of those crimes through general deterrence. Under these circumstances, consistent with subsection (2)(b)(iv), the commission may prioritize the use of certain penalties for DUI offenders, as opposed to other classes of crimes where the evidence of a deterrent effect is weak.

m. Humane administration of sanctions. The purposes provision of the original Code did not address prison and jail conditions, or the subject of the humane administration of criminal

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sanctions in general, although provisions in Parts III and IV of the 1962 Code spoke to those topics. The revised Code views these questions as fundamental to sentencing law and policy. A criminal sentence does not begin and end with words spoken in a courtroom or written in a judicial order, but takes the form of a sequence of experiences, sometimes over a period of many years. The content of a sentence, and its chances of achieving the societal goals that lie behind it, depend on its manner of administration. From a perspective of basic human rights, and from a utilitarian perspective of crime avoidance, it is strongly in a society's interest to ensure that all criminal punishments are administered in a humane fashion, as subsection (2)(b)(v) insists.

The history of the American penitentiary suggests that the minimalist requirement of humane treatment has not reliably been met for inmates in the nation's prisons and jails. The question of conditions of confinement in American prisons and jails has in many ways become more pressing than in the 1950s, when the original Code was drafted, or in 1962 when the first Code was finalized. While conditions in many of the nation's prisons and jails have improved in five decades, incarcerated populations have increased by a factor of six. Prison terms on average were shorter than they are today, and the intervening decades have seen the advent of new correctional instruments worthy of examination, including the increased use of private prisons and the advent of "supermax" prisons.

The standard of humane administration is not limited to total institutions. It also applies to probation, postrelease supervision, and the use of economic penalties. At some point, humiliating or gratuitous conditions of supervision can be inhumane—as the actions of some offenders suggest, when they prefer to serve out prison time over being placed on a community sentence. The disruptive effects of random drug testing, for example, which can interfere with work and family commitments, are needless and humiliating for probationers and parolees with no history of substance abuse. In a number of jurisdictions, indigent offenders are forced to pay the costs of their own supervision, testing, and programming without regard to their economic standing, family circumstances, or the effects of such financial obligations on their ability to "get back on their feet" in the law-abiding economy. In some places, the total budgetary costs of supervising entities, public and private, are borne mostly or entirely by the supervised clientele. While these are highly variable practices and are by no means universal across America, the administration of economic penalties in many jurisdictions has earned such pejoratives as "soaking the poor" and the creation of modern-day "debtors' prisons."

It is difficult to conceive of a purposes provision drafted in the 21st century that overlooks the subject matter of how sentences are actually carried out, with U.S. incarcerated populations now standing at more than two million individuals, probation and parole populations at more than four million, and economic penalties—not easily counted in bodies—that have grown exponentially in the last several decades. Subsection (2)(b)(v) states a general precept that all can agree upon, yet is supremely challenging to implement.

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n. Promotion of research. One priority of the revised Code is to promote adequate research and data-collection capabilities within the sentencing system of each jurisdiction, and through partnerships among responsible state agencies, federal agencies, and other organizations. Subsection (2)(b)(vi) states this principle broadly, and posits that governments' assessment responsibility goes beyond an internal examination of the sentencing system itself and the effects of sentences on convicted offenders; it extends further to pressing societal interests in how the sentencing system impacts families and communities.

o. Transparency, accountability, and legitimacy of the sentencing system. Subsection (2)(b)(vii) concludes § 1.02(2) with a statement of how a sentencing system should relate to the broader society. In addition to producing good results in individual cases, the system's workings must be visible and knowable to the public and all affected constituencies ("transparency"), adequate information must be generated to allow for scrutiny of how well the system is performing ("accountability"), and continuous attention must be given to the question of public trust in the system's fairness and intentions ("legitimacy").

The goals of transparency, accountability, and legitimacy given voice in subsection (2)(b)(vii) were not explicit in original § 1.02(2). Indeed, those values held low priority in the indeterminate-sentencing systems of mid-20th-century America, including the indeterminate machinery of the 1962 Code. The most important sentencing decisions in such systems were made in the discretion of judges, correctional officials, and parole boards, all subject to little regulation, burden of explanation, or review. Sentencing was a "black box" process of invisible acts of discretion and power. Many American jurisdictions have failed to meet these aspirations in the past several decades and—more critically—have failed to regard them as bedrock concerns. On all three dimensions, in many sectors of U.S. criminal-justice systems, shortfalls in transparency, accountability, and legitimacy can be said to exist at crisis levels.

The revised Code can further these goals only in the domain of criminal punishment. It works a substantial improvement upon traditional American sentencing systems by making the decisional processes of criminal punishment open for inspection. The goal of system "transparency" is promoted in the Code by creating a structured environment for the exercise of sentencing discretion, which requires reasoned explanations and allows for the review of outcomes, at every important decision point in the sentencing chronology. Goals of transparency and "accountability" are furthered through the Code's increased reflexivity: new institutional mechanisms for regular monitoring of the system as a whole. The public is entitled to information necessary to appraise the workings of the system in the aggregate, as well as disclosures of the rationales for decisions in particular cases.

The goal of enhanced "legitimacy" of the sentencing and corrections system, "as perceived by all affected communities," goes to the moral authority of the criminal law. Even if a system of laws is built on morally sound precepts, and is well designed to further utilitarian goals, it fails when it cannot command the respect of the communities it governs. Subsection (2)(b)(vii) posits

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that the goal of moral legitimacy must not simply respond to majoritarian sentiment, but should be sought within all communities affected by the sentencing and corrections system.

p. States choosing an advisory-guidelines system. The revised Code recommends that states adopt a sentencing system that incorporates a permanent sentencing commission, presumptive-sentencing guidelines, and meaningful appellate review of sentences. The revised Code also recognizes, however, that many of the advantages of a reformed sentencing system can be realized in a well-designed structure that substitutes advisory for presumptive guidelines, while retaining a permanent sentencing commission and an authentic commitment to the appellate oversight of punishment decisions.

Recognizing that adoption of a presumptive-guidelines system will not be feasible in all jurisdictions, the revised Code seeks to assist states that elect to use an advisory system, and help them design the best system possible. The drafters of the Code have studied American sentencing law over the past two decades in search of the conditions for success among those advisory guidelines systems that have earned credibility with judges, and have contributed to important systemwide goals of principled decisionmaking, policy transmission, and resource management.

The Code will contain a running series of Comments addressed specifically to states that elect to adopt an advisory guidelines system, or states that merely desire to study a detailed roadmap of such a program in order to consider the alternatives of a presumptive versus an advisory system. Section 1.02(2), Comments *p* and *q*, are the first in this series. Others in the series are §§ 6B.01, Comment *b*; 6B.02, Comment *k*; 6B.03, Comment *g*; 6B.04, Comment *f*; 6B.07, Comment *g*; 6B.08, Comment *h*; 6B.10, Comment *e*; 7.XX, Comment *i*; and 7.09, Comment *i*.

q. Recommended revisions of § 1.02(2) for an advisory system. States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments to §§ 1.02(2)(b)(i) and (ii):

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

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

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

(ii) to ~~produce~~ encourage sentences that are uniform in their reasoned pursuit of the purposes in subsection (a); . . . .

This version of subsection (2)(b)(i) signals that, under an advisory guidelines system, judicial discretion within statutory boundaries is not constrained by guidelines with force of law, but is exercised in light of advisory recommendations promulgated by the sentencing commission. This iteration of subsection (2)(b)(ii) softens the statement that the sentencing system is designed to "produce" uniform sentences. This is a fair statement when presumptive guidelines are

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employed. With advisory guidelines, it is more accurate to say that the system "encourages" uniformity in sentencing.

REPORTERS' NOTE [3]

a. Scope. The drafters of the original Code hoped that rehabilitative successes would predominate in American sentencing and corrections, and that the nation's use of incarceration would decline through the late 20th century. Instead, punitive and incapacitative goals gained precedence during the 1970s, 1980s, and 1990s, and American incarceration rates expanded by a factor of nearly five. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2010 (2011), at 1 (reporting the first decline since 1971 in U.S. prison populations during the year of 2010, of 0.6 percent); Margaret Werner Cahalan, Historical Corrections Statistics in the United States, 1850-1984 (1986), at 79 tbl. 4-4; Franklin E. Zimring and Gordon Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime (1995), at 3. Indeterminate-sentencing systems such as the one recommended in the original Code became more oriented toward long-term confinement, and less invested in offender change, than most criminal-justice professionals had anticipated in 1962. During the nation's period of unbroken prison growth from 1972 to 2009, the legal systems most often and most dramatically associated with explosive growth in imprisonment rates have been those in states working with indeterminate-sentencing regimes. See Tentative Draft No. 2 (2011), Appendix A.

Revised § 1.02(2), including its linkages to later provisions in the Code, has no close precedent in preexisting legislation. See Preliminary Draft No. 3 (May 28, 2004), Statutory Appendix to § 1.02(2), at 17-40. The drafters intend the provision to be a strong statement that contemporary criminal codes are deficient in their failure adequately to specify and integrate core legislative purposes within the law of criminal punishment. As of this writing, one state has adopted the whole of § 1.02(2)—as approved in Tentative Draft No. 1 (2007)—in a statutory provision governing the Michigan Criminal Justice Policy Commission's authority to transmit recommendations to the legislature on matters affecting sentencing law. The introduction to Mich. Comp. Laws § 769.33a(4), before borrowing in full the language from § 1.02(2), states that the Commission's recommendations "shall reflect all of the following policies."

b. Utilitarian purposes within limits. For examples of policy frameworks closely resembling § 1.02(2)(a), see Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (2012), chapter 2; The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), at 16; Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System (1990); John Monahan, The Case for Prediction in the Modified Desert Model of Criminal Sentencing, 5 International J. of Law & Psychiatry 103 (1982).

(1) Crime-reductive utilitarian purposes. For examples of state sentencing codes that lay out the traditional utilitarian purposes of punishment, see N.Y. Penal Law § 1.05(6) (one purpose of criminal code is "[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection").

[3] This Reporters' Note has not been revised since § 1.02(2)'s approval in 2007, except for changes relevant to the provision's 2016 amendments. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Similar provisions include Ala. Code § 13A-1-3(5); N.J. § 2C:1-2(a)(2); N.D. Century Code § 12.1-01-02; Ohio Rev. Code § 2929.11(A); Or. Rev. Stat. § 161.025(1)(a). For state statutes that give priority to the goal of offender reintegration or "reentry," see California Penal Code § 1170(a)(2) ("the Legislature further finds and declares that programs should be available for inmates including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community"); see also Florida Statutes § 944.012(6)(d); Kan. Stat. § 74-9101(b)(12); Minn. Stat. § 364.01; Mont. Code § 46-18-101(2)(d).

(2) Victim restitution. Provisions that highlight victims' interests in sentencing proceedings exist in every state. See, e.g., Alaska Stat. § 12.55.005(7) ("In imposing sentence, the court shall consider . . . the restoration of the victim and the community"); Arkansas Code § 16-90-801(a)(3), (4) ("primary purposes of sentencing" include "restitution or restoration to victims of crime to the extent possible and appropriate" and "[t]o assist the offender toward rehabilitation and restoration to the community as a lawful citizen"); Del. Code, Title 11, § 6580 (goals for sentencing commission to consider when developing sentencing guidelines include "[r]estoration of the victim as nearly as possible to the victim's preoffense status"); Mo. Rev. Stat. § 558.019(7) ("Courts shall retain discretion . . . to order restorative justice methods, when applicable") id. § 558.019(8) ("If the imposition or execution of a sentence is suspended, the court may order any or all of the following restorative justice methods," including victim restitution, offender treatment, mandatory community service, work release in local facilities, and community-based residential and nonresidential programs); Mont. Code § 46-18-101(2)(c) (among other goals, the correctional and sentencing policy of the state is to "provide restitution, reparation, and restoration to the victim of the offense"); N.Y. Penal Law § 1.05(5) (one purpose of criminal code is "[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community"); Okla. Stat. tit. 22, § 1514 (purposes of criminal-justice system include "restitution and reparation").

(3) Preservation of families. On whether sentencing decisions should be informed in part by their effects on families, see Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepp. L. Rev. 905 (1993); Patricia M. Wald, "What About the Kids?": Parenting Issues in Sentencing, 10 Fed. Sent. Rptr. 34, 36 (1997); Leslie Acoca and Myrna S. Raeder, Severing Family Ties: The Plight of Nonviolent Women Offenders and Their Children, 11 Stan. L. & Pol'y Rev. 133 (1999); Douglas A. Berman, Addressing Why: Developing Principled Rationales for Family-Based Departures, 13 Fed. Sent. Rptr. 274l (2001); Washington State Department of Corrections, Community Parenting Alternative (2015), <http://www.doc.wa.gov/community/fosa/docs/CPAoffenderHandbook.pdf>; Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon, 92 Or. L. Rev. 755 (2013); Tamar Lerer, Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System, 9 Northwestern J. of L. & Policy 24, 49 (2013) (arguing that, along with blameworthiness and utilitarian goals, sentencing judges should be required to consider "the best interests of [defendants'] children and the effect sentences within the appropriate range will have on them.").

Under the federal sentencing guidelines, sentencing judges are discouraged from using defendants' "family ties and responsibilities" as a ground for departure except in exceptional cases. See U.S. Sentencing Commission, U.S. Sentencing Guidelines Manual (2015), § 5H1.6 ("Family ties and responsibilities . . . are not ordinarily relevant in

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determining whether a sentence should be outside the applicable guideline range."). This provision has long been the subject of criticism. See, e.g., United States v. Dyce, 78 F.3d 610 (D.C. Cir. 1995), amended and reh'g en bane denied, 91 F.3d 1462, 1475 (D.C. Cir.), cert. denied, 117 S. Ct. 533 (1996) (Wald, J. dissenting from denial of rehearing en banc) ("this is a strange kind of jurisprudence for a family-oriented society."); Emily W. Anderson, "Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table, 56 B.C.L. Rev. 1501 (2015).

(4) Proportionality constraints. The goal of proportionality in punishment is ubiquitous in legislative statements of the underlying purposes of criminal sentencing. Typically, however, proportionality is articulated as one important objective alongside a number or others, including one or more of the crime-reductive utilitarian purposes. See, e.g., Alaska Stat. Ann. § 12.55.005 ("In imposing sentence, the court shall consider . . . (1) the seriousness of the defendant's present offense in relation to other offenses; (2) the prior criminal history of the defendant and the likelihood of rehabilitation; (3) the need to confine the defendant to prevent further harm to the public; (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order; (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and (7) the restoration of the victim and the community"). See also Ala. Code § 13A-1-3; Ariz. Rev. Stat. § 13-101); Colo. Rev. Stat. § 18-1-102.5; Conn. Gen. Stat. § 54-300(c); D.C. Code § 24-112(b)(2); Official Code of Ga. § 16-1-2; Ill. Compiled Stat., Ch. 720, § 5/1-2; Ind. Const., Art. 1, §§ 16 and 18; Mass. Laws, Ch. 211E, § 2; Nev. Rev. Stat. § 176.0125; N.J. Stat. § 2C:1-2(b); N.Y. Penal Law § 1.05; N.C. Gen. Stat. § 15A-1340.12; N.D. Century Code § 12.1-01-02; Or. Rev. Stat. § 161.025(1); Pa Stat., Tit. 18 § 104; Tex. Penal Code § 1.02; 18 U.S.C. § 3553(a); Utah Code § 76-1-104; Va. Code § 17.1-801; Rev. Code of Wash. § 9.94A.010. In the above formulations, it is unclear what result is intended when proportionality in punishment conflicts with another statutory goal of sentencing, such as the rehabilitation or incapacitation of an offender. It is perhaps implied that proportionality should impose a limit on the pursuit of utilitarian ends. It is unlikely that a court would openly declare that disproportionate penalties are countenanced in any jurisdiction.

Occasionally, the conception of proportionality as overarching constraint is signaled or made explicit in American sentencing codes. See Cal. Penal § 1170(a) (the purpose of incarceration is "punishment," and "is best served by terms proportionate to the seriousness of the offense"; this is the only purpose mentioned); Del. Code, Title 11, § 6580 (sentencing commission must develop guidelines consistent with "overall goals of ensuring certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost"; crime-reductive and restorative utilitarian purposes are denoted "additional goals"); Md. Crim. Pro. § 6-202 ("sentencing should be fair and proportional"; no crime-reductive or other utilitarian purposes are mentioned); Ohio Rev. Code § 2929.11(B) ("A sentence imposed for a felony shall be reasonably calculated to [to protect the public from future crime by the offender and others and to punish the offender], commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders"); Tenn. Code § 40-35-102(1) ("Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense"; no other purpose made applicable to "every" case); id. § 40-35-103(2) ("The sentence imposed should be no greater than that deserved for the offense committed"). See also Ark. Code § 16-90-801 ("the

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purpose of establishing rational and consistent sentencing standards is to seek to ensure that sanctions imposed following conviction are proportional to the seriousness of the offense of conviction and the extent of the offender's criminal history"; no other purpose of the sentencing standards is given, although enumerated "purposes of sentencing" include crime-reductive and restorative utilitarian goals); Montana Code § 46-18-101(2)(a) (one goal of the correctional and sentencing policy of the state is to "punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable"; no other goal is made applicable to "each" offender).

It is rare that proportionality in punishment is not set out in a sentencing code as at least an implied—or potential—limit on sentence severity in pursuit of utilitarian objectives. But see Ky. Stat. § 523.007 ("the primary objective of sentencing shall be to maintain public safety and hold offenders accountable while reducing recidivism"; there is no language concerning proportionality as a goal or limit); Me. Rev. Stat., Tit. 17-A, § 1151 (although sentences in furtherance of utilitarian goals must not "diminish the gravity of offenses"; there is no wording that can be construed as a proportionality ceiling on severity).

For examples of courts struggling with the problem of upper or lower retributive limits, see State v. Chaney, 477 P.2d 441 (Alaska 1970) (Rabinowitz, J.) (trial court's sentence of concurrent one-year terms for two counts of forcible rape and one count of robbery "falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms"; court states that "a substantially longer term of imprisonment" would have been required to serve retributive and other goals); State v. Fields, 688 N.W.2d 878, 883 (Neb. 2004) (vacating and remanding a sentence making the defendant eligible for parole after four years after he committed sexual assault, aggravated assault, robbery, and three other offenses); United States v. Hayes, 383 F. App'x 204, 207 (3d. Cir. 2010) (sentence of six months' home confinement held to be excessively lenient for a possession of child pornography conviction); Com. v. Felix, 539 A.2d 371, 381 (Pa. Super. 1988) (vacating and remanding a four-month sentence for theft and burglary as excessively lenient); United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987) (Posner, J., concurring) (trial court's sentence of life imprisonment without possibility of parole for repeat bank robber was unjustified on retributive grounds by the "sheer enormity of [the defendant's] conduct," especially when measured against the lighter sentences received by many murderers, traitors, or rapists); State v. Williams, Nos. L-00-1027, L-00-1028, 2000 WL 1752889, at *6 (Ohio Ct. App. Nov. 30, 2000) ("[A]ppellant was sentenced to six years in prison for causing the death of two people while committing the misdemeanor traffic offense of speeding. . . . [W]e clearly and convincingly find that appellant's sentence is not supported by the record and is contrary to law as it fails to achieve one of the two overriding purposes of felony sentencing, that is, consistency with sentences imposed in similar crimes committed by similar offenders.").

The structure of subsection (2)(a) borrows from the theoretical writings of Norval Morris. See Norval Morris, The Future of Imprisonment (1974); Norval Morris, Madness and the Criminal Law (1982); Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System (1990). For comprehensive analysis of Morris's theory and its application within a sentencing-guidelines system, see Richard S. Frase, Sentencing Principles in Theory and Practice, in Michael Tonry, ed., Crime and Justice: A Review of Research, vol. 22 (1997). For important precursor works, see H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968), ch. 1; Herbert L. Packer, The Limits of the Criminal Sanction (1968); Frank A. Pakenham (Lord Longford), The Idea of Punishment (1961).

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Morris called his theory "limiting retributivism," because it drew from retributive—or deontological—considerations to impose limits upon the intrusiveness of utilitarian sentences. The revised Model Penal Code avoids use of the term "retribution," however, and speaks instead of "proportionality" constraints on utilitarian sanctions. The choice of terminology is meant to avoid unwanted connotations. For some, the word "retribution" has become ideologically charged; they argue that retribution theory propelled the upward spiral of American incarceration rates in the late 20th century. See James Q. Whitman, A Plea Against Retribution, 7 Buffalo Crim. L. Rev. 85 (2004); Edward Rubin, Just Say No to Retribution, 7 Buff. Crim. L. Rev. 17, 49-55 (2004). Some have conflated the Code's approach with just-deserts theory, or with other theories that posit the derivation of penalty severity from indices of retribution standing alone. See Michael H. Marcus, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1 (2002), 30 Am. J. Crim. L. 135, 136, 169 (2003) (claiming that an early draft of revised § 1.02(2) would "reintroduc[e] just deserts as the primary purpose of sentencing" and would "virtually abandon public safety as a guiding principle").

(5) Alternative theoretical frameworks. Subsection (2)(a) rejects the "just deserts" model of sentence severity, which apportions degrees of punishment exclusively on retributive grounds. See Andrew von Hirsch, Doing Justice: The Choice of Punishments (1976); Richard Singer, Just Deserts: Sentencing Based on Equality and Desert (1979); Andrew von Hirsch, Censure and Sanctions (1993); Andrew Ashworth, Sentencing & Criminal Justice, Fourth Edition (2005), at 84-87. Paul H. Robinson contrasts his preferred program, in which desert specifies the particular amount of punishment that should be imposed on offenders, with the approach of the revised Model Penal Code in: Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, 67 Cambridge L.J. 145 (2008).

The theory of retribution as the controlling principle for the distribution of criminal sanctions has not been widely adopted in American criminal codes. But see Cal. Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances"; no other purpose is given for the setting of prison terms); Fla. Stat. § 921.002(1)(b) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment").

Subsection (2)(a) likewise rejects utilitarian models that pursue instrumental goals without proportionality constraints—or with proportionality limits so far distant that they seldom operate as meaningful checks upon sentence severity. See Michael H. Marcus, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1 (2002), 30 Am. J. Crim. L. 135, 150 (2003) ("Any improvement in criminal sentencing must make crime reduction the primary focus of sentencing. Properly implemented, that approach would make the role of morally based limits (maximum and minimum) secondary in the sense that they would only rarely need to override the outcome generated by responsible consideration of utilitarian factors"). See also Utah Sentencing Comm'n, Adult Sentencing and Release Determinations: A Philosophical Approach 1 (2006) ("The first and foremost objective in the sentencing of offenders is to protect the public. (a) Risk to the public should be of paramount consideration at initial sentencing and in probation/parole deliberations. (b) All other positions taken herein are considered secondary."); Ewing v. California, 538 U.S. 11, 25-26 (2003) (plurality opinion) (holding sentence of 25 years to life imposed under state's three-strikes law, for current offense of theft of golf clubs worth $1200, is not grossly disproportionate

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under Eighth Amendment when based on legislative "judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime").

c. The sentencing commission and benchmarks of proportionality. Nearly all existing guidelines systems incorporate proportionality in sentencing as one important aim of the guidelines, usually stated alongside a number of utilitarian goals. See Ark. Code § 16-90-801(b)(1); 11 Del. Code § 6580(c); D.C. Code. § 3-101(b)(2); Md. Crim. Proc. Code § 6-202; Minnesota Sentencing Guidelines and Commentary (2015), at 1; Ohio Rev. Code § 181.24; Or. Admin. R. 213-002-0001(3)(d); 204 Pa. Code § 303.11(a); Tenn. Code § 40-35-102; Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 4 (2006); Rev. Code Wash. § 9.94A.010(1). Many such systems conceive of presumptive sentencing guidelines as reflecting appropriate punishments for "ordinary" or "typical" cases. For state-specific accounts, see Kansas State Sentencing Guidelines Desk Reference Manual (2006), at 38 (guidelines address "typical case scenarios"; departures are permitted in "atypical cases"). See also Minnesota Sentencing Guidelines and Commentary (2015), at 1; Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 11; Pa. Sentencing Guidelines Standards (2005), at 65; Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 7; Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines, (9th ed. 2006), at 3; Washington Adult Sentencing Guidelines Manual (2006), at II-147. Accord, American Bar Association, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(i) (1994).

d. Subconstitutional proportionality analysis in the courts. For examples of the toothlessness of proportionality review in noncapital cases under the Eighth Amendment's Cruel and Unusual Punishments Clause, see Ewing v. California, 538 U.S. 11 (2003) (holding sentence of 25 years to life for current offense of theft of three golf clubs worth $1200 is not grossly disproportionate under Eighth Amendment); Lockyer v. Andrade, 538 U.S. 63 (2003) (finding no unreasonable application of clearly established Eighth Amendment law when state imposed mandatory prison term of 50 years to life for current offenses of two counts of petty larceny arising from shoplifting of videotapes worth approximately $150); Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding mandatory sentence of life without parole imposed on first offender convicted of possessing more than 650 grams of cocaine). At least two Justices have endorsed the view that the Eighth Amendment imposes no proportionality constraint on the length of prison terms. Ewing v. California, 538 U.S. at 31-32 (separate concurring opinions of Scalia, J. and Thomas, J.).

State courts have generally followed the federal courts' lead; and have upheld unusually severe sentences against constitutional challenge. See State v. Berger, 134 P.3d 378, 387–88 (Ariz. 2006) (en banc) (upholding a 200-year sentence for possession of child pornography); State v. Jonas, 792 P.2d 705, 706 (Ariz. 1990) (upholding a 46-year sentence for selling one marijuana cigarette and agreeing to sell a handgun stolen by a third party); Glover v. State, 477 S.W.3d 68, 73 (Mo. Ct. App. 2015) (upholding 43-year sentence for a 21-year-old defendant who burglarized three unoccupied homes); Piller v. State, No. 68536, 2015 WL 9595184, at *1 (Nev. App. Dec. 29, 2015) (upholding 48- to 120-month sentence for using the personal identification of another); State v. Adams, 565 S.E.2d 353, 354 (W. Va. 2002) (upholding a 90-year sentence for aggravated robbery, where the extent of the offender's violent conduct was grabbing a store clerk by the collar).

It is often said among American criminal-justice professionals that legal doctrines of "proportionality" and "desert" are too amorphous and contestable to provide a genuine systemic constraint on overly harsh (or overly lenient) sentences. For a sustained attack, see Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J.

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Crim. L. & Criminology 1293 (2006). For an argument that American sentencing practices, in the majority of cases that present more than one count of conviction, cannot be reconciled with any extant theory of proportionality, see Kevin R. Reitz, The Illusion of Proportionality: Desert and Repeat Offenders, in Julian Roberts and Andrew von Hirsch eds., Previous Convictions at Sentencing: Theoretical and Applied Perspectives (2010).

Appellate proportionality review of sentences has not always been foreign to American courts, however. In the 1960s and 1970s, a number of federal appellate and district courts struck down sentences under the Eighth Amendment as disproportionately severe. See e.g., Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (life sentence for a habitual offender whose prior convictions included: "(1) writing a check on insufficient funds for $50; (2) transporting across state lines forged checks in the amount of $140; and (3) perjury."); Downey v. Perini, 518 F.2d 1288, 1289 (6th Cir.) vacated, 423 U.S. 993 (1975) (30- to 60-year sentence for possession of a small amount of marijuana); Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir.*)* opinion vacated on reh'g, 587 F.2d 651 (5th Cir. 1978) aff'd, 445 U.S. 263 (1980) (life sentence for habitual offender whose prior convictions were thefts of under $200); Davis v. Davis, 601 F.2d 153, 154 (4th Cir. 1979) cert. granted, judgment vacated sub nom. Hutto v. Davis, 445 U.S. 947 (1980) (40-year sentence and $20,000 fine for intent to distribute less than nine ounces of marijuana); Carmona v. Ward, 436 F. Supp. 1153, 1172 (S.D.N.Y. 1977) rev'd, 576 F.2d 405 (2d Cir. 1978) (overturning life sentences for possession of one individual dose of cocaine and for a co-defendant, for intent to distribute less four ounces of cocaine); Roberts v. Collins, 404 F. Supp. 119 (D. Md. 1975) aff'd, 544 F.2d 168 (4th Cir. 1976) (consecutive 20-year terms for simple assault deemed excessive when aggravated assault with intent to murder carries a maximum sentence of 15 years); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978) (50-year sentence for safecracking, where the offender did not use a weapon or violence); Terrebonne v. Blackburn, 624 F.2d 1363, 1365 (5th Cir. 1980) on reh'g, 646 F.2d 997 (5th Cir. 1981) (remanding a life sentence for an offender convicted of selling 22 packets of heroin). This body of federal jurisprudence, however, was displaced by later Supreme Court rulings.

Appellate jurisprudence in several other countries suggests that proportionality constraints can play a meaningful role within a sentencing system—arguably to a greater degree than has occurred in the United States. Proportionality review is central to the Canadian system. The Canadian Supreme Court recently said that, "[w]hatever weight a judge may wish to accord to the various objectives and other principles listed in the [sentencing] *Code*, the resulting sentence must respect the fundamental principle of proportionality," and also stated that "[p]roportionality is the *sine qua non* of a just sanction." R v. Ipeelee, [2012] SCC 13 at § 37–38. For examples of Supreme Court of Canada cases overturning disproportionately severe sentences, see R v. Ipeelee, [2012] SCC 13 (overturning an aboriginal offender's three-year sentence for violating a supervision order); R v. Nurr [2015] SCC 15 (overturning a 40-month sentence for possession of a loaded firearm); R v. Smith [1987] Carswell BC 198 (overturning a seven-year sentence for bringing seven ounces of cocaine into the country); Steele v. Mountain Institution [1990] Carswell BC 245 (ordering the release of a sexual offender whose indeterminate sentence resulted in 37 years of incarceration). Australian courts regularly modify sentences that are either too lenient or severe under a doctrine of "manifest error." As in the United States, the Australian High Court commands lower courts to be deferential to the legislature. See Jones v The Queen [2010] HCA 45. In practice, however, appellate courts regularly modify sentences they determine to be too severe. See, e.g., Zamolo v. The Queen [2011] NTCCA 8 (reducing a six-year drug-trafficking sentence to four years because the defendant appeared amendable to

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rehabilitation and was nonviolent); Buddle v. The Queen [2011] TASCCA 11 (reducing an 18-month sentence for possession of child pornography to nine months because the offender had a stable job, had no prior convictions, and did not possess videos or meet the victims); Garner v. The Queen [2009] NSWCCA 79 (reducing a three-year sentence to 18 months for possession of a firearm and intent to distribute drugs because the offender committed acts of relatively low culpability, maintained a stable job, and acted as a caretaker for his elderly father); Nieva v. Hales 2003 NTSC 110 (reducing a one-month sentence and 18 months of parole to a small fine for a young offender convicted of possession of a knife). Israeli appellate courts also exercise aggressive review in proportionality challenges. See Julian V. Roberts & Oren Gazal-Ayal, *Statutory Sentencing Reform in Israel,* 46 Israel L. Rev. 455, 456, 471(2013) ("Officially, appellate review of sentences is limited to cases were the trial court made a substantial mistake or deviated significantly from the proper sentencing policy. In practice, however, about one-quarter of the sentencing appeals are granted.").

e. Assessment constraints on utilitarian purposes. The proviso in subsection (2)(a)(ii) (activating utilitarian goals "when reasonably feasible") borrows from Tenn. Code § 40-35-102(3)(C) (among other purposes, criminal sentences "shall" encourage "effective rehabilitation of . . . defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendant"). Subsection (2)(a)(ii) has been adopted in one state as of this writing, in a provision governing the policies that must be reflected in recommendations made to the legislature by the Michigan Criminal Justice Policy Commission, Mich. Comp. Laws § 769.33a(4)(b) (2015).

On the shortfall in quality research on the effectiveness of criminal sanctions in reducing crime, see Gerald G. Gaes et al., Adult Correctional Treatment, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 26 (1999); Lawrence W. Sherman et al., National Institute of Justice, Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress (1997); Alfred Blumstein and Joan Petersilia, Investing in Criminal Justice Research, in James Q. Wilson and Joan Petersilia eds., Crime (1995). The feasibility of general deterrence through marginal increases in the severity of criminal punishments is especially in doubt, at least for many species of criminal behavior. See Anthony N. Doob and Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003) (surveying 10 years of deterrence research). The empirical evidence of deterrence is thin even for white-collar offenders, who are commonly supposed to act with greater calculation than most other criminals. A meta-analysis of existing studies of deterrence in the corporate setting found that regulatory oversight could be an effective deterrent in some settings, but found no evidence of the effectiveness of criminal penalties as a deterrent to illegal behavior, see Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie, and Mariel Alper, What Works? A Systematic Review of Corporate Crime Deterrence, 15 Criminology & Public Policy 387, 397 (2016).

A growing body of literature demonstrates that some offender rehabilitation programs realize desired effects for meaningful numbers of participants. See, e.g., Francis T. Cullen and Katerhine E. Gilbert, Reaffirming Rehabilitation, 2d ed. (2013); Mark W. Lipsey and Nana Landenberger, Cognitive Behavioral Interventions, in Brandon C. Welsh and David P. Farrington eds., Preventing Crime: What Works for Children, Offenders, Victims, and Places (2006). Empirical assessment is needed, however, in part because some interventions aimed at rehabilitation are ineffectual or criminogenic. See, e.g., Anthony Petrosino, Carolyn Turpin-Petrosino, and James O. Finckenauer, Well-Meaning Programs Can Have Harmful Effects!: Lessons From Experiments of Programs Such as

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Scared Straight, 46 Crime & Delinq. 354 (2000). Rigorous evaluation also contributes to the credibility and successful replication of programs that work. See Lawrence W. Sherman, Reducing Incarceration Rates: The Promise of Experimental Criminology, 46 Crime & Delinq. 299 (2000) (arguing that experimental testing of rehabilitative programs "would be the shortest path to reducing incarceration rates" in the United States; that policymakers and the public would invest enthusiastically in such programs if they can be proven to deliver results).

On the other hand, actuarial measures for predicting the risk of recidivism posed by individual offenders have become more powerful over time. See generally John Monahan, The Future of Violence Risk Management, in Michael Tonry ed., The Future of Imprisonment (2004). Actuarial tools have increasingly been put to use in the criminal-sentencing process—sometimes to identify high-risk offenders, and sometimes to identify low-risk offenders for whom an incapacitative sentence would likely be pointless. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). In the terminology of § 1.02(2)(a)(ii), it is not reasonably feasible to pursue the goal of incapacitation of dangerous offenders through the confinement of individuals who pose little or no risk of serious reoffending. At the same time, any attempt selectively to incapacitate high-risk offenders must acknowledge that there will be substantial numbers of "false positives"—individuals who register as dangerous on even the most sophisticated risk-assessment instrument, but who in fact would not reoffend as predicted. See Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985), pp. 1-50. Sentencing decisionmakers in each jurisdiction should ponder not only what aggregate crime reduction is feasible through incapacitative strategy, but whether such programs are reasonable given their human costs.

f. Prohibition on unnecessary severity. On the principle of "parsimony" in the use of criminal sanctions, see Norval Morris, The Future of Imprisonment 60-62 (1974), id. at 61 ("This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty").

Statements against needless severity in criminal punishments are found in many American sentencing codes or in sentencing guidelines. See Ala. Code § 12-25-2 ("purposes of sentencing" include "[i]mposing sanctions which are least restrictive while consistent with the protection of the public and the gravity of the crime"); Ark. Code § 16-90-801(c)(4) ("Restrictions on an offender's liberty should only be as restrictive as necessary to fulfill the purposes of sentencing contained in this policy"); Mich. Comp. Laws 769.33a(4)(c) (sentences rendered should be "no more severe than necessary to achieve the applicable purposes"); Minnesota Sentencing Guidelines and Commentary 1 (2015) ("sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence"); Pa. Stat. Tit. 18 § 104(3) (offenders should be safeguarded against sentences that are too "excessive, disproportionate or arbitrary"); Tenn. Code § 40-35-103(4) ("The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed"); 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection"). See also ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-2.4 (1994) ("Sentencing authorized and imposed, taking into account the gravity of offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized"). For an interesting variation see Ohio Rev. Code § 2929.11(A) (the offender should be punished "using the minimum sanctions that the

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court determines accomplish those purposes [of felony sentencing] without imposing an unnecessary burden on state or local government resources").

g. The principle of "do no harm." On the criminogenic effects of imprisonment, see Daniel S. Nagin, Francis T. Cullen and Cheryl Lero Jonson, Imprisonment and Reoffending, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 38 (2009) (stating that the best reading of current evidence is that prison has no net effect of reducing crime, and may have slight criminogenic results overall); Bert Useem and Anne Morrison Piehl, Prison State: The Challenge of Mass Incarceration (2008) (arguing that, as prison systems enlarge, they achieve diminishing returns in crime avoidance and eventually reach a tipping point when they become crime-productive). On the criminogenic dangers of community supervision and economic sanctions, see Cecelia M. Klingele, Rethinking the Use of Community Supervision, 101 J. Crim. L. & Criminology 1015 (2013); Ronald P. Corbett, Jr., The Burdens of Leniency: The Changing Face of Probation, 99 Minn. L. Rev. 1697 (2015); Breanne Pleggenkuhle, The Effect of Legal Financial Obligations on Reentry Experiences (July 2012) (unpublished Ph.D dissertation, University of Missouri–Saint Louis); Kevin R. Reitz, The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second), 99 Minn. L. Rev. 1735 (2015). On the crime-producing effects of some well-intended prevention programs, see Anthony Petrosino, Carolyn Turpin-Petrosino, and James O. Finckenauer, Well-Meaning Programs Can Have Harmful Effects!: Lessons From Experiments of Programs Such as Scared Straight, 46 Crime & Delinq. 354 (2000). For an ethnographic account of the reciprocal relationship between community sentences and increased crime in a distressed neighborhood, see Alice Goffman, On the Run: Fugitive Life in an American City (2013).

i. Preservation of judicial discretion. For statutory sources, see § 6B.03, Reporter's Note to Comment *d* (Tentative Draft No. 1, 2007). One primary complaint with the federal guidelines system, instituted in 1987, is that it has been too restrictive of judicial sentencing discretion. See Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), ch. 4; Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity, 29 Amer. Crim. L. Rev. 833 (1992). The tight grip of the federal guidelines on judicial discretion loosened with the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005) (declaring the federal guidelines to be "advisory"). See also American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 37 ("The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored. But judicial discretion is necessary to assure that sentences reflect the totality of circumstances regarding an offender and offense").

j. Consistency of analysis. The record of many state sentencing guidelines systems in bringing greater consistency to sentencing decisions is discussed in Michael Tonry, Sentencing Matters 40-49 (1996). There is also evidence that the use of advisory guidelines can enhance the consistency of judicial sentencing, albeit less reliably than when presumptive guidelines are used. John F. Pfaff, The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines, 54 UCLA L. Rev. 235 (2006).

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For a sampling of the criticisms of the sentencing criteria built into the federal sentencing guidelines, see Albert W. Alschuler, Jr., The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901 (1993); Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998).

k. Elimination of inequities in sentencing. For a very long time, the most pressing issues of uniformity and disparity in American criminal law have been those of racial and ethnic disproportionalities in sentences imposed. See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010); Michael Tonry, Punishing Race: A Continuing American Dilemma (2011); Marc Mauer, Race to Incarcerate (2013). Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response 27-32 (2003) quantify the steadily worsening problems of racial and ethnic disparities in prison populations over 120 years from 1880 to 2000. In the 21st century, the black–white "disparity ratio" in male imprisonment rates (see Tonry, above) has diminished somewhat but, as of 2014, remained at nearly 6:1. See Bureau of Justice Statistics, Prisoners in 2014 (2015), at 15 table 10. In the same year, Hispanic:white disparities in male prison rates were 2.3:1, id. Fifty-seven percent of state and federal prisoners in the United States are either black or Hispanic; id.

High ratios of disproportionality have had increasing impact on minority communities as the total scale of American incarceration has grown over the past 35 years. Among black males born in 2001, the U.S. Justice Department estimated that 32.2 percent will serve a prison term during their lifetime. For white males of the same birth year, an estimated 5.9 percent would serve prison time; for Hispanic males, the probability was estimated as 17.2 percent. Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (2003). See also Alfred Blumstein and Allen J. Beck, Population Growth in U.S. Prisons, 1980-1996, in Michael Tonry and Joan Petersilia eds., Crime and Justice: A Review of Research, vol. 26 (1999), at 22-23 ("Between 1980 and 1996 . . . [t]he number of white [prison] inmates increased by 185 percent, the number of black inmates by 261 percent, and the number of Hispanic inmates by 554 percent").

If one combines correctional populations in the prisons, jails, on probation, and on parole, nearly one-third of young adult African American males (in the age group 20 to 29) are under the jurisdiction of American criminal-justice systems on any given day. Marc Mauer, Race to Incarcerate (1999), at 124-125; Marc Mauer and Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later (1995), at 3. Single-city estimates in the 1990s produced still higher control rates in one-day counts: 42 percent of young black males aged 18 to 35 were under justice-system control in Washington, D.C., and 56 percent in Baltimore. See Jerome G. Miller, 42 Percent of Black D.C. Males, 18 to 35, Under Criminal Justice System Control, Overcrowded Times, vol. 3(3), pp. 1, 11 (1992); Jerome G. Miller, National Center on Institutions and Alternatives, Hobbling a Generation: Young African American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland (1992).

Some observers take the view that criminal punishment in America has been driven or infected by pervasive racial discrimination. See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010); Loïc Wacquant, Deadly Symbiosis: Race and the Rise of Neoliberal Penality (2007); William J. Chambliss, Power, Politics, and Crime (2001); Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics (1997); Jerome G. Miller, Search and Destroy: African-American Males in the Criminal Justice System (1996); American Friends Service Committee, Struggle for Justice: A Report on Crime and Punishment in

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1 America (1971). The issue is complex. Serious crime rates, and victimization rates, are highest in America's most
2 disadvantaged communities, which overwhelmingly are minority communities. See James Forman, Jr., Racial
3 Critiques of Mass Incarceration: Beyond The New Jim Crow, 87 N.Y.U. L. Rev. 21, 45-52 (2012); Franklin E.
4 Zimring and Gordon Hawkins, Crime Is Not the Problem: Lethal Violence in America (1998), at 76; Alfred
5 Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743 (1993); Alfred
6 Blumstein, On the Racial Disproportionality of United States' Prison Populations, 73 J. Crim. L. & Criminology
7 1259 (1983); Bureau of Justice Statistics, Homicide Trends in the U.S.: 1998 Update (2000), at 1-3; Bureau of
8 Justice Statistics, Violent Victimization and Race, 1993-1998 (2001), at 10 tbl. 14. Estimated differences in crime
9 commission, however, do not account for the degree of racial and ethnic disparities in punishment. Research
10 consistently suggests that "unexplained" disparities are largest for crimes at the low end of the seriousness scale—
11 especially drug offenses. See Michael Tonry and Matthew Melewski, The Malign Effects of Drugs and Crime
12 Control Policies on Black Americans, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 37
13 (2008 (finding that 38.9 percent of the difference between white and black imprisonment rates in the United States
14 in 2004 could not be traced back to higher rates of arrest in black communities); Blumstein, Racial
15 Disproportionality of U.S. Prison Populations Revisited, supra (finding that the portion of black prisoners
16 "unexplained" by differential arrest rates in 1978 was 20.1 percent); Randall Kennedy, Race, Crime, and the Law
17 (1997), ch. 10; Marc Mauer, Race to Incarcerate (1999), ch. 8; David Cole, No Equal Justice: Race and Class in the
18 American Criminal Justice System (1999), at 141-146; Human Rights Watch, Punishment and Prejudice: Racial
19 Disparities in the War on Drugs (2000).

20 On the multiple causes of high crime rates in disadvantaged communities, see Alice Goffman, On the Run:
21 Fugitive Life in an American City (2013); Victor M. Rios, Punished: Policing the Lives of Black and Latino Boys
22 (2011); Elijah Anderson, Code of the Street: Decency, Violence, and the Moral Life of the Inner City (1999); Robert
23 J. Sampson and William Julius Wilson, Toward a Theory of Race, Crime, and Urban Inequality, in John Hagan and
24 Ruth D. Peterson eds., Crime and Inequality (1995); William Julius Wilson, The Truly Disadvantaged: The Inner
25 City, the Underclass, and Public Policy (1987), at 22-26. Research has documented that the "underclass" status of a
26 community is associated with high crime rates among those who live there, regardless of race and ethnicity. Lauren
27 J. Krivo and Ruth D. Peterson, Extremely Disadvantaged Neighborhoods and Urban Crime, 75 Social Forces 619
28 (1996); Faith Peeples and Rolf Loeber, Do Individual Factors and Neighborhood Context Explain Ethnic
29 Differences in Juvenile Delinquency?, 10 J. Quantitative Criminology 141 (1994).

30 Subsection (2)(b)(iii) is consistent with the following "basic principle" articulated in American Bar
31 Association, Justice Kennedy Commission, Reports with Recommendations to the House of Delegates (2004), at 7-
32 8:

> 33 Given the history of race in America—e.g., slavery, Jim Crow laws, segregation, Japanese
> 34 internment, urban ghettos—there is reason for concern when two-thirds of those incarcerated are
> 35 African-American or Latino. Even though offenders of color may commit a disproportionate
> 36 percentage of certain types of criminal acts as the result of socio-economic disadvantage and the
> 37 many other complex causes of crime, there is also evidence of discriminatory treatment of
> 38 defendants and victims of color at various stages of the criminal process. Every jurisdiction should
> 39 examine whether conscious or unconscious bias or prejudice may affect investigatory,

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> prosecution, or sentencing decisions and take steps to eliminate such bias. All participants in the criminal justice system, including legislators, should strive to eliminate the racial impact of their decisions.

For a full background discussion, see Model Penal Code: Sentencing, Report (2003), at 89-106 (available at "Projects Online" at www.ali.org).

l. Correctional resource management. Perhaps the leading impetus of sentencing reform at the state level beginning in the 1980s and persisting into the 2000s, was the desire to exert deliberate policymaking control over the size of prison populations and the use of other correctional resources. See generally Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 686-689 (1993). For state-specific illustrations, see State of California, Little Hoover Commission, Solving California's Corrections Crisis: Time is Running Out 133-148 (2007); Colorado Lawyers Committee, Task Force on Sentencing, Report on the Sentencing System in Colorado: A Serious Fiscal Problem on the Horizon (2006).

It is no accident that prison growth should be a leading policy issue for American criminal-justice policymakers in the late 20th and early 21st centuries. The 47 years from 1972 through 2009 saw an unprecedented explosion in the use of incarceration by state and federal governments. The nation held an estimated total of 357,292 inmates in its prisons and jails in 1970, which rose to 2,284,900 in 2009. Corrected for population growth, this represented a near quintupling of the incarceration rate. See Bureau of Justice Statistics, Correctional Populations in the U.S. 2009 (2010), at 2 table 1; Margaret Werner Cahalan, Historical Corrections Statistics in the United States, 1850-1984 (1986), at 79 tbl. 4-4. By the late 20th century, the U.S. incarceration rate was higher than that reported in any other nation worldwide, where it remains in 2016. See The Sentencing Project, New Incarceration Figures: Growth in Population Continues (2004), at 4; Tapio Lappi-Seppälä, American Penal Exceptionalism in Comparative Perspective: Explaining Trends and Variation in the Use of Incarceration, in Kevin R. Reitz ed., American Exceptionalism in Crime and Punishment (Oxford University Press, forthcoming 2017).

Although U.S. incarceration growth slowed at the turn of the century, and confinement rates have turned slightly downward since 2010 (see Bureau of Justice Statistics, Prisoners in 2014 (2015); Prisoners in 2010 (2011)), as of this writing there is no sign of a pronounced reduction in nation's prison and jail populations. Incarceration rates are falling much more slowly than they rose in the 1980s, 1990s, and 2000s. A large share of the national prison drop has come from California alone, which was forced to make drastic reductions in its prison population by the federal courts; see Brown v. Plata, 563 U.S. 493 (2011); Joan Petersilia, California Prison Downsizing and Its Impact on Local Criminal Justice Systems, 8 Harvard Law & Policy Review 327 (2014).

Sentencing reforms most similar to the approach of the revised Code have proven effective at giving policymakers the ability to predict and control future patterns of prison use. Most states have used the tools of a sentencing commission and guidelines to slow down or stop preexisting growth trends. Empirical studies using a variety of methodologies have found a correlation between states' use of sentencing guidelines and rates of prison growth lower than in non-guidelines states. See Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696 (1995) (finding that, wherever sentencing commissions had made conscious efforts to restrain prison expansion, sentencing guidelines were strongly associated with slower prison growth than in comparable non-guidelines jurisdictions); Don Stemen et al., Vera Institute of Justice, Of

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Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates (2005), at 143 (finding that "states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states. . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates"); Kevin R. Reitz, Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces, 84 U. Tex. L. Rev. 1787 (2006).

Just as important as the introduction of controls on aggregate prison scale, states with well-designed sentencing guidelines have established new priorities for the use of prison bedspaces. Almost universally, these jurisdictions have increased the severity of prison sentences for serious crimes of violence and sex, while cutting back modestly on the lengths and likelihood of prison terms for less serious felonies or misdemeanors. Because crimes of low gravity outnumber those high on the felony scale by overwhelming margins, minor adjustments in sentencing outcomes at the low end can free many prison beds for confinement of the most dangerous criminals. See, e.g., Virginia Criminal Sentencing Commission, Annual Report 2005, at 41-55; Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002). For a discussion of the history of resource management under state sentencing commissions, see Model Penal Code: Sentencing, Report (2003) at 72-85.

n. Promotion of research. The 1962 Code spoke to questions of research and data collection in general terms in original § 1.02(2)(g), which stated that one purpose of the "provisions governing the sentencing and treatment of offenders" was "to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders." The new subsection (2)(b)(vii) continues the spirit of the former provision.

o. Transparency, accountability, and legitimacy of the sentencing system. On the lack of transparency in American sentencing processes, including judicial sentencing and parole, see Marvin E. Frankel, Criminal Sentences: Law Without Order (1973). The moral legitimacy of the criminal-justice system is at issue particularly in some American communities of color, where the police and criminal courts are viewed by many as hostile institutions. See Gary LaFree, Losing Legitimacy: Street Crime and the Decline of Social Institutions in America (1998); William J. Stuntz, Race, Class, and Drugs, 98 Colum. L. Rev. 1795 (1998). This is a problem with deep historical roots. See Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century South (1984); Randall Kennedy, Race, Crime, and the Law (1997), chs. 2 & 3. Maintaining the moral legitimacy of any system of law is an intrinsic good, but one that also holds instrumental dimensions. Negative consequences of widespread distrust of the criminal-justice system include reduced inclinations to abide by the law, to cooperate with officials during a criminal investigation, and even to report serious criminal victimizations in the first instance. See, e.g., Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003); Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women (New York: Routledge, 1996), at 77, 95-97; Lawrence Sherman, Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction, 30 J. Rsrch. Crime & Delinq. 445 (1993); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Government Printing Office, 1967), at 49-55.

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p. States choosing an advisory-guidelines system. By recent count, 10 states and the District of Columbia had adopted advisory sentencing guidelines systems; see Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (2012), at 122-123. It is likely that experimentation with such structures will continue in the future. In some jurisdictions, the adoption of presumptive guidelines has proven politically infeasible, while advisory guidelines have met with approval. Following the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), and Cunningham v. California, 127 S. Ct. 856 (2007), additional states may gravitate toward advisory guidelines because the Supreme Court has held that Sixth Amendment requirements of jury factfinding at sentencing do not apply to advisory systems. See § 7.07B, Reporter's Note to Comment *a* (Tentative Draft No. 1, 2007).

Nationwide, systems of advisory guidelines have had important successes in some jurisdictions, and failures in others. In some states, trial courts elect to follow the recommendations of advisory guidelines frequently enough to resemble the "compliance rates" of sentencing decisions in presumptive-guidelines systems. In other states, advisory guidelines have been given little weight by sentencing judges. See Michael Tonry, Sentencing Matters (1996), at 27-28; David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 28 (2001), at 81-82; Kim S. Hunt and Michael Connelly, Advisory Guidelines in the Post-Blakely Era, 17 Fed. Sent'g Rep. 233 (2005).

Where advisory guidelines are ineffectual, they provide no authoritative starting point for a principled decisional process in individual sentencings. Criminal punishment reverts to a process of invisible and unregulated discretion. In addition, when guidelines are ignored, systemwide policy is not translated into case-specific rulings. Weak advisory guidelines allow individual judges to formulate sentencing policy one case at a time, with no meaningful coordination across the jurisdiction.

In at least two states, advisory guidelines have been well-respected by sentencing judges, and have been used effectively as a tool to regulate the use of correctional resources, including the number of prison bed spaces and the demand for community sanctions. See Hunt and Connelly, supra. Surveying all states that have employed advisory guidelines, however, the record of success is mixed. Only about half of the advisory-guidelines states have succeeded in imposing deliberate controls upon prison population growth. Nearly all of the state guidelines systems with pronounced rates of prison growth in the decades after 1980 (far above national average rates) were advisory-guidelines systems. See Tentative Draft No. 2 (2011), at 152 n. 115, 154 figure 3.

No state with an advisory-sentencing-guidelines system has succeeded in generating a practice of meaningful appellate review of the substance of sentencing decisions. Presumptive-guidelines systems, where provision has been made for appellate sentence review, have generally succeeded in promoting this longstanding law-reform goal. See ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 29; ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-8.1 (1994); ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, First Edition (1969). For a history of 20th century law-reform efforts, see Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Northwestern L. Rev. 1441, 1443-1450 (1997).

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Possible models of systems that conjoin advisory sentencing guidelines with development of a substantive body of appellate sentencing precedent are the federal system after 2005 and the system in England and Wales since 2009. See Kevin R. Reitz, Comparing Sentencing Guidelines: Do U.S. Systems Have Anything Worthwhile to Offer England and Wales?, in Andrew Ashworth and Julian V. Roberts eds., Sentencing Guidelines: Exploring the English Model (Oxford University Press, 2013), pp. 182-201. So far, however, neither jurisdiction has come to a resting position in attempting to reconcile advisory sentencing guidelines at the trial court level with the nonadvisory power of appellate courts to overturn sentences with reference to those guidelines. See Spears v. United States, 555 U.S. 261 (2009) (Roberts, C.J., dissenting) ("*Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones."). For a comprehensive discussion of the federal cases, see § 7.09 and Reporters' Note *i* (Council Draft No. 5, 2015). On the unsettled state of English law, and the enforceability of sentencing guidelines, see Andrew Ashworth, Departures from the Sentencing Guidelines, [2012] *Crim. L.R.* 81; Julian V. Roberts, Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions, 14 Punishment & Society 267 (2011).

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

§ 6.01. Grading of Felonies and Misdemeanors.[4]

(1) Felonies defined by this Code are classified, for the purpose of sentence, into [five] degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree;

(d) felonies of the fourth degree;

(e) felonies of the fifth degree.

[*Additional degrees of felony offenses, if created by the legislature*.]

(2) A crime declared to be a felony by this Code, without specification of degree, is of the [least serious] degree.

(3) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code, for the purpose of sentence, shall constitute a felony of the [least serious] degree.

(4) Misdemeanors defined by this Code are classified, for the purpose of sentence, into [two] grades, as follows:

[4] This Section was originally approved in 2011; see Tentative Draft No. 2.

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(a) misdemeanors; and

(b) petty misdemeanors.

Comment: [5]

a. Scope. This is a revision of § 6.01 in the 1962 Model Penal Code. Black letter in the original Code divided felonies into three degrees—although there were four felony grades if one counted the Code's optional death-penalty category; see 1962 Code, §§ 6.02(2) and 210.6. The original black letter was not intended to be tightly restrictive of legislative discretion as to the number of felony levels. Official Commentary stated that subdivision into three felony grades was "the absolute minimum," and that classifications in the range of three to six degrees of felony would fall well within the Code's recommendations.

The use of bracketed language in subsection (1) is intended to convey a similar message of flexibility, due to the absence of clear policy imperatives that would help determine the precise number of felony grades a legislature should select. Further, the revised Code is meant to provide workable sentencing provisions for many different substantive criminal codes. No matter how many felony classifications a state has chosen to create, the Code's new Articles may be fitted to that state's grading framework. The bracketed language also allows the revised Code to dovetail with the original Code, through substitution of three felony grades instead of five. In this variation, the provision would interlock with the offense-by-offense grading assignments in Part II of the 1962 Code.

Original § 6.01 did not speak to the grading of misdemeanors. This subject is now addressed in subsection (4). Although two levels of misdemeanor crimes are indicated, the revised Code suggests rather than insists upon this number of separate grades. There is no compelling reason that a state could not choose to subdivide misdemeanors into three categories, or somewhat more, if local sensibilities support such fine gradations. What the Code does seek to avoid, however, is the propagation of so many levels of offense that sensible classification of crimes, in the abstract and in relation to one another, becomes difficult or impossible. See Comment *c* below.

b. General grading scheme. The original Code's recommendation that states should adopt a general classification system for grades of felony offenses has been widely influential. In 2007, only 14 states and the federal criminal code did not classify felonies and misdemeanors by degrees. In jurisdictions without comprehensive grading schemes, authorized penalties are assigned offense by offense. This frequently results in a patchwork of authorized punishments, with no clear rationale for the assignment of penalties to specific crimes when compared one to another. The revised Code reaffirms the position taken in the 1962 Code that orderly grading of offenses into a discrete number of categories is superior to piecemeal grading.

[5] This Comment has not been revised since § 6.01's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

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c. Degrees of felonies. Relatively few states today follow the 1962 Code's black-letter suggestion that felonies be classified into only three degrees. Contemporary codes with comprehensive grading schemes have typically chosen a more fine-grained approach, and include varying numbers of felony gradations, from three to 10.

The revised Code signals even greater latitude than the original Code through its use of bracketed alternatives in subsection (1). Depending on legislative preference in a particular jurisdiction, any number of felony grades from three to 10 would be reasonable according to current state practice. Indeed, no firm principle supports a stopping point precisely at 10. What the original and revised Code both seek to foreclose is the proliferation of sentencing levels to the point where no sensible comparative ordering of offenses and penalty ranges is likely.

Revised § 6.01 retains the 1962 Code's default rules for felonies not explicitly graded in the criminal code, see subsection (2), or felonies created outside the criminal code, see subsection (3). In either instance, offenses are automatically sorted to the lowest felony grade for purposes of sentencing.

d. Grading of misdemeanors. While there is no precise, optimum number of misdemeanor classifications, the low level of offense seriousness within this category suggests that a small number of statutory distinctions will be needed. Most states with comprehensive grading schemes have adopted two or three tiers of misdemeanor crimes.

e. Violations. The original Model Penal Code created a class of noncriminal offenses denominated as "violations," which were punishable only by a fine, a forfeiture, or "other civil penalty." See Model Penal Code and Commentaries, Part I, §§ 1.01 to 2.13, § 1.04(5) (1985). Sections 6.01 and 6.06 do not speak to penalties for violations. The current revision project does not affect original § 1.04(5).

REPORTERS' NOTE [6]

b. General grading scheme. The 14 states with no general classification scheme for felonies and misdemeanors in 2007 were California, Georgia, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Oklahoma, Rhode Island, Vermont, and West Virginia. See Fifty State Survey, prepared by Jared Butcher, June 1, 2007 (on file with Reporter). The U.S. Criminal Code likewise lacks a comprehensive grading scheme.

c. Degrees of felonies. On the number of felony classifications consistent with the spirit of the original Code, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.01, Comment 2 (1985), at 37 ("That a case can be made for four, five, or six categories, however, is not to deny that there is virtue in eliminating proliferation to the point that fifty, sixty, or more categories can be identified.").

A minority of states with general grading schemes partition the bulk of felonies into three degrees, although nearly all of these states add further grading levels for the most serious offenses. See, e.g., Ala. Code § 13A-5-3;

[6] This Reporters' Note has not been revised since § 6.01's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Alaska Stat. § 11.81.250 (3 levels of felonies; offenses falling outside the three-tier grading scheme include "murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping"); Fla. Stat. § 775.081 (3 degrees plus "life felonies" and "capital felonies"); Haw. Stat. § 701-107 (3 degrees plus 4 penalty levels for grades of murder and attempted murder); N.H. Rev. Stat. § 625:9 (2 classes of felonies plus murder); Or. Rev. Stat. § 161.535 (3 degrees plus murder); 18 Pa. Cons. Stat. § 106 (3 degrees plus 3 degrees of murder); Utah Code § 76-3-103 (3 degrees plus capital felonies); Wash. Rev. Code § 9A.20.010.

Most states have created more than three degrees of felony offenses. See, e.g., Ariz. Rev. Stat. § 13-601 (6 degrees); Ark. Code § 5-1-106 (5 degrees); Colo. Rev. Stat. § 18-1-104 (6 degrees); Conn. Gen. Stat. § 53a-25 (4 degrees plus "capital felonies"); 11 Del. Code § 4201 (7 degrees); Ill. Stat. c. 730 § 5/5-5-1 (5 degrees plus "murder one"); Ind. Code §§ 35-50-2-3 through 35-50-2-7 (4 degrees plus "murder"); Iowa Code § 701.7 (4 degrees); Kan. Stat. § 21-4704; Kansas Sentencing Comm'n, Kansas Sentencing Guidelines: Desk Reference Manual, Appendix G (10 statutory severity levels under sentencing guidelines for "nondrug" offenses; 4 statutory severity levels for drug offenses; all exclusive of capital crimes); Ky. Rev. Stat. § 532.010 (4 degrees plus "capital felonies"); Me. Rev. Stat.17 § 4 (5 degrees plus "murder"); Mo. Rev. Stat. § 557.016 (4 degrees plus capital murder); Neb. Rev. Stat. § 28-105 (9 degrees); Nev. Rev. Stat. §§ 193.120 & 193.130 (5 degrees); N.J. Rev. Stat. §§ 2C:1-4 & 2C:43-1 (4 degrees not including capital crimes); N.M. Stat. §§ 30-1-5 & 30-1-7 (4 degrees plus "capital felonies"); N.Y. Penal Law §§ 55.05 & 55.10 (6 degrees); N.C. Gen. Stat. § 164-41 (10 degrees as classified under sentencing guidelines); N.D. Code § 12.1-32-01 (4 degrees); Ohio Rev. Code § 2901.02 (5 degrees plus "murder"); S.C. Code § 16-1-10 (6 degrees exclusive of capital cases); S.D. Codified Laws § 22-6-1 (9 degrees); Tenn. Code Ann. § 40-35-110 (5 degrees); Tex. Penal Code § 12.04 (4 degrees plus capital felonies); Va. Code § 18.2-9 (6 degrees exclusive of capital offenses); Wis. Stat. § 939.50 (9 degrees).

d. Grading of misdemeanors. Most states divide misdemeanors into two or three subclassifications. See Ala. Code § 13A-5-7; Alaska Stat. § 12.55.135; Ark. Code § 5-4-401; Conn. Gen. Stat. § 53a-36; 11 Del. Code § 4206; Fla. Stat. § 775.082; Haw. Stat. § 706-663; Ill. Stat. c. 730 § 5/5-8-3; Ind. Code §§ 35-50-3-2 through 35-50-3-4; Iowa Code § 903.1; Ky. Rev. Stat. § 532.090; Me. Rev. Stat. 17 § 1252 (Class D and E crimes are equivalent to misdemeanors elsewhere); Mo. Rev. Stat. § 558.011; Nev. Rev. Stat. §§ 193.140 & 193.150; N.H. Rev. Stat. § 651:2; N.M. Stat. § 31-19-1; N.Y. Penal Law § 70.15; N.D. Code § 12.1-32-01; Or. Rev. Stat. § 161.615; S.D. Codified Laws § 22-6-2; Tenn. Code Ann. § 40-35-111; Tex. Penal Code §§ 12.21 – 12.23; Utah Code § 76-3-204; Va. Code § 18.2-11; Wash. Rev. Code § 9A.20.021. For exceptions, see Neb. Rev. Stat. § 28-106 (7 grades of misdemeanors); N.J. Rev. Stat. § 2C:43-6 (no misdemeanor category of offenses; "4th degree crimes" have maximum prison term of 18 months); N.C. Gen. Stat. § 15A-1340.23 (4 grades of misdemeanors); Ohio Rev. Code § 2929.24 (5 grades of misdemeanors).

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§ 6.02. Authorized Dispositions for Individuals.[7]

(1) Following an individual's conviction of one or more offenses, the court may sentence the offender to one or more of the following sanctions:

(a) probation as authorized in § 6.03;

(b) economic sanctions as authorized in §§ 6.04 through 6.04D;

(c) imprisonment as authorized in § 6.06;

(d) postrelease supervision as authorized in § 6.09; and

(e) unconditional discharge, if a more severe sanction is not required to serve the purposes of sentencing in § 1.02(2)(a).

[(2) The court may suspend the execution of a sentence that includes a term of imprisonment and order that the defendant be placed on probation as authorized in § 6.03 and/or satisfy one or more economic sanctions as authorized in §§ 6.04 through 6.04D.]

(3) When choosing the sanctions to be imposed in individual cases, the court shall apply any relevant sentencing guidelines.

(4) The court may not impose any combination of sanctions if their total severity would result in disproportionate punishment under § 1.02(2)(a)(i). In evaluating the total severity of punishment under this subsection, the court should consider the effects of collateral consequences likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.

(5) Authorized dispositions under this Article include deferred prosecutions as authorized in § 6.02A and deferred adjudications as authorized in § 6.02B.

Comment: [8]

a. Scope. This Section is based on Model Penal Code § 6.02 (1962). One significant change from the original Code is that the provision now speaks both to criminal sentences following convictions and other "dispositions" of criminal matters. The expanded scope accommodates resolutions of criminal matters prior to conviction (deferred adjudications under § 6.02B) or even prior to charging (deferred prosecutions under § 6.02A).

The Section speaks of dispositions "for individuals." Organizational sanctions are not included in the Model Penal Code: Sentencing revision project.

b. Rejection of jury sentencing. In identifying "the court" as the sentencing authority, subsection (1) continues the original Code's rejection of the practice of jury sentencing, which

[7] This Section was originally approved in 2014; see Tentative Draft No. 3.

[8] This Comment has not been revised since § 6.02's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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still occurs in a handful of states. Long experience has shown that the use of jurors as sentencers is antithetical to policies of rationality, proportionality, and restraint in the imposition of criminal sanctions, and is fundamentally inconsistent with the Code's philosophy that the public policies of sentencing should be applied consistently and even-handedly in all cases; see § 1.02(2) (Tentative Draft No. 1, 2007).

The principle that lay jurors should not impose sentences is consistent with the rule that jurors are sometimes required to make factual findings at sentencing under the Sixth Amendment and Due Process Clause, and some state constitutions. See § 7.07B(6) (Tentative Draft No. 1, 2007) ("Determination of the existence of a jury-sentencing fact [when constitutionally required] shall not control the court's decision as to whether a specific penalty is appropriate under applicable legal standards. Discretion as to the weight to be given the jury-sentencing fact remains with the court.").

c. Authorized sanctions. Subsection (1) catalogs the menu of authorized sanctions under the revised Code, and states that they may be imposed separately or in combination. Each sanction type in subsection (1) may be employed as a freestanding sanction or as a complete sentence, with the exception of postrelease supervision in subsection (1)(d), which by definition can only be ordered to follow a term of incarceration. For example, the sentencing court may order probation as a complete sentence in a case, without imposing and suspending a prison term. (The option of a suspended prison term may also be available to the court, see bracketed language in subsection (2), but is never the required route to a probation sanction.) Similarly, in an appropriate case, the court may order an economic sanction as a stand-alone penalty.

One important feature of § 6.02(1) is that prison terms are not all followed by a period of postrelease supervision, or even the possibility of a postrelease term, unless specifically ordered by the court. This configuration reflects two policy judgments. First, while most prison inmates require a period of supervision and aftercare following release, experience has shown that this is not always the case. It is wasteful of scarce resources to dispense supervision terms without examination of the purposes that may realistically be served. Second, when postrelease supervision is warranted, the duration of supervision terms should be set in relation to the facts of each case, including the risks and needs of individual releasees, and not by an arbitrary yardstick such as the unserved balance of a prison term; see § 6.09(2) and Comment *c*.

Subsection (1)(e), new to the revised Code, authorizes an offender's "unconditional discharge" following conviction if a more severe sanction is not required to serve the statutory purposes of sentencing. The provision is modeled on similar laws in force in several states. It reflects the conclusion that a criminal conviction by itself carries significant retributive force, and may be sufficient to also further the utilitarian purposes of sentencing in some cases. Indeed, it is possible for criminal sanctions, when meted out unnecessarily, to be "criminogenic," that is, to increase the likelihood that a defendant will reoffend in the future. In order for more severe dispositions to be justified under the Code, they must aim toward identifiable purposes and,

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when those objectives are utilitarian in nature, there must be at least a reasonable basis for belief that the goals can be achieved through the selected disposition; see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007).

Subsection (1)(e) is consistent with the Code's policy that probation sanctions are frequently overused, and that scarce community-corrections resources should be conserved for cases in which they will serve identifiable purposes, see § 6.03(3) and Comments *b* and *e*. An unneeded probation term, for example, commits state or local resources, and risks the even more expensive prospect of sentence revocation.

In evaluating the policy desirability of subsection (1)(e), it is important to consider that the process of being charged and convicted is inherently punitive and increasingly carries with it a lasting stigma, particularly in an era in which criminal records are easily accessed electronically by potential employers and members of the public. The collateral consequences of conviction can include deportation, disenfranchisement, limits on occupational licensing, loss of public-benefits eligibility, and many other restrictions that may last a lifetime. Although these collateral sanctions are classified as civil measures, their cumulative punitive force should inform criminal-sentencing policy. For many minor and first-time offenders, no formal sanction beyond conviction may be needed.

d. Suspended execution of sentences. The bracketed language in subsection (2) reflects the Institute's policy ambivalence toward the authorization and use of suspended prison sentences as a route to probationary sentences. The use of brackets signals the Code's preference that the suspended prison sentence should not be authorized in a state's criminal code. This comports with the position of the original Code; see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Explanatory Note at p. 45. Considered more than 50 years after the 1962 Code was approved, however, the Institute now reaches a more qualified conclusion.

There are colorable arguments for and against the use of suspended prison sentences. Some of these depend on assumptions about how judges, prosecutors, and offenders will behave under one regime versus another. The validity of these assumptions cannot be tested in advance or for all systems. Indeed, the balance of advantages and disadvantages of the suspended sentence may vary across the states, given different offender populations, penalty structures, and courtroom cultures. Ultimately the revised Code reposes the question in the judgment of the legislature in each jurisdiction.

Leaving out the bracketed language in subsection (2), § 6.02(1)(a) authorizes sentencing courts to impose probation as a freestanding sanction, without reference to a suspended prison term. The permissible contours of a probation sanction are governed by § 6.03. Upon violations of conditions of probation, the available sanctions are catalogued in § 6.15 (with the exception of bracketed language in § 6.15(3)(e), which is included only for jurisdictions that choose to authorize the use of suspended prison sentences). With freestanding probation as envisioned in subsection (1)(a), there is no suspended prison sentence that determines or limits the penalties

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that may be imposed on offenders who violate conditions of probation. The maximum term of incarceration upon probation revocation is fixed by the length of the probation term itself, which is limited to three years under § 6.03(5); see § 6.15(3)(e).

The bracketed subsection (2), if adopted, would give sentencing judges a second route to the imposition of probation sanctions. It authorizes courts to impose and suspend execution of a sentence that includes a term of imprisonment, and instead place the defendant on probation, impose an economic sanction, or both. (An example of a sentence that "includes" a term of imprisonment is a prison term followed by a period of postrelease supervision.) The duration and conditions of probation are governed by § 6.03, while economic sanctions are controlled by §§ 6.04 through 6.04D. Under the revised Code's approach, the authorization and use of suspended prison sentences has no impact on the substantive requirements of probation and economic penalties. These remain regulated by § 6.03, which likewise regulates freestanding probation. Perhaps the most important consequence of this policy choice is that, no matter how long a suspended prison term may be, the attendant probation term may not exceed the three-year maximum in § 6.03(5).

The feature of the suspended prison sentence that differentiates it from stand-alone probation is the range of remedies available for sentence violations. If the defendant successfully completes probation and economic sanctions imposed by the court, the original suspended sentence is lifted. If the defendant fails to comply with conditions of probation, however, probation may be revoked under the Code's provision on revocation of community supervision, § 6.15. On revocation, the court may impose the sentence it had originally suspended, or any other sentence of lesser severity, see § 6.15(3)(e) (bracketed language applicable only to jurisdictions that adopt § 6.02(2)). Thus, for suspended prison terms longer than three years, the maximum available sanctions upon revocation are greater than for stand-alone probation.

The Institute's skepticism about the use of suspended prison sentences stems from two concerns. First, in many U.S. jurisdictions, a suspended prison sentence predetermines the sanction for an offender whose probation is revoked. In effect, it becomes a mandatory penalty for any future revocation, even if the revoking judge would choose a different penalty. In some instances, this produces needless over-punishment of revoked offenders. It can also result in under-punishment of probation violators, if a sanctioning judge cannot in good conscience order the full force of the suspended sentence, and therefore is forced to choose among sanctions short of revocation. For these reasons, even if a state elects to authorize the use of suspended prison sentences, the revised Code recommends that a revocation judge should also have discretion to impose a lesser penalty, see § 6.15(3)(e) (bracketed language).

Second, even when suspended sentences do not predetermine penalties for revocation, their use undermines the revised Code's general policy approach to probation and probation revocation. Under § 6.15(3)(e) (omitting bracketed language), the maximum possible confinement term on revocation of freestanding probation is three years. If probation via a

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suspended prison sentence is added to the mix, however, confinement terms on revocation are not so limited. Instead, a revocation sanction can be whatever prison sentence was given in the suspended sentence—or any prison term authorized in the state's criminal code; see § 6.15(3)(e) (bracketed language included). For example, in the extreme case of a 20-year suspended prison sentence, the term of confinement upon probation revocation could be many times longer than any term authorized for stand-alone probation.

Viewed in this light, authorization of suspended sentences under subsection (2) would provide an end run around the Code's controls on revocation sanctions. This also carries direct implications for a jurisdiction's prison policy. Roughly one-third of state prison admissions in the United States are for community-sentence revocations, including a majority of admissions in some states. Given the widespread use of suspended sentences in American criminal courtrooms today, their impact on community-supervision and prison policy is not marginal or remote. A legislature that chooses to adopt subsection (2) should do so only if it is satisfied that the benefits of the suspended sentence outweigh its liabilities.

Three important arguments are made in favor of authorization of suspended prison sentences.

First, some judges report that they would impose fewer probationary sentences if they were unable to pair probation with a suspended prison term. Similarly, it is argued that prosecutors would be reluctant to agree to such outcomes. Across many cases and many courtrooms, these tendencies could result in a greater use of incarcerative penalties overall. Whether or not this would happen in some or all jurisdictions is an empirical question. There is a possibility that unavailability of the suspended prison term as a sentencing tool would result in more prison sentences in borderline cases, and would frustrate the Code's policy of prioritizing the use of prison spaces for offenders who pose the greatest risks to public safety.

Second, and closely related to the first point, some judges and scholars assert that a suspended sentence helps the legal system express to victims and the public that the case has been taken seriously, when a "bare" probation sentence might appear unduly lenient. This argument draws on the symbolic force of criminal punishments. In theory, a suspended sentence can signify the full measure of deserved punishment for a particular crime, even though the impact of the sentence is provisionally withheld for reasons of forbearance, mercy, or the desire to give the defendant a chance to repair his life. Under this view, the suspended sentence makes room for actual penalties more lenient than those that would be called for on grounds of strict retribution.

Third, it is posited that suspended sentences aid offenders in the rehabilitative process through the mechanism of specific deterrence. A suspended sentence is articulated in clear and vivid terms, for a definite period of months or years, and may therefore appear a more credible threat to probationers than the abstract possibility of revocation, with no revocation penalty named in advance. Research suggests that certainty and swiftness are elements of an effective

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deterrence policy. It is plausible to think that the threat of a suspended sentence will motivate some offenders to comply with their terms of probation, work harder than they otherwise would in treatment programs, and put more effort into the avoidance of temptations to reoffend.

e. Sentencing guidelines. Under the sentencing-guidelines system envisioned in the revised Code, the sentencing commission has an ongoing duty to promulgate guidelines that speak to the full range of criminal sanctions. See § 6B.02(6) (Tentative Draft No.1, 2007) ("The guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission.").

f. Overall severity of sanctions in combination. Subsection (4) incorporates the tenet of proportionality of punishment in § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007), and encourages the courts to apply the principle with reference to the total package of sanctions imposed in each case. The subsection further recognizes that collateral sanctions applied to the offender, even if denominated as civil measures, are experienced by the offender as additional punishments; see Article 6x, §§ 6x.01 through 6x.06. Thus, in assessing the total impact of sanctions for proportionality purposes, the courts are permitted to consider the impact of any collateral consequences likely to be applied to the offender under state and federal law. Subsection (4) envisions that the burden should rest with defendants to make a showing of the likely effects of collateral sanctions in their particular cases.

g. Deferred prosecutions and adjudications. The revised Code recognizes that many criminal cases are now disposed before reaching the formal stages of conviction and criminal sentencing. In some instances, cases are diverted by prosecutors' offices before charges are filed. It is the intention of subsection (5), and later provisions on deferred prosecution and deferred adjudication, see §§ 6.02A and 6.02B, to encourage the use and development of such mechanisms, while imposing minimal statutory controls to ensure their fairness and procedural regularity.

h. Consolidation of authorized sanctions. Subsection (6) continues the original Code's view that all forms of criminal sentences should be authorized in one consolidated provision. Although no statute can control future legislation, subsection (6)'s injunction reduces the possibility that such authorizations will be dispersed throughout the Code or, worse yet, be placed outside the Penal Code entirely. In many states, statutory provisions governing sentencing are overly complex, disorganized, and scattered. In some jurisdictions, sentencing codes are such a morass that few lawyers or judges fully understand their operation. It is an aim of the revised Code that sentencing laws in all jurisdictions should be accessible and understandable.

i. Specialized courts. The dispositions described in this Section apply to all criminal cases, regardless of the forum in which those cases are adjudicated. Increasingly, jurisdictions across the country are using specialized programs and procedures for defendants with shared needs who may benefit from more intensive or directed intervention than can be easily accommodated by traditional courts. These specialized programs are known by many names, including treatment

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courts, problem-solving courts, and therapeutic courts. They have been formed around many different needs and problems, including drug and alcohol addiction, mental illness, homelessness, veterans, re-entering prisoners, and domestic violence. The best of these courts are characterized by a rehabilitative approach to justice that include trained judges and court staff, access to a variety of well-resourced treatment programs, and procedural protections for participants. In cases where specialized courts operate as a form of preconviction diversion, subsection (5) governs, while subsections (1)-(4) apply in cases where the specialized court is charged with administering a traditional sentence in a nontraditional forum.

j. Capital sentences. The original Code's reference to the death penalty in this Section, see Model Penal Code § 6.02(2) (1962), has been deleted in the revised edition. In 2009, the death-penalty provision of the 1962 Code, former § 210.6, was withdrawn based on analysis in the Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (April 15, 2009), including an extensive "Report to the ALI Concerning Capital Punishment, Prepared at the Request of ALI Director Lance Liebman" by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law) (November 2008). The following resolution was adopted by the ALI membership in May 2009 and by the ALI Council in October 2009:

> For reasons stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.

REPORTERS' NOTE [9]

b. Rejection of jury sentencing. Original § 6.02 was intended to convey "an explicit rejection of the practice of jury sentencing that still prevails in some states." See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 3, at 48-49 (1985). See also American Bar Association, Standards for Criminal Justice, Sentencing, Third Ed. (1994), Standard 18-1.4(a) ("The jury's role in a criminal trial should not extend to determination of the appropriate sentence."). Juries are still empowered to determine sentences in noncapital cases in six states: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. For policy analyses, see Nancy J. King and Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 Vand. L. Rev. 885 (2004); Nancy J. King, How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared, 2 Ohio St. J. Crim. L. 195 (2004); Robert A. Weninger, Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 Wash. Univ. J. of Urban & Contemp. Law. 3 (1994).

Although the number of states that employ jurors as sentencers in non-death-penalty cases is small, the Code's statement of policy remains relevant to contemporary debate. Jury sentencing is not without current-day proponents. See Morris B. Hoffman, The Case for Jury Sentencing, 52 Duke L.J. 951 (2003); Jenia Iontcheva, Jury Sentencing

[9] This Reporters' Note has not been revised since § 6.02's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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as Democratic Practice, 89 Va. L. Rev. 311, 346 (2003); Adriaan Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775 (1999). Inspired by the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), which recognized a constitutional right to jury factfinding during some sentencing proceedings, interest in the jury's role at sentencing has increased. See Erik Lillquist, The Puzzling Return of Jury Sentencing: Misgivings about Apprendi, 82 N.C. L. Rev. 621 (2004); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33 (2003).

c. Authorized sanctions. The terminology in subsection (1)(e) is borrowed from New York law, which provides that, "The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of unconditional discharge . . . if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release." The effect of unconditional discharge is detailed as follows: "When the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine or probation supervision. A sentence of unconditional discharge is for all purposes a final judgment of conviction." See N.Y. Penal Law § 65.20(1), (2) ("sentence of unconditional discharge"). See also Pa. C.S. § 9723 (authorizing sentence of "guilt without further penalty"); Conn. Gen. Stat. § 53a-34(a) ("The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of conditional discharge . . . if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release."); N.H. Rev. Stat. § 651:2(I) ("A person convicted of a felony or a Class A misdemeanor may be sentenced to imprisonment, probation, conditional or unconditional discharge, or a fine.").

d. Suspended execution of sentences. A representative state provision is Mass. Gen. Laws, Ch. 279 § 1 ("When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix. When a person so convicted is sentenced to pay a fine and to stand committed until it is paid, the court may direct that the execution of the sentence, or any part thereof, be suspended for such time as it shall fix and in its discretion that he be placed on probation on condition that he pay the fine within such time."). On the question of whether probation is legally defined as an independent sentence in its own right, or as an incident of a suspended prison sentence, compare People v. Daniels, 130 Cal. Rptr. 2d 887, 891 (Cal. Ct. App. 2003) ("Although courts sometimes refer to it as a 'sentence,' probation is not a sentence even if it includes a term in the county jail as a condition. In granting probation, the court suspends imposition or execution of sentence and issues a revocable and conditional release as an act of clemency."); State v. Hamlin, 950 P.2d 336 (Or. App. 1997) ("With the passage of the sentencing guidelines, . . . [p]robation is no longer the suspension of a sentence; probation is the sentence.").

On the merits of suspended prison sentences, see Richard Frase, Just Sentencing: Principles and Procedures for a Workable System (2013), at 19-20 (encouraging the authorization and use of suspended sentences for several reasons: "they are more parsimonious—less costly and less harmful to offenders and their families—than an immediately executed sentence; they have expressive value, conveying the degree of seriousness of the offender's crimes; they give offenders a strong incentive to comply with required conditions; and they leave substantial room for later tightening sanctions in case of noncooperation or new evidence of offender risk."); Joan Petersilia,

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1 Probation in the United States, in Michael Tonry ed., 22 Crime and Justice: A Review of Research 149-200 (1997)
2 ("Offenders are presumed to be more motivated to comply with conditions of probation by knowing what awaits
3 should they fail to do so."). In some community-supervision settings, the "Sword of Damocles" of a suspended
4 prison sentence has been found important to securing compliance by program participants. See, e.g., Shelli B.
5 Rossman et al., The Multi-Site Adult Drug Court Evaluation: Executive Summary (Urban Institute 2011).

6 *h. Consolidation of authorized sanctions.* On the original Code's strategy of collecting statutory provisions on
7 the array of sentencing dispositions in a single Article of the Code, see Model Penal Code and Commentaries, Part I,
8 §§ 6.01 to 7.09 (1985), § 6.02, Comment 1, at 46 (provision designed to "prevent the ad hoc growth of sentencing
9 law in many different titles of a penal code, which . . . is one reason for the chaos in sentencing that existed in so
10 many states at the time the Model Code was drafted."). This recommendation has been widely adopted, id., at 46
11 n.1.

12 *i. Specialized courts.* The first documented specialty court in the United States was the Miami-Dade County
13 (Florida) Drug Court, started in 1989. Today there are more than 2400 drug courts nationwide—roughly half of
14 which serve adult offenders—with an estimated participant population of about 70,000. Steven Belenko, Nicole
15 Fabrikant, and Nancy Wolff, The Long Road to Treatment: Models of Screening and Admission Into Drug Courts,
16 38 Criminal Justice & Behavior 1222, 1222-1223 (2011). Other examples of specialized courts include community
17 courts, mental-health courts, domestic-violence courts, gun courts, prostitution courts, homeless courts, driving-
18 under-the-influence (DUI) courts, tobacco courts, teen courts, gambling courts, veterans' courts, and reentry courts.
19 See James L. Nolan, Problem-Solving Courts: An International Comparison, in Joan Petersilia and Kevin R. Reitz
20 eds., The Oxford Handbook of Sentencing and Corrections (2012), at 154.

21 The subject of problem-solving courts provokes strong disagreement among criminal-justice stakeholders.
22 Specialized courts, while responsive to the needs of defendants, often eschew an adversary approach to litigation,
23 instead promoting a "team approach" to resolving cases that is more flexible and less attentive to procedural
24 regularities than are traditional courts. That difference has been heralded by proponents of treatment-oriented
25 sanctioning policies, and attacked by advocates for safeguarding the procedural rights of the accused. Thus, the
26 public debate of specialty courts includes the most laudatory and hopeful of accounts, as well as the skeptical and
27 condemnatory. For examples of the latter viewpoint, see National Association of Criminal Defense Lawyers,
28 America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform (2009), at 53 ("What
29 began 20 years ago in Miami as a revolutionary and laudable opportunity for defendants to receive much-needed
30 treatment and avoid costly and ineffective incarceration has evolved into something much different and dangerous.
31 As detailed throughout this report, problem-solving courts often create far more problems than they attempt to
32 solve—for defendants, lawyers, judges, and the public at large"); Richard Boldt, A Circumspect Look at Problem-
33 Solving Courts, in Paul Higgins and Mitchell B. Mackinem eds., Problem-Solving Courts: Justice for the Twenty-
34 First Century? (2009), at 13-32 ("From the point of view of the defendant . . . problem-solving courts may be 'more
35 difficult to complete, more onerous and far more intrusive on liberty' than traditional criminal court dispositions");
36 Nolan at 160 ("Therapeutic nomenclature cloaks the essentially punitive nature of certain sanctions. . . . [I]n the
37 enthusiasm to act therapeutically, concern about the preservation of traditional court processes and due process
38 rights fade into the background."). Despite their origins as places where individual needs can be addressed, some

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critics assert that large, high volume specialized courts have themselves been reduced to "out-of-control case-processing machine[s]." Morris B. Hoffman, The Drug Court Scandal, 78 N.C. L. Rev. 1437, 1533 (2000).

The case in favor of drug courts and other specialized tribunals turns largely on the empirical claim that they are effective at reducing recidivism, and substance use. As Ronald Corbett put it at the "Future of the Model Penal Code Conference" held in December 2011 at the University of Minnesota, "In the field of correctional treatment, where obtaining positive results is difficult, drug courts stand out for their record for recidivism reduction. How can we be against them?" Evaluations of drug-court programs have yielded positive or promising results across multiple sites, including reduced reoffending and substance abuse among participants, with some findings of reduced recidivism extending beyond the program period. See Shelli B. Rossman, John K. Roman, Janine M. Zweig, Michael Rempel, and Christine H. Lindquist eds., The Multi-Site Adult Drug Court Evaluation, Final Report (Urban Institute, Center for Court Innovation, and RTI International, 2011) (study of 23 drug-court sites collected in four volumes and executive summary); Steven Belenko, Nicole Fabrikant, and Nancy Wolff, The Long Road to Treatment: Models of Screening and Admission Into Drug Courts, 38 Crim. J. & Behavior 1222, 1222 (2011); U.S. Government Accountability Office, Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes (2005). Moreover, research indicates that specialty courts can achieve positive results across many categories of offenders. For example, offenders with violent criminal histories showed greater reductions in reoffending than other classes of offenders. See Douglas B. Marlowe, Evidence-Based Policies and Practices for Drug-Involved Offenders, 91 Prison Journal 27S-47S (2011), at 34S ("The average effect of drug court, for example, is nearly twice the magnitude for high-risk offenders than for low-risk offenders. Drug courts that serve high-risk offenders also return roughly 50% greater cost benefits to their communities") (citations omitted).

The Institute considered the possibility of including a separate provision in the revised Code on the subject matter of problem-solving or therapeutic courts, see Council Draft No. 4 (September 25, 2013) § 6.13 (draft provision on "Specialized Courts"). Ultimately this approach was rejected because specialty courts nationwide are still experimental and are increasingly diverse in focus. There was little that could be said in model legislation that would be helpful and not unduly limiting to the continuing growth and evolution of such courts.

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§ 6.02A. Deferred Prosecution. [10]

(1) For purposes of this provision, deferred prosecution refers to the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions, with the exception of an agreement to cooperate in the prosecution of any criminal case.

(2) The purpose of deferred prosecution is to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual

[10] This Section was originally approved in 2014; see Tentative Draft No. 3.

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1 **accountable for criminal conduct when justice and public safety do not require that the**
2 **individual be subjected to the stigma and collateral consequences associated with formal**
3 **charge and conviction.**

4 **(3) When a prosecutor has probable cause to believe that an individual has committed**
5 **a crime and reasonably anticipates that sufficient admissible evidence can be developed to**
6 **support conviction at trial, the prosecutor may decline to charge the individual or dismiss**
7 **already-filed charges without prejudice, and forgo prosecution completely, contingent on**
8 **the individual's willingness to comply with specified conditions.**

9 **(4) When the prosecution offers to defer prosecution in a case involving an identified**
10 **victim, the government shall make a good-faith effort to notify the victim of the conditions**
11 **of the proposed deferred-prosecution agreement.**

12 **(5) Before agreeing to the terms of a deferred-prosecution agreement, an individual**
13 **shall have a right to counsel.**

14 **(6) Entry of a deferred-prosecution agreement does not relieve the prosecuting agency**
15 **of any duty to disclose exculpatory evidence or bar the individual from seeking otherwise**
16 **discoverable information about the alleged crime.**

17 **[(7) A deferred-prosecution agreement may be conditioned on an individual's consent**
18 **to a tolling of any applicable statutes of limitations during the period of a deferred-**
19 **prosecution agreement.]**

20 **(8) A prosecutor's office may seek the cooperation of [correctional and court-services**
21 **agencies] to provide services and supervision for the execution of deferred-prosecution**
22 **agreements, or may contract with qualified service providers. No assessments of costs or**
23 **fees may be collected from the individual subject to the deferred-prosecution agreement in**
24 **excess of actual expenditures incurred by the prosecutor's office in the case.**

25 **(9) The deferred-prosecution agreement should extend for a specified duration that is**
26 **reasonable in light of the stipulated condition(s) and the potential charge(s) available for**
27 **prosecution.**

28 **(10) A deferred-prosecution agreement may be presented to the trial court for**
29 **approval if needed to secure funding for or access to agreed-upon programs or services. If**
30 **the court approves the agreement, it may order any conditions or services, consistent with**
31 **the agreement, that might be ordered for a defendant for whom adjudication is deferred**
32 **pursuant to § 6.02B.**

33 **(11) If the terms of the deferred-prosecution agreement are materially satisfied, no**
34 **criminal charges shall be filed in connection with the conduct known to the prosecution**
35 **that led to deferred prosecution. Completion of the terms of a deferred-prosecution**
36 **agreement shall not be considered a conviction for any purpose.**

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(12) A deferred-prosecution agreement may be terminated only when the individual materially breaches the terms of the agreement. When such a breach occurs, sanctions short of termination should be used when reasonably feasible.

(13) If a deferred-prosecution agreement is terminated pursuant to subsection (12), the prosecutor may file against the accused any charge supported by fact and law. An individual's failure to comply with the agreement should not bear on the severity of the ultimate charge pursued or sentence imposed.

(14) Each prosecutor's office shall adopt and make publicly available written standards for its use of deferred-prosecution agreements. The standards should address:

(a) the criteria for selection of cases for the program;

(b) the content of agreements, including the number and kinds of conditions required for successful completion;

(c) the grounds and processes for responding to alleged breaches of agreements, and the possible consequences of noncompliance; and

(d) the benefits afforded upon successful completion of agreements.

(15) Each prosecutor's office shall maintain records and data relating to its use of deferred prosecution in a manner that allows for monitoring and evaluation of the practice while protecting the confidentiality of participants. Demographic information shall be maintained, including the economic status, race, gender, ethnicity, and national origin of individuals who participated in the program, or were offered the option of participating, and shall be matched against demographic information concerning crime victims, if any, in each case.

Comment: [11]

a. Scope. This provision, new to the Code, provides structure for the use of deferred prosecution, a longstanding practice by which the prosecution agrees to forgo charges in exchange for the accused individual's compliance with certain requirements, such as the payment of restitution or completion of a treatment program. (This is distinct from the practice of deferred adjudication, discussed in § 6.02B, which allows courts to resolve without conviction criminal cases in which charges have already been filed.) When there is probable cause to believe an individual has committed a crime, the prosecutor possesses largely unfettered discretion to decide whether to issue formal charges. Often, and for many reasons both legal and nonlegal, a prosecutor will decline to charge even when there is legal authority to do so. This provision addresses those decisions not to prosecute that arise from a prosecutor's decision not to pursue charges against an individual believed to have committed a crime in exchange for

[11] This Comment has not been revised since § 6.02A's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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completion of specified conditions. The sole exceptions, made clear by § 6.02A(1), are cases in which a prosecutor decides not to pursue criminal charges in exchange for an individual's cooperation with law enforcement. Such agreements fall outside the scope of § 6.02A, since the use of such deferred-prosecution agreements requires more secrecy than the publication provisions of subsections (14)-(15) would require.

The provision acknowledges that deferred prosecution is a legitimate practice, but one that benefits from transparency and structure. It recognizes that deferred prosecution may be used to rehabilitate individuals who have committed crimes, to make reparation to crime victims, and to advance public safety. At the same time, by placing restrictions on how pre-charge diversion programs may be arranged and requiring monitoring of their use, § 6.02A also represents a new way of regulating prosecutorial discretion.

By requiring that deferred prosecution be used only in cases where the state could prove a defendant's guilt at trial, the provision bans the use of conditional deferral as a way to "punish" individuals who would not be found guilty in a court of law because of weak or tainted evidence. See § 6.02A(3). The provision permits and encourages the use of deferred prosecution in cases where guilt could be proven, but the individual can nonetheless be fairly held accountable without resort to formal charge and conviction.

Under this provision, the decisions to defer and determine the conditions of the deferred-prosecution agreement lie solely with the prosecutor. In jurisdictions where the prosecutor is unable, however, to arrange for necessary services or adequately monitor compliance with the terms of the agreement, subsection (9) allows the prosecution, with approval from the court, to draw upon the court's resources, including community supervision and access to publicly funded treatment programs.

A central objective of this provision is to encourage prosecutors to use their legal authority parsimoniously and, when appropriate, in ways that avoid the often-severe collateral consequences imposed on individuals who have been charged with a crime or who have made an admission of guilt in open court. For example, pre-charge diversion may be an effective way for a noncitizen to avoid deportation for a relatively minor offense, or for a youthful offender to avoid the stigma of a criminal record based on an anomalous indiscretion.

b. Purposes of deferred prosecution. As an alternative to traditional prosecution, deferred prosecution lacks many of the procedural safeguards that accompany criminal prosecution. Deferred prosecution is not intended to be an extrajudicial mechanism by which the prosecutor exacts punishment without first proving guilt. Although conditions of a deferred-prosecution agreement may have a subjectively punitive element, the purpose of deferred prosecution should be the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime.

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Subsection (2) addresses the goals pursued by deferred-prosecution agreements, but it is not a full statement of their external benefits. High among these is the conservation of prosecutorial and judicial resources.

c. The problems of net-widening and relinquishment of rights. The Institute recognizes that a number of dangers attend the practice of pre-charge diversion. Among the most salient is the risk that individuals who would not otherwise be prosecuted or convicted will be persuaded to enter into deferred-prosecution agreements, thus expanding the net of social control in the name of "diversion." The psychological pressure to resolve the matter as quickly as possible may also prevent accused individuals from invoking constitutional rights and other protections they would possess in a formal prosecution. Consequently, the decision to offer deferred prosecution should be made thoughtfully, with sensitivity to the danger of net-widening. The draft provision addresses these concerns in several of its subsections, including subsection (3), which limits deferred prosecution to cases in which "a prosecutor has probable cause to believe that an individual has committed a crime and reasonably anticipates that sufficient admissible evidence can be developed to support conviction at trial."

Subsection (5) provides that "[b]efore agreeing to the terms of a deferred-prosecution agreement, an individual shall have a right to counsel." Although the opportunity to consult with counsel is not constitutionally mandated before the initiation of formal charges, providing counsel to individuals who are offered a deferred-prosecution agreement serves many purposes. One responsibility of defense counsel at this juncture is to provide the accused with information and advice concerning the prospects and likely consequences of a formal prosecution, and the costs and benefits of the agreement offered by the government. In some states, it may be necessary to revise the legal prerequisites for appointment of defense counsel so that representation may begin early enough to assist the accused's decision of whether to enter into a deferred-prosecution agreement. While individuals may waive the right to counsel, providing access to an attorney helps ensure that conditions imposed are proportional to the suspected offense and that the individual understands the positive and negative ramifications of choosing to enter into the agreement.

In order to ensure that only culpable individuals are made the subject of deferred-prosecution agreements, subsection (6) further states that the existence of a deferred-prosecution agreement "does not relieve the prosecuting agency of any duty to disclose exculpatory evidence" or prevent an individual subject to such an agreement from "seeking otherwise discoverable information about the alleged crime." Without the initiation of formal criminal proceedings, the accused has no constitutional right to discovery, and consequently the prosecution may not be required to disclose any information under this standard. In some jurisdictions, however, local rules or codes of ethics may impose obligations on the prosecution or provide a limited right of discovery to the accused individual even when the constitutional right to disclosure of exculpatory evidence has not yet attached. Requiring disclosure under these circumstances reinforces the common-sense notion that when the prosecutor comes into

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possession of evidence suggesting the accused has committed no crime, the deferred-prosecution agreement should be revisited by the parties.

Finally, subsection (9) requires that the deferred-prosecution agreement specify a reasonable duration for the agreement to continue that takes account of the severity of the potential charges and the nature of the stipulated conditions. This provision encourages the prosecution to use its leverage parsimoniously, being attentive to proportionality when setting the length of time in which an accused but uncharged individual is subject to the conditions set forth in the deferred-prosecution agreement.

d. Cases appropriate for deferred prosecution. For reasons discussed above, no case should be selected for deferred prosecution unless the prosecution reasonably anticipates that, by the time of trial, the state will be able to prove guilt beyond a reasonable doubt. Deferred prosecution is appropriate in cases where (1) guilt is clear and provable; (2) an individual has sufficient culpability to be held accountable for his or her criminal conduct; and (3) neither justice nor public safety demands that the individual be stigmatized by formal charge and conviction, with their attendant collateral consequences. Such cases might include first-time or youthful offenders, nonviolent offenders, and individuals with substance-abuse or mental-health problems that can be safely treated in the community.

e. Eligibility. No offense- or offender-based restrictions on admission to deferred-prosecution programs are set out in this provision. Under subsection (14), eligibility must be determined with reference to objective criteria that are formulated and publicized by the prosecutor's office.

f. Victim notification. Recognizing that victims of crime often have a stake in the outcome of a charging decision and may have rights under state law relevant to the charging decision, subsection (4) requires the prosecution to make good-faith efforts to inform any identified victim of the terms of any deferred-prosecution agreement.

g. Conditions of the agreement. This provision does not place a limit on the number or kind of conditions that may be imposed on an individual who is the subject of a deferred-prosecution agreement. Subsection (8) contemplates that prosecutors may require, as a condition of deferral, that individuals participate in treatment programs or submit to some level of supervision for a specified period of time. Prosecutors imposing conditions should take care to ensure that any burdens imposed by the agreement are proportional to the suspected offense and in light of the formal punishments that would be available upon conviction.

Bracketed language in subsection (8) makes reference to the common practice among prosecutors' offices to assess costs or fees against those who participate in pre-charge diversion programs. Under § 6.04D, the Code recommends that assessments of this kind not be permitted under state law, and that those suspected or even convicted of criminal offenses should not be treated as special sources of revenue for agencies of the criminal-justice system. The Code recognizes that the elimination of costs and fees is a difficult policy question, however, and

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includes an Alternative § 6.04D for jurisdictions that cannot accept the Code's primary recommendation. The bracketed language in § 6.02A(8) speaks only to those states that follow the approach in Alternative § 6.04D. It prohibits prosecutors from using deferred prosecution as a means of generating revenue for their offices by barring cost and fee assessments "in excess of actual expenditures incurred by the prosecutor's office."

h. Sources of supervision and services. Ideally, participants in deferred-prosecution programs should have access to the same state-funded resources as individuals on probation or defendants in deferred-adjudication programs under § 6.02B. Subsection (10) achieves this result for selected cases. When the prosecutor's office lacks the resources to provide the supervision, services, or programs that may be required as part of a deferred-prosecution agreement, the parties may petition the court to order the full panoply of supervision and treatment services that would be available under § 6.02B. At the same time, § 6.02A anticipates that a large group of individuals who enter deferred-prosecution programs will not require supervision or services—or no more than may be administered by prosecutors' offices themselves.

i. Tolling of statute of limitations. The language concerning the tolling of applicable limitations periods is presented in brackets on the assumption that the law in some jurisdictions will not allow for tolling by agreement of the parties.

j. Termination. Subsection (11) allows for termination of the agreement only when an individual materially breaches the terms of the agreement. When a deferred-prosecution agreement is terminated, the prosecutor retains the discretion to file any and all charges supported by the evidence. In determining whether to terminate the agreement, consideration should be given for an individual's good-faith attempt to comply with the deferred-prosecution agreement. The accused's failure to comply with the deferred-prosecution agreement should not serve as a basis for the ultimate charge pursued in the event that the agreement is breached

k. Monitoring and evaluation. A central concern surrounding pre-charge diversion is the risk that it will be used in a discriminatory way. Even in the absence of conscious discrimination, the benefits of deferred prosecution may be extended disparately to individuals of different races, genders, ethnicities, national origins, and social and economic stature. The revised Code has adopted as a fundamental goal of the sentencing system "to eliminate inequities in sentencing across population groups," § 1.02(2)(b)(iii) (Tentative Draft No. 1, 2007). This principle must be understood to extend across all dispositions of criminal cases, even if a technical "sentencing" has not occurred. The best antidote to inequities of this kind is transparency, as required in subsections (14)-(15), and the ability to evaluate a program's implementation in light of its own published standards.

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1 **REPORTERS' NOTE** [12]

2 *a. Scope.* This Section, while new to the Code, has analogues in a variety of state procedures and rules
3 governing "pre-charge diversion." For an example of one state that gives express statutory authorization to
4 prosecutors to create diversion programs that engage before charges have been filed, see Okla. Stat., Title 22,
5 § 305.1. For a discussion of federal immigration law, and its treatment of deferred adjudication—a closely related
6 practice—see N.Y. City Bar, The Immigration Consequences of Deferred Adjudication Programs in New York City
7 (2007), available at http://www.nycbar.org/pdf/report/Immigration.pdf.

8 *c. The problems of net-widening and relinquishment of rights.* The standard adopted by subsection (3) is
9 modeled on the American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, 3d ed.
10 (1993), Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or permit the continued
11 pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A
12 prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the
13 absence of sufficient admissible evidence to support a conviction.").

14 *g. Conditions of the agreement.* Deferred prosecution can be a useful tool for minor cases and instances in
15 which traditional prosecution is unnecessary or might impose unwarranted collateral consequences, it is also a
16 practice that can be abused. Nevertheless, because the exercise of prosecutorial discretion is hidden from public
17 view, and because the threat of criminal prosecution is so powerful, it is also a tool that is subject to abuse. For an
18 example of the ways in which financial incentives can affect the use of pretrial diversion programs administered by
19 prosecutors, see Nathan Koppel, Probation Pays Bills for Prosecutors, The Wall Street Journal, January 20, 2012
20 (describing Oklahoma's programs of "DA supervision," which are "larger than the state prison system's traditional
21 probation program," and generate fees in excess of actual expenses that have been used to offset a $1.2 million drop
22 in state funding).

23 ———————

24

25 **§ 6.02B. Deferred Adjudication.** [13]

26 **(1) For purposes of this provision, deferred adjudication refers to any practice that**
27 **conditionally disposes of a criminal case prior to the entry of a judgment of conviction.**
28 **Courts are encouraged to defer adjudication in ways consistent with this provision.**

29 **(2) The purposes of deferred adjudication are to facilitate offenders' rehabilitation and**
30 **reintegration into the law-abiding community and restore victims and communities**
31 **affected by crime. Deferred adjudication should be offered to hold the individual**
32 **accountable for criminal conduct through a formal court process, but justice and public**

[12] This Reporters' Note has not been revised since § 6.02A's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

[13] This Section was originally approved in 2014; see Tentative Draft No. 3.

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safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.

(3) The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(4) The court may defer adjudication upon motion of either party, or on its own motion. Deferred adjudication shall not be permitted unless the court has given both parties an opportunity to be heard on the motion and has obtained the consent of the defendant. Before deciding to grant deferred adjudication, the court shall direct the prosecution to make a good-faith effort to notify the victim, if any, of any judicial proceedings that may occur in connection with the motion, and provide an opportunity for comment.

(5) Deferred adjudication shall not be conditioned on a guilty plea but may be conditioned on an admission of facts by the accused.

(6) Deferred prosecution may be conditioned on a waiver of the right to a speedy trial during the period in which the conditions of deferred adjudication are being satisfied.

(7) As a condition of deferred adjudication, the court may order, separately or in combination, any condition that would be authorized under § 6.03, along with victim restitution.

(8) If the defendant materially satisfies the conditions for deferred adjudication, the court shall dismiss the underlying charges with prejudice. A disposition under this Section shall not be considered a conviction for any purpose.

(9) If there is probable cause to believe a defendant who has been offered deferred adjudication has materially breached one or more conditions of deferral, the court may require the defendant to appear for a hearing, at which the defendant is entitled to the assistance of counsel.

(a) If, after hearing the evidence, the court finds by a preponderance of the evidence that a material breach has occurred, it may take any of the following actions:

(i) modify the conditions of deferral in light of the violation to address the offender's identified risks and needs; or

(ii) revoke the opportunity for deferred adjudication, and resume the traditional adjudicative process.

(b) When sanctioning a violation, the court should impose the least severe consequence needed to address the violation and the risks posed by the offender in

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the community, in light of the purpose for which the condition was originally imposed.

(10) The sentencing commission shall develop guidelines identifying the kinds of cases and offenders for which deferred adjudication is a recommended disposition.

Comment: [14]

a. Scope. Like § 6.02A, this provision is new to the Code, but not to practice. As the number of people charged with crimes has risen, courts and prosecutors have developed numerous ways of managing certain criminal cases, particularly those committed by youthful or first-time offenders, that do not result in a record of conviction. These practices go by many names ("pre-trial diversion," "deferred entry of judgment," "deferred sentencing," "probation before judgment," etc.), and are administered by different actors (sometimes the prosecutor, sometimes the court). In most cases, participation requires the entry of a guilty plea or an admission of guilt. Some practices referred to as "deferred adjudication" involve the entry of a guilty plea that is later expunged upon completion of conditions by the convicted person.

This provision defines deferred adjudication as any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction. The provision vests administrative responsibility over deferred adjudication in the trial courts, which set the conditions of deferral, see § 6.02B(7), and resolve questions of compliance, see § 6.02B(9). The provision is the post-charge judicial analog to the prosecutor's pre-charge power to defer prosecution under § 6.02A.

Section 6.02B reverses the Institute's former policy that "[t]he Model Code does not provide for the imposition of probation without conviction" because "[t]he Institute . . . was unwilling to approve a procedure so likely to put pressure on the innocent to submit to correctional restraints." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 9 at p. 56. The original Code championed a postconviction version of deferred adjudication under the title "deferred imposition of sentence." Section 6.02(3) of the 1962 Code provided that "the Court may suspend the imposition of sentence on a person who has been convicted of a crime." During the period of suspended imposition, former § 301.1(1) authorized trial courts to attach supervision conditions identical to those available for a sentence of probation. For defendants who fully satisfied these conditions, § 301.5(1) gave courts discretion to order that "so long as the defendant is not convicted of another crime, the judgment shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction of a crime." Many existing state provisions have followed the original Code's approach.

Proposed § 6.02B responds to many of the same concerns, but pauses the normal flow of case processing at an earlier juncture—before a conviction has occurred. The most compelling

[14] This Comment has been minimally revised since § 6.02B's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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reason for this change is to prevent the imposition of some of the most serious collateral consequences of conviction. In addition, because mandatory-minimum sentencing laws are commonplace—despite the Institute's categorical disapproval—it is helpful to give courts a pathway to disposition that bypasses the force of those laws.

b. Purposes. Like deferred prosecution, deferred adjudication is intended to promote the rehabilitation and reintegration of the accused individual and the restitution of direct and indirect victims of the crime. Although conditions imposed by the court may be subjectively punitive, the court should make every effort to be parsimonious in the imposition of conditions.

c. Eligibility. Similar to deferred prosecution, cases should not be selected for deferred adjudication unless neither justice nor public safety demands that the individual be stigmatized by formal conviction, with its attendant collateral consequences. Such cases might include first-time or youthful offenders, nonviolent offenders, and individuals with substance-abuse or mental-health problems that can be safely treated in the community.

This provision does not impose any offense- or offender-based restrictions on admission to deferred-prosecution programs. Subsection (3) allows courts to make use of deferred adjudication in cases where mandatory-minimum sentences would otherwise apply. Under subsection (10), eligibility may turn on guidelines developed by the sentencing commission.

d. Process. The main significance of subsection (4) is that a deferred adjudication does not require the approval of the prosecutor, though it always requires the consent of the defendant. The majority of existing state provisions interpose prosecutors as gatekeepers to deferred adjudications, and the revised Code would disapprove of this arrangement in all cases. While the views of the prosecutor and crime victims, if any, may be heard on the question, full dispositional authority resides in the courts.

The draft provision does not impose a requirement of a presentence report before a deferred adjudication may be granted. While a report will often—perhaps usually—be desirable, the Code would allow court systems flexibility on this point.

The Model Code has not yet developed an overall framework for the role of crime victims in the many stages of the sentencing process. This subject is slated for the drafting cycle that will culminate in Tentative Draft No. 4 (one cycle ahead of the current drafting effort). Subsection (4), which requires courts to direct the prosecution to give notice to victims and an opportunity to be heard, may therefore be revisited at a later date.

e. Offenses that carry mandatory penalties. The revised Code would prohibit the use of mandatory prison sentences in every instance, but also includes numerous provisions designed to mute the impact of such laws where they exist despite the Institute's longstanding disapproval. See § 6.06, Comments *a* and *d* (Tentative Draft No. 2, 2011). Subsection (3) continues this approach. It is also an explicit disavowal of state laws that exclude offenses carrying mandatory penalties from eligibility for deferred adjudication. In the absence of the prospect of statutory

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exclusion, subsection (3) would be uncontroversial. Mandatory punishments follow upon convictions, and § 6.02B interrupts the flow of case processing before convictions have occurred. For other Code provisions carving out exceptions to the operation of mandatory penalties, see § 6.11A(f) (Tentative Draft No. 2, 2011); § 6B.03(6) (Tentative Draft No. 1, 2007); § 6B.09(3) (Tentative Draft No. 2, 2011); § 7.XX(3)(b) (Tentative Draft No. 1, 2007); § 7.09(5)(b); § 305.1(3) (Tentative Draft No. 2, 2011); § 305.6(5) (Tentative Draft No. 2, 2011); § 305.7(8) (Tentative Draft No. 2, 2011).

f. Guilty plea not required. Subsection (5) adopts a pre-plea model of deferred adjudication. Because § 6.02B is intended to serve as a full-fledged alternative to conviction and sentences short of imprisonment, it is reasonable to expect that some defendants may be required to make admissions of fact to be granted deferred adjudication. Subsection (5) vests discretion in the courts to determine whether such a prerequisite is desirable in individual cases.

g. Waiver of speedy-trial rights. Subsection (6) responds to the self-evident necessity of obtaining a waiver from the defendant of the right to a speedy trial.

h. Repeat eligibility. The draft rejects the common practice among the states of allowing an individual only one opportunity to participate in a deferred-adjudication program. Instead, it leaves the decision to the discretion of the trial court, guided by the sentencing commission, see § 6B.03(4).

i. Benefits of completion. Insofar as possible, the deferred-adjudication program should attempt to restore defendants to the legal and social position of someone who has never been charged with a crime. For individuals who successfully complete the terms imposed by the court, subsection (8) provides that the charges be dismissed with prejudice, that the disposition not be considered part of the defendant's criminal record, and that collateral consequences should not be triggered by the disposition.

This provision does not provide for expungement of records of arrests and charges as part of any deferred-adjudication provision, but instead follows the original Code's practice of ameliorating the harms that flow from conviction rather than attempting the difficult—and perhaps inadvisable—step of trying to hide the fact of past arrest or charge—in an era of electronic records. Proponents of expungement want defendants to be permitted to "truthfully" represent to government officials and private parties that they have never been arrested or convicted. Others argue that records of criminal-case processing are so widely available that expungement is simply not feasible. Even were the law to allow individuals to state "truthfully" that they had never been arrested or convicted, these representations would often be viewed as concealments or lies in the broader world. On this view, some form of "certificate of rehabilitation" is preferable to ineffectual attempts at erasure of the past. See § 6x.06.

j. Violations of conditions. Subsection (9)(a) provides that, upon proof of a material breach of the conditions of deferred adjudication, the court may either modify the conditions of the original offer of deferred adjudication or revoke the opportunity for deferred adjudication. When

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an offer of deferred adjudication is revoked, the case resumes its processing through the traditional adjudicative process. Subsection (9)(b) encourages judges, when responding to material breaches, to impose the least severe consequence needed to address the violation and the risks posed by the offender in the community.

k. Sentencing guidelines. Under the revised Code, sentencing guidelines may take the form of presumptively enforceable rules, subject to trial-court discretion to depart from those rules, or advisory recommendations. See § 6B.04 (Tentative Draft No. 1, (2007)). Guidelines for deferred adjudications do not currently exist in any jurisdiction, but in theory they could supply valuable information and direction, and could foster uniformity of analysis, for decisions on admission and appropriate sanctions. Accordingly, subsection (10) encourages, but does not mandate, that sentencing commissions create such guidelines.

REPORTERS' NOTE [15]

a. Scope. State provisions authorizing deferred adjudications exist in many states, although there is a wide variety in terminology and approach across jurisdictions. See Ark. Code § 16-93-1206 ("suspended imposition of sentence"); Cal. Penal Code §§ 1000 & 1000.8 ("deferred entry of judgment"); Colo. Rev. Code § 18-1.3-102 ("deferred sentencing"); 11 Del. Cod. § 4218 ("probation before judgment"); N.D. R. Crim. Proc. 32.2 ("pretrial diversion"); Conn. Gen. Stat. § 54-56e ("accelerated pretrial rehabilitation"); Hawaii Rev. Stat. § 853-1 ("deferred acceptance of guilty plea"); Ill. Compiled Stat. § 5/5-6-1 ("disposition of supervision"); Maryland Code, Criminal Procedure § 6-220 ("probation before judgment"); N.Y. Crim. Proc. Law § 170.55 ("adjournment in contemplation of dismissal"); Ohio Rev. Code § 2935.36 ("pretrial diversion"); Ohio Rev. Code § 2951.041 ("intervention in lieu of conviction" for defendants in need of drug or alcohol treatment); Wis. Stat. § 971.39 ("deferred prosecution" after charges have been filed).

For background on deferred-adjudication processes across the states, see Margaret Colgate Love, Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences, 22 Fed. Sent'g Rep. 6, 7 (2010) (noting that "[d]eferred adjudication schemes are statutorily authorized in over half the states"). Love credits the provisions of the original Code for spawning much of the state legislation that now exists on deferred adjudications. See id. ("In the 1970s, many states adopted deferred adjudication laws that were evidently inspired by the corrections articles of the Model Penal Code.").

d. Process. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 ("Adjournment in contemplation of dismissal in cases involving marihuana"); Vt. Stat., title 13, § 7041 (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (prosecutor must initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs; see Lane v. Phillabaum, 912 N.E.2d 113 (Ohio Ct. App. 2008)).

[15] This Reporters' Note has not been revised since § 6.02B's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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There is no general deferred-adjudication statute in New York, but courts have created a deferred-adjudication process under their own rules, allowing guilty pleas to be withdrawn with the consent of the prosecutor following successful completion of a period of probation. See N.Y. City Bar, The Immigration Consequences of Deferred Adjudication Programs in New York City (2007), at 2-3, available at http://www.nycbar.org/pdf/report/Immigration.pdf; N.Y. Crim. Proc. Law §§ 160.5, 160.55.

Some codes require that the prosecutor or court consider the victim's views before consenting to a deferred adjudication or sentencing, see, e.g., N.D. R. Crim. P. 32.2(a)(1). Subsection (4) of the proposed provision requires the court to order the prosecution to provide the victim with notice of proceedings and the opportunity to comment on the decision to defer adjudication of any given case.

f. Guilty plea not required. Massachusetts law closely mirrors the framework of subsection (5), requiring neither a conviction nor a guilty plea to support a deferred adjudication with probation. See Mass. Gen. Laws, Ch. 276, § 87.

i. Benefits of completion. Subsection (8) goes further than the law of many states in providing that a deferred adjudication may not be considered a part of the accused's criminal history in later proceedings. See Rudman v. Leavitt, 578 F. Supp. 2d 812 (D. Md. 2008) (holding that probation before judgment under Maryland law is considered a prior conviction for purposes of federal sentencing); United States v. Morillo, 178 F.3d 18 (1st Cir. 1999) (holding that a "continuance without finding" disposition under Mass. Gen. Law, Ch. 278, § 18, counts as a prior sentence for federal sentencing purposes because it is an admission of guilt).

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§ 6.03. Probation. [16]

(1) The court may impose probation for any felony or misdemeanor offense.

(2) The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses.

(3) The court shall not impose probation unless necessary to further one or more of the purposes in subsection (2).

(4) When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court should consult reliable risk- and needs-assessment instruments, when available, and shall apply any relevant sentencing guidelines.

(5) For a felony conviction, the term of probation shall not exceed three years. For a misdemeanor conviction, the term shall not exceed one year. Consecutive sentences of probation may not be imposed.

(6) The court may discharge the defendant from probation at any time if it finds that the purposes of the sentence no longer justify continuation of the probation term.

[16] This Section was originally approved in 2014; see Tentative Draft No. 3.

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1 **(7) For felony offenders, probation sanctions should ordinarily provide for early**
2 **discharge after successful completion of a minimum term of no more than 12 months.**

3 **(8) The court may impose conditions of probation when necessary to further the**
4 **purposes in subsection (2). Permissible conditions include, but are not limited to:**

5 **(a) compliance with the criminal law;**

6 **(b) completion of a rehabilitative program that addresses the risks or needs**
7 **presented by an individual offender;**

8 **(c) performance of community service;**

9 **(d) drug testing for a substance-abusing offender;**

10 **(e) technological monitoring of the offender's location, through global-**
11 **positioning-satellite technology or other means, but only when justified as a means**
12 **to reduce the risk that the probationer will reoffend;**

13 **(f) reasonable efforts to find and maintain employment, except it is not a**
14 **permissible condition of probation that the offender must succeed in finding and**
15 **maintaining employment;**

16 **(g) intermittent confinement in a residential treatment center or halfway**
17 **house;**

18 **(h) service of a term of imprisonment not to exceed a total of [90 days];**

19 **(i) good-faith efforts to make payment of victim restitution under § 6.04A, but**
20 **compliance with any other economic sanction shall not be a permissible condition**
21 **of probation.**

22 **(9) No condition or set of conditions may be attached to a probation sanction that**
23 **would place an unreasonable burden on the offender's ability to reintegrate into the law-**
24 **abiding community.**

25 **(10) The court may reduce the severity of probation conditions, or remove conditions**
26 **previously imposed, at any time. The court shall modify or remove any condition found to**
27 **be inconsistent with this Section.**

28 **(11) The court may increase the severity of probation conditions or add new conditions**
29 **when there has been a material change of circumstances affecting the risk of criminal**
30 **behavior by the offender or the offender's treatment needs, after a hearing that comports**
31 **with the procedural requirements in § 6.15.**

32 **(12) The court should consider the use of conditions that offer probationers incentives**
33 **to reach specified goals, such as successful completion of a rehabilitative program or a**
34 **defined increment of time without serious violation of sentence conditions. Incentives**
35 **contemplated by this subsection include shortening of the probation term, removal or**

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lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

Comment: [17]

a. Scope. Probation in the United States is a criminal-justice institution with profound challenges and difficulties. As American prison populations have grown over the past four decades, probation has followed suit. While expenditures on prisons have increased dramatically, however, budgets for probation services have not kept pace. Probation agencies today struggle to discharge their duties to offenders and communities, almost everywhere with overlarge caseloads and inadequate resources.

At the same time, probation is the most frequently imposed of all criminal penalties. Far more individuals are under probation supervision on any given day than the combined populations in prison and jail and on parole. In a majority of all criminal cases, therefore, probation is the institution relied upon to achieve the goals of American sentencing systems. With § 6.03 and related provisions, the Institute joins the many organizations, commissions, and academics who have called for a "reinvention" or "transformation" of probation in this country.

Many subjects of importance to probation reform in America cannot be addressed in a sentencing code. For example, it is beyond the scope of the Model Code to speak to best practices in the administration of probation sentences, the organization and culture of probation agencies, and mechanisms for rationalizing complex funding streams across state and local governments. The approach of § 6.03 is to craft legislative authorization for probation that allows for best practices and experimentation by agencies and line officers, while taking into account the realities and needs of contemporary justice systems.

Section 6.03 interlocks with § 6.15, governing legal responses to sentence violations and the revocation of community supervision sentences. In its policy foundations, § 6.03 runs parallel in most respects with § 6.09, governing postrelease supervision.

b. Underlying policies. A series of policy judgments are reflected throughout this provision:

First, it is likely that the resources available to probation services will remain in critically short supply for the foreseeable future. A well-designed sentencing code must create a framework for conserving those resources and channeling them to areas of greatest need and highest use. If there is a master principle behind the policy choices in § 6.03, it is the need to prioritize the use of scarce correctional resources. A rethinking of American statutory provisions on probation is an important step toward maximization of the sanction's public-safety benefits. Without fundamental change, we can expect that probation budget allocations will continue to be spread thinly over too many cases. In contrast, a program of hard-nosed prioritization can bring

[17] This Comment has not been revised since § 6.03's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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about improvements in the effectiveness of community supervision, even if funding levels do not increase in the near term.

Second, for individual cases, the Code posits that a primary goal of probation is to reduce or eliminate new criminal behavior by probationers. The best means of pursuing that end can vary a great deal. Offenders fall across a wide spectrum in the risks they pose to public safety, the manageability of those risks, their potential responsiveness to rehabilitative services, and the infrastructure needed to provide them with appropriate programming. Accordingly, the Code recommends that allocation of surveillance and treatment resources be aided by the best available processes for classification of probationers according to their individualized risks and needs.

Third, the Code recognizes the salience of punishment as a core purpose of probation. In many instances, conditions of supervision aimed at utilitarian goals will carry sufficient punitive force to ensure that probation sentences are not disproportionately lenient. When this is not the case, the Code permits imposition of probation sanctions designed for the sole purpose of holding offenders accountable for their criminal behavior.

Fourth, the Code encourages state probation systems to make greater use of positive rewards for compliance, alongside consistently applied penalties for noncompliance. One of the best-known findings of behavioral psychology is that rewards are generally more effective at altering behavior than penalties—yet this principle has been underutilized in community supervision. In addition, the application of penalties for probation violations in most jurisdictions has been slow, infrequent, and unpredictable. When sanctions come, often after many violations have accumulated, they tend to land heavily on probationers, including the overuse of revocations to prison. This pattern conflicts with research findings that sanctions achieve their greatest deterrent effect when applied swiftly and certainly—while increases in the severity of penalties yield disappointingly little in marginal deterrence. Section 6.03 proceeds from the view that uses of both "carrots" and "sticks" in American probation practice are in need of reexamination.

Fifth, any forward-looking law of community sanctions must seek a just and rational balance between the priorities of control and treatment. An increasing reliance on evidence-based practices, which can help sort out effective, neutral, and criminogenic interventions, is a positive step in this direction. Yet there is an emerging technological bias in favor of measures of surveillance and control that should be recognized and considered in long-term policy formation. The hardware and data systems available for the monitoring of offenders have proliferated in recent years, and will continue to develop at a rapid pace. The specifics cannot be known in advance, but two general predictions may be offered with confidence: The intrusiveness of surveillance made possible through new technologies will increase with time, and the associated costs will decline. Also, the speed of innovation in technological systems will almost certainly outpace progress in the rehabilitative sciences. Given the numbers of people who serve sentences of probation (as well as parole) in this country, critical policy questions will include how to make

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the best use of high-tech surveillance tools to reduce recidivism and enhance public safety, while avoiding a reflexive reliance on those tools in ways that could unjustly extend the government's powers of social control—or unnecessarily disrupt probation's reintegrative mission.

Sixth, the base of research and information about probation strategies and tactics should be substantially increased. Although several million offenders are on probation on any given day, American governments have invested very little in rigorous evaluation of the results achieved. No business would invest billions of dollars, year in and out, without a sophisticated measurement of net returns. The operations of probation agencies, and the behaviors of offenders under their charge, should be monitored more closely than in the past, so that adequate outcome data are collected. Within the limits of what is practicable, rehabilitative services should be assessed to determine their effectiveness, the quality of their implementation, and the profiles of offenders most likely to succeed or fail in specific programs.

c. Eligibility for sentence of probation. All offenders are eligible to receive a sentence of probation under the Model Code, as provided in subsection (1). This continues the position of the original Code and is a corollary of the Institute's across-the-board disapproval of mandatory prison sentences. See § 6.06 and Comment *d* (Tentative Draft No. 2, 2011).

The sentencing court's discretion to impose a probationary sanction for any crime is less absolute under the revised Code than in the original edition. Such determinations must now be made in light of the presumptive rules laid down in sentencing guidelines, see subsection (4), and are subject to the check of appellate review, see § 7.09. Neither guidelines nor sentence appeals were a part of the institutional structure of the 1962 Code's sentencing system.

d. Purposes of probation. Subsection (2) gives emphasis to goals of punishment and public safety in the fashioning of probation sanctions. The provision is not meant to supersede the statement of statutory purposes of sentencing in § 1.02(2), but gives application to those general purposes in the specific context of probation. The provision begins with a statement that one purpose of the probation sanction is to hold offenders accountable for their criminal conduct. Punishment through community supervision may in some cases hold retributive force comparable to a term of incarceration, yet be preferable on grounds of greater cost efficiency to the state and reduced impact upon the life chances of offenders, including their ability to care for their families and make restitution to crime victims.

Given high rates of recidivism and absconding by probationers as a group, the primary tasks of probation sentences must include effective responses to the risks of criminality that are posed by individual offenders, as well as their correctional needs. Leading probation-reform efforts of the past 10 to 15 years have concluded that probation services must move away from performance criteria such as the number of contacts agents have with probationers, the number of violations detected, and the number of sentences revoked. Instead, reformers have advocated a shift toward crime reduction, or "public safety" in current terminology, as a primary mission and

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performance measure. Much of the remainder of § 6.03 details how these utilitarian purposes should be reflected in the ordering of probation sentences.

e. Probation used only when necessary. It is an important goal of the revised Code to prioritize the use of community-corrections resources, channeling them to where they can be of greatest use. Subsection (3) provides that "[t]he court shall not impose probation unless necessary to further one or more of the purposes in subsection (2)." This is intended to be an enforceable legal standard, giving rise to a right to appeal; see § 7.09.

The Institute disapproves of the use of probation when the sanction serves no definable purpose. Too often in criminal courtrooms, probation is treated as a fallback or default sentence—a symbolic sanction that shows the court is "doing something." It is rare in American law to find an enforceable injunction that probation may not be imposed in the absence of a satisfactory reason. As a result, many thousands of probationers every year are subjected to controls and supervision they do not need, and face risks of sentence revocation for technical violations of probation conditions. This is wasteful of scarce community-corrections resources, and is a mistaken prison policy. In most states, one-third or more of prison admissions are due to community-sentence revocations rather than new court commitments. In some states, it is more than one-half. In the aggregate, probation does not function as a reliable "alternative" to imprisonment; it is often a prison sentence delayed. The laws that determine the inflow and size of the probation population are thus one significant component of a jurisdiction's prison policy.

When applying subsection (3), courts should not assume uncritically that a probation sentence will be effective in realizing its purported goals. While many probationers desist from future criminality, the evidence that probation programming can claim credit for this is relatively weak. Research suggests that nearly all probationer desistance would occur without intervention. Similarly, although a significant percentage of probationers are rearrested or reconvicted, detection of new crimes is often the product of police work rather than surveillance by a probation agency.

Forbearance in the use of probation need not be seen as a failure to hold offenders accountable for their crimes. In some instances, economic sanctions, including means-based fines that are adjusted to the wealth and income of individual defendants, can be used as proportionate punishments; see § 6.04B. In other cases, short terms of incarceration may supply penalties that are equivalent in severity to longer probation terms; see § 6.06 (Tentative Draft No. 2, 2011), while avoiding risks of revocation and more extended prison stays at a later date. The revised Code also encourages legislatures to authorize "unconditional discharge" as a complete criminal sentence in appropriate cases, when a more severe sanction is not required to serve the purposes of sentencing in § 1.02(2)(a). See § 6.02(1)(e). Unconditional discharge is itself a disposition that carries meaningful punitive force. The fact of conviction is painful and stigmatizing. And, as recognized elsewhere in the Code, see Article 6x, most felony and many misdemeanor convictions carry collateral consequences that affect offenders' employability,

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eligibility for public benefits, voting and jury-service rights, ability to secure licenses, and, in some cases, parental rights and immigration status. See § 6x.01 and Comment *a*; § 6.02(1)(e) and Comment *c*. In contemporary American legal systems, a criminal conviction without further sanction is by itself a substantial punishment.

The case for forbearance in the use of probation is strengthened by comparisons with sentencing systems in other countries. It is well known that U.S. incarceration rates in the late 20th and early 21st centuries have been the highest in the world. Less widely appreciated is that rates of community supervision in this country are also extraordinarily high by worldwide standards. Based on information collected by the Council of Europe, for example, the current U.S. probation supervision rate is more than seven times the average rate among 39 reporting European countries. The U.S. probation rate is more than four times the Canadian rate and nearly seven times that in Australia.

f. Assessment of offenders' risk and needs. In recent decades, important advances have been made in the development of actuarial tools to measure the risks of recidivism posed by individual offenders and, with somewhat less success, to assess their correctional needs and likely responsiveness to specific rehabilitative interventions (often called—infelicitously—their "criminogenic needs"). Research has consistently shown, for more than 50 years, that well-designed actuarial risk-assessment tools offer better predictions of future behavior than the clinical judgments of treatment professionals such as psychiatrists and psychologists, or the intuitions of criminal-justice professionals such as judges and probation officers.

Courts and community supervision agencies have increasingly used such tools to help determine the intensity of supervision warranted for individual probationers and parolees, and to help match offenders to the programs most likely to do them some good. Risk assessments are also used by sentencing courts in some states to help them decide whether to impose a prison or community sentence—a practice encouraged by the revised Code when accompanied by adequate protections; see § 6B.09 (Tentative Draft No. 2, 2011) (encouraging the use of actuarial risk-assessment tools at sentencing, especially to identify otherwise prison-bound offenders who may be safely diverted from incarceration).

Subsection (4) states that risk-and-needs-assessment tools should be consulted in the selection of probation sanctions and the fashioning of their terms, so long as "reliable" instruments are available. This is meant to signal that the tools used for risk prediction and the identification of treatment needs are of widely varying quality. Also, the quality of even the best instruments should be open to challenge. Ultimately, the reliability standard in subsection (4) will be given content in application, subject to adversarial testing, judicial interpretation, and oversight by the appellate courts. The Code contemplates that the party seeking to make use of an instrument should bear the burden of demonstrating its quality, and that this will help set general standards for other cases. Ideally, for example, risk-and-needs instruments should be developed and validated using offender populations within each jurisdiction. As a practical

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matter, however, this is not always possible. A professionally developed risk scale that has been validated using local offender populations might also be a "reliable" tool under this Section, even if the instrument was created using out-of-state cohorts of offenders.

In assessing an offender's risks and needs, many courts find input from the probation department helpful or essential. While not elevated to a statutory requirement in the Model Code, best practice suggests that sentencing judges consult the probation department on questions of whether to impose probation, and how probation sanctions should be configured.

g. Use of sentencing guidelines. In the revised Code's sentencing system, judicial sentencing discretion is to be applied within a framework of guidelines promulgated by an expert and nonpartisan sentencing commission. Subsection (4) expressly extends this approach to probation sanctions. It provides that, "When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court . . . shall apply any relevant sentencing guidelines." Subsection (4)'s injunction that the courts "shall apply" guidelines does not require judges to follow the guidelines in lockstep fashion. Under the Code's scheme, sentencing guidelines are never mandatory. At most, they carry "presumptive" legal force subject to the courts' authority to depart for "substantial" reasons grounded in the purposes of the sentencing system. See § 7.XX (Tentative Draft No. 1, 2007). Indeed, well-reasoned departures are considered desirable within the guidelines structure.

Sentencing guidelines in a handful of states address the use of community sanctions, but most guidelines schemes neglect this important area of sentencing law. One goal of the revised Code is to spur development of guidelines that address the full array of authorized criminal sanctions. The statutory outlines of § 6.03 may be given considerable substantive content by guidelines devoted to the subject of probation sanctions. See § 6B.02(6) (Tentative Draft No. 1, 2007) ("The guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission."). Section 6B.04(3) (Tentative Draft No. 1, 2007) includes the following subsections:

> **(3) The guidelines shall address the selection and severity of sanctions. Presumptive sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties. . . .**
>
> > **(b) The guidelines shall include presumptive provisions for determinations of the severity of community punishments, including postrelease supervision.**
> >
> > **(c) Where the guidelines permit the imposition of a combination of sanctions upon offenders, the guidelines shall include presumptive provisions for determining the total severity of the combined sanctions.**

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When developing sentencing guidelines, for example, commissions can identify categories of cases in which a fine or short jail sentence may be preferable to a term of probation. They can make recommendations about durations of probation supervision for offenders convicted of different crimes, or with differing risks and treatment needs. They can provide guidance about appropriate probation conditions. Finally, commissions can develop structured approaches for the sanctioning of probation violators. By taking such steps, sentencing commissions can help ensure that community sentences will advance public safety and offender accountability without squandering the justice system's limited resources.

h. Length of probation terms. Just as prison terms for misdemeanors and felony offenses have lengthened over the past three decades, so too have periods of authorized community supervision in most jurisdictions. Many states now authorize probation terms lasting five years, 10 years, or longer, including instances of "lifetime" supervision. Over the past four decades, the increased use of community sentences has not displaced prison growth, but has occurred side by side with the nation's unprecedented expansion of its prison systems. It is thus ahistorical to view probation as an "alternative" to incarceration. In academic literature, the pejorative terminology of "mass incarceration," as a unique American practice, has recently been supplemented by descriptions of "mass supervision." The lengthening of supervision terms is also an element of prison policy. Longer probation terms extend the period in which a community sentence can be converted to a prison sentence through revocation.

The revised Code recommends a more parsimonious use of probation sanctions than the majority approach in American law. Subsection (5) recommends maximum probation terms of three years for felonies and one year for misdemeanors. This deviates from the original Code, which recommended a maximum five-year term for felony probationers and two years for misdemeanants, see Model Penal Code § 301.2(1) (1962).

The Code's recommendations in subsection (5) are not unprecedented. A handful of states have capped probation sanctions with relatively low maximum terms for most or all offenses. A general two-year maximum term is in effect in at least two states, while others have adopted maximum periods of three to five years.

Subsection (5) reflects a policy judgment that the treatment and control objectives of probation will normally take less than three years to effectuate—or else a time period of less than three years will be needed to discover which probationers will fail under supervision. Longer supervision periods carry diminishing benefits. The three-year maximum in subsection (5), therefore, is a central element of the strategy of prioritization that runs through § 6.03 as a whole; see Comment *b* above. Community-supervision resources should be concentrated where the expected public-safety benefits are greatest, and should not be dissipated through the use of overlong probation terms.

For isolated offense categories, public acceptance of nonprison sanctions may demand longer terms of supervision than those contemplated in § 6.03(5). For example, the three-year

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limit might be deemed unacceptable for serious sex offenders who present high recidivism risks. The Institute has recently begun a project on the Model Penal Code: Sexual Assault and Related Offenses, which will consider the desirability of specialized penalty provisions. If warranted, they may be accommodated by the legislature on an offense-by-offense basis. The policy choices throughout § 6.03 were made with the vast majority of probationary sentences in mind, setting aside the question of unique subsets of crimes that might call for a different approach.

i. Early discharge. Subsections (6) and (7) contain mechanisms for the shortening of probation terms in appropriate circumstances. Subsection (6) gives blanket authorization to the courts to terminate probation sanctions before their full terms have elapsed, if the original purposes of the sentence no longer justify continuing supervision. Subsection (7) encourages, but does not require, that courts structure probation sentences so that early termination is promised to probationers who complete one year of supervision without serious incident. In either case, the sanction is structured to give incentives to offenders to establish law-abiding habits in the critical early days of probation, and to maintain those behaviors for a meaningful period of time. This reinforces the rehabilitative and reintegrative goals of probation, while releasing offenders who should not be draining community supervision resources. Data show that probationers who succeed and those who fail tend to be sorted by their own conduct relatively early in probation terms. A sustained period of compliance with sentence conditions is the best evidence that a particular offender can be safely discharged.

j. Authorized conditions of probation. In many U.S. jurisdictions, probation sanctions are accompanied by "standard" and "special" sentence conditions. Although no data are maintained, reports from the field suggest that the average number of conditions has been growing in recent years. When these become too numerous or complex they can interfere with offenders' work and family obligations. Corrections professionals report that many probationers are unable to comply with them. Overburdensome sentence conditions can also have negative effects on the system as a whole. Probation agencies and courts in many jurisdictions cannot hope to respond effectively to all violations. Instead, according to knowledgeable observers, enforcement tends to be excessively lenient over the course of numerous transgressions, and then excessively harsh when an offender's repeated missteps have exhausted the patience of the probation officer and the court. The result can be a system that lacks credibility in the eyes of offenders, is demoralizing, and sacrifices the public-safety benefits of a more sensible reintegrative approach.

Subsection (8) recommends that conditions of supervision be limited to those that serve genuine and identifiable purposes. It contains a nonexclusive list of conditions that may be imposed consistent with this Section—but need not be in every case. Most are a familiar feature of existing practice in every state.

The revised Code eschews the use of standard or boilerplate conditions, and erects a barrier to the imposition of lengthy laundry lists of conditions by requiring that each one be justified with reference to an authorized purpose of the probation sanction. Conditions should be limited

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1 to requirements the system is prepared to enforce; see § 6.15. This admonition applies to the
2 specific conditions itemized in subsection (8), or any additional conditions a judge may impose.
3 Ideally, every condition should relate to the best available estimates of the risks that the
4 probationer will reoffend and his or her treatment needs. The process of setting conditions may
5 be informed by credible risk-and-needs assessments under subsection (4). In some cases,
6 conditions can be imposed solely for their punitive effect, to hold offenders accountable for their
7 criminal conduct; see subsection (2).

8 Subsection (8)(c) encourages the use of community service as a condition of probation in
9 appropriate cases. Community service is especially useful as a substitute for an economic
10 sanction that cannot be imposed because of the financial circumstances of the offender; see
11 § 6.04(6). Seen as in-kind labor, community service can in theory be translated into a dollar
12 value. Certain drawbacks should be kept in mind, however. Community-service requirements
13 can interfere with an offender's employment obligations. Because ongoing employment is a
14 factor strongly associated with lower rates of recidivism, a condition of community service
15 should, when possible, be structured so that it can be satisfied outside the offender's normal
16 working hours. In addition, research indicates that community-service sentences of overlong
17 duration become exceedingly difficult to enforce. The policy literature includes
18 recommendations that no more than 120 to 240 hours of community service be required of an
19 offender.

20 Subsection (8)(e) refers to the growing use of global-positioning-satellite technology as a
21 means of monitoring the whereabouts of offenders, often combined with a condition of home
22 confinement for designated periods of each day. As such technology becomes increasingly
23 available and less expensive to employ, there is a danger of net-widening and overuse. When this
24 occurs, gratuitous punishment is inflicted on the offender, and there is an increased risk of
25 sentence violations and unneeded drains on judicial and correctional resources. Subsection (8)(e)
26 authorizes GPS-like conditions of supervision, yet places an important limitation upon them:
27 They may not be employed unless justified by the risk of criminal behavior presented by the
28 particular offender and the capacity of monitoring to address those risks.

29 Subsection (8)(f) speaks to a condition that is frequently included in probation terms today,
30 that the offender find and maintain employment. The subsection would soften this condition to
31 require only that the probationer make reasonable efforts to secure a job. While work is a known
32 "protective" factor, statistically associated with reduced risk of recidivism, it is increasingly
33 difficult for ex-offenders to secure ongoing employment. Some of the difficulty stems from the
34 growing numbers of civil disabilities and employment disqualifications imposed by law; see
35 Article 6x.

36 Subsection (8)(h) would allow for a limited period of incarceration to be imposed as a
37 condition of probation—a common practice sometimes called a "split sentence." One national
38 survey found that split sentences were used in roughly one-quarter of all felony cases. The length

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of term of incarceration that may be imposed as a condition of probation is an important policy question. The 1962 Code allowed for a period of confinement "not exceeding thirty days to be served as a condition of probation." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.02(3)(b); see also Model Penal Code, Complete Statutory Text, § 301.1[(3)]. Many state codes permit jail confinement of a year or more as part of a probation sentence. In the Institute's view, any term of incarceration longer than 90 days should be denominated a separate sentence for legal purposes, and regulated by sentencing guidelines and court decisions that differentiate between confinement and probation sanctions. The bracketed duration of 90 days in subsection (8)(h) is meant to indicate an outer limit for the use of incarceration as a condition of probation. A shorter cap would also be consistent with the Code.

Subsection (8)(i) clarifies the relationship between economic sanctions under § 6.04 and conditions of probation under § 6.03. Ordinarily, economic sanctions are freestanding penalties with their own terms and conditions, timelines for compliance, and sanctions for violations. Because the revised Code gives priority to collection of victim restitution over other economic sanctions, see § 6.04(10), sentencing courts are given authority to designate full or installment payments of victim restitution as a condition of probation. Failure to comply with the court's payment schedule for a victim-restitution order would then subject the offender to the violation and revocation procedures set forth in § 6.15.

k. Limits on the severity of probation conditions. All sanctions or combinations of sanctions under the Code must fit within the boundaries of proportionate sentences as defined in § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007) (one general purpose of sentencing is "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). Section 6.02(4) makes reference to this injunction, and adds that:

> **In evaluating the total severity of punishment . . . the court should consider the effects of collateral sanctions likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.**

Under current law, collateral sanctions in many cases amass to a greater punitive force than whatever criminal sanctions have been imposed, even though they are denominated as civil disabilities; see Article 6x. Section 6.02(4) provides a mechanism to account appropriately for the functional impacts of collateral consequences in the criminal-sentencing process. Sections 1.02(2)(a)(i) and 6.02(4) both operate as limits on the severity of probation sanctions, including the intensity and intrusiveness of any conditions imposed.

Section 6.03(9) further provides that no probation conditions may be imposed that would place an "unreasonable burden" on an offender's ability to establish a productive life in the law-abiding community. While society has a compelling interest in offenders' desistance from future criminal activity, burdens on offenders' rehabilitative chances cannot always be avoided. Probationers sometimes pose risks to public safety that are best met with restrictive sentencing

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conditions, such as tight monitoring requirements, frequent drug testing, and travel limitations—which may impede offenders' efforts to keep regular work hours or spend time reestablishing family contacts. In addition, probation sanctions sometimes serve retributive purposes, and the need for proportionate punishment is sometimes in tension with rehabilitative aims. Subsection (9) lays down a balancing test that would allow measures of surveillance, control, and punishment to trench upon goals of rehabilitation and reintegration, but not to a degree that would "place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community." What is permissible in this context depends on the imperatives of each case. For example, an offender who poses a substantial risk of violent reoffending could be subject to intrusive conditions of monitoring and control that would not be warranted in other cases.

l. Judicial modification of conditions of probation. Subsection (11) treats a court order to increase the severity of probation conditions, or to add new conditions of supervision, as equivalent to the imposition of a sanction under § 6.15, and imports the hearing requirements of that provision.

Subsections (10) and (12) mirror earlier subsections on the early termination of probation sentences, see subsections (6) and (7) and Comment *i*. Subsection (10) gives blanket authorization to the courts to reduce the severity of probation conditions, or remove conditions previously imposed, at any time. Subsection (12) encourages, but does not require, courts to structure probation sentences to offer probationers incentives to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions.

Social-science research for many decades has shown that behavioral change is more readily achieved through a system of rewards than a system of punishments. American probation practice has begun to exploit this knowledge, and some agencies now offer "carrots" as well as "sticks" in the administration of community supervision. Subsection (12) seeks to encourage this strategy through authorization of conditions that offer promised or predictable rewards to probationers in return for the accomplishment of identifiable goals. One particularly powerful incentive that may be offered probationers—the reduction of their term of supervision—is addressed in subsection (7), which provides that the prospect of early discharge should ordinarily be a feature of probation contracts.

Bracketed language in subsection (12) would allow a state legislature to exclude victim restitution from the economic sanctions that may be modified as a reward for partial compliance with sentence requirements. As a general matter, the Code places a higher priority on the imposition and collection of victim restitution than on other economic sanctions; see § 6.03(10). On principle a jurisdiction may take the view that victim-restitution payments should never be discounted, see § 6.04A and Comment *h*, or may want to hold open the possibility of full collection for those rare cases in which offenders' financial circumstances greatly improve, see § 6.04A and Comment *f*. A statutory exemption from subsection (12) may not always increase

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the net amount of restitution that is collected for a victim's benefit, however. It is possible, for example, that a particular offender might be encouraged to pay half of a restitution order over a designated period of time, if given the incentive that the total amount due will be reduced, but that the same offender would make no payment at all or pay less than half in the absence of such an incentive. The optimum policy balance in the use of carrots and sticks under subsection (12) is a subtle equation, and room for experimentation by sentencing courts may be preferable to fixed rules.

REPORTERS' NOTE [18]

a. Scope. For a definition of probation, see Joan Petersilia, Probation in the United States, Perspectives (Spring 1998), at 30 (defining probation as "[a] court-ordered disposition alternative through which an adjudicated offender is placed under the control, supervision and care of a probation staff member in lieu of imprisonment, so long as the probationer meets certain standards of contact."). For examples of statutory definitions, see 18 U.S.C. § 3563; N.H. Sup. Ct. R. 107; Or. Rev. Stat. § 137.540(1).

With justification, probation has been called "the primary sentencing disposition of the justice system affecting both adult and juvenile offenders." Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model (2000). On any given day nearly four million persons are on probation in the United States, accounting for 80 percent of all persons under community supervision, see Bureau of Justice Statistics, Probation and Parole in the United States, 2011 (2012), at 2. Slightly more than half of all persons on probation have been convicted of felony offenses, and slightly less than half of misdemeanors, id. at 17, appendix table 3. In addition, by one estimate there are more than one million adults enrolled in community-supervision programs not formally classified as probation, such as drug-treatment courts (about 50,000), diversion programs (about 300,000), and various preadjudication programs. See Faye S. Taxman, Matthew L. Perdoni, and Lana D. Harrison, Drug Treatment Services for Adult Offenders: The State of the State, 32 J. of Substance Abuse Treatment 239 (2007). Nationally, probation populations began to decline somewhat in 2009; see Bureau of Justice Statistics, Probation and Parole in the United States, 2012 (2013). The numbers of probationers in America remain at near-historic highs, however, and community-supervision rates in this country are vastly greater than in developed democracies elsewhere in the world; see Reporters' Note to Comment *e* below.

While some probation programs are above the norm, and promising reform efforts have been undertaken in some jurisdictions, the majority of probation departments are under-resourced, poorly managed, under-evaluated, and ineffective. These are problems of long standing. See National Advisory Commission on Criminal Standards and Goals (1973), at 112 (stating that probation was the "brightest hope for corrections" but was "failing to provide services and supervision"); U.S. Comptroller General's Office, State and County Probation: Systems in Crisis: Report to the Congress of the United States (1976), at 74 ("The priority given to probation in the criminal justice system must be reevaluated."). Recent calls for nationwide probation reform include The Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model (2000) (chaired by Model Penal Code Adviser, Ronald P. Corbett, Jr.); Pew Center on the States, Policy Framework to Strengthen Community

[18] This Reporters' Note has not been revised since § 6.03's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 Corrections (2008); National Institute of Corrections, Implementing Evidence-Based Policy and Practice in
2 Community Corrections, 2nd ed. (2009); Justice Center, Council of State Governments and Bureau of Justice
3 Assistance, A Ten-Step Guide to Transforming Probation Departments to Reduce Recidivism (2011).

4 *b. Underlying policies.* Probation populations have grown more or less in tandem with prison populations over
5 the past four decades, but funding levels for probation services have not increased, while expenditures for prisons
6 have expanded many times over. See Joan Petersilia, Reforming Probation and Parole in the 21st Century (2002), at
7 3-4, 38-41. The shortage of resources available for community supervision is evident across probation systems.
8 President Johnson's Crime Commission recommended a caseload of 30:1; see President's Commission on Law
9 Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967). By the early 1990s,
10 average probation caseloads were more than 100:1. National Research Council, Parole, Desistance from Crime, and
11 Community Integration (2008), at 34-35. In some jurisdictions, probation officers carry caseloads of 200 or even
12 300 offenders. Id.; see also George M. Camp and Camille Camp, The Corrections Yearbook (1995): Petersilia,
13 Probation in the United States, supra, at 168-169 (estimating average caseloads of 254:1; reporting that "about 20
14 percent of adult felony probationers are assigned to caseloads requiring no personal contact"). Symptoms of
15 shortfalls in funding include such practices as "bunker" probation (where line probation officers seldom or never
16 leave their offices) and "kiosk" probation (where probationers can satisfy reporting requirements by interacting with
17 an ATM-like machine).

18 Probation practices vary enormously from state to state, and within states. For instance, per capita probation
19 populations in 2011 varied from a low of 396 per 100,000 in New Hampshire to a high of 6205 per 100,000 in
20 Georgia—more than a factor of 15. Bureau of Justice Statistics, Probation and Parole in the United States, 2011
21 (2012), at 16 app. table 2. There are more than 2000 probation agencies in the United States, and they share no
22 common structure. See Joan Petersilia, Probation in the United States, in Michael Tonry ed., 22 Crime and Justice:
23 A Review of Research 149 (1997), at 169 ("probation services in the United States differ in terms of whether they
24 are delivered by the executive or the judicial branch of government, how services are funded, and whether probation
25 services are primarily a state or a local function."); National Institute of Corrections, State Organizational Structures
26 for Delivering Adult Probation Services (1999).

27 Most statistical data about probation is collected nationally by the Department of Justice, and little useful
28 information is maintained at the state level. Id. at 11 (probation data are "scattered among hundreds of loosely
29 connected agencies, each operating with a wide variety of rules and structures. . . . [M]ost states cannot describe the
30 demographic or crime characteristics of probationers under their supervision."). For an informed overview, see The
31 Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model
32 (2000), at 15:

> 33 In many respects, probation is the "dark figure" in the criminal justice world. Though
> 34 responsible for nearly two-thirds of offenders under correctional control, amazingly little in-depth
> 35 research has been conducted on its activities or impact, except in the limited area of intensive
> 36 supervision programs. Very little can be said with confidence about what probation does and to
> 37 what effect. . . .

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> Similarly, probation has neglected the area of constructing a "theory of practice" to guide practitioners. Mission statements call for enforcing court orders and providing treatment options in the service of reducing recidivism. Extraordinarily little has been put forth regarding the most appropriate supervision strategies for achieving these goals. When this is compared with the richness of the available practice theory in such domains as counseling, social work, and even police work, the extent of inattention to the "how" of probation supervision becomes manifest.

Studies of recidivism among probationers have been conducted only sporadically, and those that exist are consistent with a pattern of widely diverse experience across the country. One survey of 17 studies found that felony rearrest rates among probationers in different jurisdictions varied from a low of 12 percent to a high of 65 percent. Michael Geerken and Hennessey D. Hayes, Probation and Parole: Public Risk and the Future of Incarceration Alternatives, 31 Criminology 549, 551-554 (1993). See also Joan Petersilia, Susan Turner, James Kahan, and Joyce Peterson, Granting Felons Probation: Public Risks and Alternatives (1985) (California study finding that, over a three-year period, 65 percent of probationers were rearrested, 51 percent reconvicted, and 34 percent incarcerated). We have reason to believe that rates of success on probation have varied substantially in recent decades. According to national surveys sponsored by the U.S. Department of Justice, 74 percent of probationers successfully completed their sentences in 1986, but this dropped to 67 percent in 1992, and 59 percent by 1998, while bouncing back to about 66 percent in 2009-2011. As might be expected, felons fare worse on probation than misdemeanants. More than three-quarters of misdemeanants placed on probation successfully complete their sentences—and they do so, on average, having received very few services. See Bureau of Justice Statistics, Probation and Parole in the United States, 2011 (2012); Bureau of Justice Statistics, Probation and Parole in the United States, 1998 (1999); Joan Petersilia, Reforming Probation and Parole in the 21st Century (2002).

The Comment forecasts that expensive rehabilitative programming will compete in the future with ever-cheaper means of monitoring and control of probationers. The Supreme Court has recently observed, and grappled with, problems that may arise from swiftly improving surveillance technologies. See United States v. Jones, 132 S. Ct. 945 (2012) (remarking on enormous advances in GPS tracking of suspects' movements, at a small fraction of the cost of traditional methods requiring human observation). See also Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 194 ("Correctional technology is developing faster than the enactment of laws to manage its use. . . . [U]nderstanding how to best utilize this fast-growing technology for public safety, rather than unnecessary intrusion, is critically important.").

c. Eligibility for sentence of probation. For the original Code's reasoning in rejecting mandatory prison sentences for any offense, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 6 at p. 53 ("However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition of most offenses where the circumstances are so unusual or the mitigating factors so extreme that a suspended sentence or probation will be proper.").

d. Purposes of probation. For examples of state laws that set forth the purposes of probation sentences, see Cal. Penal Code § 1202.7 ("The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim;

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and the needs of the defendant shall be the primary considerations in the granting of probation."); Minn. Stat. § 609.02, subd. 15 ("The purpose of probation is to deter further criminal behavior, punish the offender, help provide reparation to crime victims and their communities, and provide offenders with opportunities for rehabilitation.").

On the need to address the risk of recidivism by probationers, see The Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model (2000), at 18, 19 ("Until probation practitioners reach widespread agreement that public safety is their primary mission, and act accordingly, the practices of the field will not resonate with core public values."). Persons on probation are responsible for a meaningful share of all crimes committed in America. One of every five adults charged with a felony offense was on probation at the time of their crime., id. at 2; see also Bureau of Justice Statistics, Recidivism of Felons on Probation 1986-89 (1992). Among prison inmates in 1991, 29 percent had been on probation at the time of the offense leading to their imprisonment. Thirty-one percent of persons on death row in 1992 were on probation or parole supervision at the time of their crimes. See Bureau of Justice Statistics, Survey of State Prison Inmates, 1991 (1993); Bureau of Justice Statistics, Capital Punishment in 1994 (1995).

e. Probation used only when necessary. On the overuse of probation, see Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015 (2013). Critics of probation have long observed that the rate of criminal reoffending by those under supervision is relatively unaffected by the availability of treatment programs, or even the nature of interactions between agents and their clients. See Ralph W. England, Jr., What is Responsible for Satisfactory Probation and Post-Probation Outcome?, 47 J. Crim. L. & Criminology 667, 674 (1957). More recent studies have reached similar conclusions. A 2005 study comparing rearrest rates for individuals released through both mandatory and discretionary supervision schemes, and those released without supervision found no differences at all between those without supervision and those released with supervision under mandatory release schemes. Amy Solomon, Vera Kachnowski, and Avinash Bhati, Does Parole Work? Analysis of the Impact of Postrelease Supervision on Rearrest Outcomes (Urban Institute: 2005). See also James Bonta et al., Exploring the Black Box of Community Supervision, 47 J. Offender Rehabilitation 248, 251 (2008) (reporting study findings that indicated no statistically significant relationship between community supervision and the incidence of violent recidivism); Faye Taxman, Probation, Intermediate Sanctions, and Community-Based Corrections, in Joan Petersilia and Kevin R. Reitz, The Oxford Handbook of Sentencing and Corrections (2012), at 374-375 ("There have been no experiments or studies on whether being on probation (i.e., having contacts between the probation officer and offender) as opposed to having no oversight has any impact on offender behavior."). Some have argued that supervision not only does little good, but may cause overt harm. Christine Scott-Hayward has documented the effects of supervision on the ability of offenders to secure and maintain employment and reestablish familial connections, and has found that in some cases supervision methods and conditions interfere with successful reentry. See Christine Scott Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. (2011).

Although probation's record of serving its utilitarian functions is poor, it is a proven contributor to large American prison populations. Estimates suggest that one-half of the people admitted to U.S. jails, and more than one-third admitted to prisons, are there as a result of revocation from community supervision, including both probation and parole. Pew Center on the States, When Offenders Break the Rules: Smart Responses to Parole and

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Probation Violations (2007); see also Alfred Blumstein and Allen J. Beck, Reentry as a Transient State between Liberty and Recommitment, in Jeremy Travis and Christy Visher, eds., Prisoner Reentry and Crime in America (2005). The total volume of American probation populations, roughly four million individuals in 2011, is a direct contributor to the size of prison populations.

There is evidence that the supervision "net" in the U.S. is wider than in Europe and elsewhere in the developed world. Arguably, the U.S. engages in "mass probation" or "mass supervision" (if parole supervision is included) on a par with the nation's "mass imprisonment" or "mass incarceration." See Michelle S. Phelps, The Paradox of Probation: Understanding the Expansion of an "Alternative" to Incarceration during the Prison Boom, Doctoral Dissertation, Princeton University (2013), at 30 (proposing and defining "the term 'mass probation' to describe the rapid build-up (and racial disproportionality) of probation supervision rates."); Jonathan Simon, Mass Incarceration: From Social Policy to Social Problem, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (2012); Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America (2006); David Garland ed., Mass Imprisonment (2001).

The Council of Europe reports an average probation rate among 39 reporting countries of 179 per 100,000 general population. See Council of Europe Annual Penal Statistics, Space II: Persons Serving Non-Custodial Sanctions and Measures in 2011 (2013), at 18-23; Council of Europe Annual Penal Statistics, Space II: 2011: Main Indicators (2012). The U.S. probation rate for 2011 was reported by the Department of Justice as 1662 per 100,000 adults, which recalculates to 1263 per 100,000 general population. (The recalculation is needed to make the data compatible with Council of Europe data). See Bureau of Justice Statistics, Probation and Parole in the United States, 2011 (2012), at 16 app. table 2. The U.S. probation supervision rate is thus seven times the rate in reporting European countries.

For a selection of specific European countries (Western European and affluent), the Space II data include the following 2011 probation rates per 100,000 general population: Finland (46), Norway (48), Switzerland (101), Sweden (146), Germany (191), Netherlands (220), England and Wales (290), France (284), and Belgium (369). Looking to individual U.S. states (see Bureau of Justice Statistics, above), there is no state below the European average of 179. The highest probation rates are found in Georgia (4716) (not a typographical error), Idaho (2611), Rhode Island (2234), Ohio (2170), and Indiana (1990). The lowest probation rate in the United States is New Hampshire's 301; the next lowest are Nevada (428) and West Virginia (443). All state rates above have been converted to reflect rates per general population.

The probation scales of Western Europe and the American states are almost wholly exclusive of one another. If Belgium (369), with the highest probation rate in Western Europe, were a U.S. state, it would have the next-to-lowest rate in the country. No other Western European country would interlace with the U.S. scale even at extreme low end—although a few would not be far below the scale's floor. There are some Eastern European countries with considerably higher rates, however: Turkey (543), Estonia (540), Georgia (866), Poland (636). Even the outlier Georgia (Eurasia) is well below the U.S. average, however, and 37 American states are above Georgia.

Community supervision in the United States also generates large numbers of sentence revocations by transnational standards. In recent years, one-third or more of all prison admissions in America have been due to probation or parole revocations rather than new court commitments. See Bureau of Justice Statistics, Prisoners in

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2012: Trends in Admissions and Releases, 1991-2012 (2013), at 2-3. In 2011, the average among reporting European states was only 6.3 percent of prison admissions attributable to "recalls" from community supervision. See Dirk van Zyl Smit and Alessandro Corda, American Exceptionalism in Parole Release and Supervision, in Kevin R. Reitz, ed., American Exceptionalism in Crime and Punishment (forthcoming, Oxford University Press). While community supervision is a major contributor to U.S. prison populations—the same is not true in many other developed nations.

Outside of Europe, the comparative picture is similar. Canada's probation rate for 2010-2011 was 393 per 100,000 adults, with variation among the provinces from a low of 175 (Quebec) to highs of 653 (Manitoba) and 713 (Prince Edward Island). The rates are comparable to U.S. rates as reported by the Justice Department (probationers per 100,000 *adults*). Canada's rate (corrected to match the Council of Europe denominator based on the entire population) is slightly higher than that of England and Wales or France, and a bit lower than Belgium. The national U.S. probation supervision rate is more than four times the national Canadian rate. Canada would be 49th in U.S. probation rates if it were an American state. See Statistics Canada, Average Counts of Adults on Probation, by Province, 2010/2011, at http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc10-eng.htm (last visited Sept. 16, 2013).

In Australia, the total community supervision rate in 2011 was 314 per 100,000 adults. Sixty percent were on probation, another 17 percent on community service, and 22 percent on parole. See Australian Bureau of Statistics: Community Based Corrections: Adult Community-Based Orders, at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Community-based%20corrections~72 (last visited Sept. 16, 2013). If we combine both probation and community-service populations in Australia to derive a "probation" rate comparable to that reported in the U.S., the Australian probation rate in 2011 was 242 per 100,000 adults. That is roughly one-seventh the national U.S. rate for the same year, and well below the probation supervision rate of any American state.

f. Assessment of offenders' risks and needs. It is now feasible, for some offender populations, to make reasonably accurate predictions of the likelihood that an individual probationer will reoffend, and the reliability of statistical risk-assessment instruments has been improving over the last 10 to 15 years. At the same time, there are subgroups of offenders for whom risk-assessment tools do not work particularly well. There are also many substandard instruments in use. On the whole, the Code takes the view that risk- assessment tools can be useful—but only when their reliability can be demonstrated. Compared to risk prediction, we know far less about how to change a probationer's propensity toward criminal behavior through rehabilitative programming, although here too scientific knowledge is growing. See Faye Taxman, Probation, Intermediate Sanctions, and Community-Based Corrections, in Joan Petersilia and Kevin R. Reitz, The Oxford Handbook of Sentencing and Corrections (2012), at 382 ("Overall, we know little about the ingredients of effective probation supervision.")

One long-term goal of the Code is to encourage the development of high-quality instruments that are tailored to the conditions in particular jurisdictions. For example, states vary significantly in the profiles of offenders who receive prison sentences versus probation sentences. Joan Petersilia, Reforming Probation and Parole (2002), at 50. Thus, the risks and needs present in aggregate populations are different from place to place. No uniform system of classification among probationers would be appropriate across all jurisdictions, or even across counties in an

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individual state. The quality of probation departments' classification systems varies greatly, as well, and many departments have inadequate processes. See Tony Fabelo, Geraldine Nagy, and Seth Prins, A Ten-Step Guide to Transforming Probation Departments to Reduce Recidivism (Council of State Governments Justice Center 2011), at 13 ("In spite of their importance, many probation departments' screenings and assessments are often ad hoc processes using instruments that have been developed internally, tinkered with over time, and never validated in a scientific manner. Restructuring and standardizing screening and assessment procedures is arguably one of the most important aspects of transforming a probation department to bring recidivism reduction into its mission.").

Probation classification based on the best-available assessment technologies can help structure appropriate sanctions for individual offenders, and prioritize the use of correctional resources. For example, in some contexts it has proven wasteful to focus programming resources on low-risk offenders. See Edward J. Latessa, Lori Brusman Lovins, and Paula Smith, Final Report, Follow-up Evaluation of Ohio's Community Based Correctional Facility and Halfway House Programs—Outcome Study (2010), at 11 ("Programs clearly produced more favorable results with high risk offenders, and tended to increase recidivism for low risk individuals."); Elizabeth K. Drake, Steve Aos, and Robert Barnoski, Washington's Offender Accountability Act: Final Report on Recidivism Outcomes (Washington State Institute for Public Policy 2010); Pew Center on the States, Policy Framework to Strengthen Community Corrections (2008), at 6 of 11 (recommending the use of "risk and needs assessments to determine how to supervise offenders allows community corrections agencies to better allocate their resources and focus their supervision on high-risk offenders."); Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model (2000), at 29 ("Probation practitioners have a crucial need for information-based decision-making. This information pertains, in part, to conducting comprehensive offender assessments to facilitate the targeting of high-risk or problematic offender populations for appropriate programming and supervision."). See also Tony Fabelo, Geraldine Nagy, and Seth Prins, A Ten-Step Guide to Transforming Probation Departments to Reduce Recidivism (Council of State Governments Justice Center 2011), at 13-19. Id. at 27 (discussion of why low-level monitoring of low-risk probationers is good policy):

> If probation officers monitor low-risk individuals extremely closely, they may be more likely to detect minor technical violations. Furthermore, frequent reporting to a probation officer may interrupt the very activities that are likely to result in positive behaviors; this may be the case when a probationer has to leave a job to travel to check-ins when compliance was likely in any case. Also, it is common for people with substance use disorders to relapse early in the recovery process; for individuals deemed a low risk of recidivating, this should not automatically require severe sanctions or probation revocation.

One notable risk-based community-supervision experiment was conducted under Washington State's Offender Accountability Act, passed in 1999, which requires the state's department of corrections to assign levels of intensity of community supervision based on a static risk assessment of probationers and prison releasees. Greater intensity of supervision is targeted to higher-risk offenders, with fewer resources devoted to low-risk offenders. An empirical evaluation of this new approach by the Washington State Institute for Public Policy found statistically significant declines in recidivism by probationers and prison releasees, including a 17 percent reduction in violent recidivism over the first three years of implementation. Although the researchers could not rule out the possibility that factors other than the Offender Accountability Act caused the drop-offs in reoffending, implementation of the Act coincided

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with the first reductions in probation and parole reoffending in over a decade, reversing an 11-year rise. See Elizabeth K. Drake, Steve Aos, and Robert Barnoski, Washington's Offender Accountability Act: Final Report on Recidivism Outcomes (Washington State Institute for Public Policy 2010).

Compared with risk assessment, there is far less research support for the efficacy of instruments that seek to identify characteristics of offenders—or "criminogenic needs"—that can be changed with specific interventions, thereby reducing their propensities to reoffend. Simply put, we know more about static risk than how to rehabilitate. The so-called "fourth generation" of risk-needs assessment instruments is still under development. The ambition for these instruments is to provide information useful to devising case plans for individual offenders (for example, matching specific offenders to programs from which they are likely to benefit), as well as monitoring changes in risks and needs over time, allowing officials to adjust supervision conditions to respond to an offender's progress or regression. See Scott VanBenschoten, Risk/Needs Assessment: Is This the Best We Can Do?, 72 Fed. Probation 38, 40 (2008) ("It is time to consider the possibilities of a new generation of risk/needs tools; a generation of tools that translates complex and abstract academic research into simple and realistic case plans."). See id. at 42:

> Tools must begin identifying what services in what duration with what level of intensity will produce the best outcomes based on the assessed needs. This advancement in assessment will require a tremendous amount of research and advanced statistical methodology, but the field of probation must demand statistically valid connections between risk/needs assessment, case planning and outcomes.

g. Use of sentencing guidelines. Current American sentencing-guidelines systems do not universally address community sanctions. For example, Maryland's guidelines simply state that, "[s]ubject to the statutory limit of five years, the length of any probation imposed is within the judge's discretion and is not limited by the sentencing guidelines." Maryland State Commission on Criminal Sentencing Policy, Maryland Sentencing Guidelines Manual (2013), at 56. For a survey of state practices, see Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (2012), at 124-125 (also arguing that it is a best practice to include community sanctions in sentencing guidelines). Section 6B.02(6) of the revised Code (Tentative Draft No. 1, 2007) provides that "[t]he guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission." On the potential of sentencing guidelines to address appropriate conditions of probation for different classes of offenders, see Cecelia Klingele, The Role of Sentencing Commissions in the Imposition and Enforcement of Release Conditions, __ Fed. Sent. Rptr. __ (forthcoming, 2014).

h. Length of probation terms. The most common practice among states is to set maximum probation terms to be the same as maximum authorized prison terms. See, e.g., Ind. Code § 35-50-2-2(c) ("whenever the court suspends a sentence for a felony, it shall place the person on probation . . . for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire"); Minn. Stat. § 609.135, subd. 2(a) (for most felonies, "the stay shall be for not more than four years or the maximum period for which the sentence of imprisonment might have been imposed, whichever is longer."). In addition, many states authorize extended periods of community supervision for designated offenses, often extending a decade or more, or for the offender's full lifetime. See Alaska Stat. § 15-22-54(a) (25 years for felony sex offenses, 10 years for all other offenses); Colo.

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Rev. Stat. § 18-1.3-1004 (up to lifetime probation terms for some sex offenders); Hawaii Rev. Stat. § 706-623(1) (10 years for class A felonies); Mich. Stat. § 333.740(2)(a)(iv) (repealed) (lifetime probation for certain drug offenses); Mo. Stat. § 559.106 (lifetime supervision for sex offenders); N.Y. Penal Law § 65.00(3) (25 years for some drug offenses, 10 years for felony sexual assault); N.D. Cent. Code § 12.1-32-06.1(3) (lifetime supervised probation for designated felony sexual offenses).

For states that have enacted relatively low statutory ceilings on probation terms, see 11 Del. C. § 4333(b) (2-year limit for violent felonies; 18-month or 12-month limits for all other offenses); Fla. Stat. § 948.04 (2-year maximum, with exceptions for crimes of sexual battery and abuse of children); Georgia Code § 42-8-34.1(g) (2 years "unless specially extended or reinstated by the sentencing court upon notice and hearing and for good cause shown"); Iowa Code § 907.7 (5 years for felonies, 2 years for misdemeanors); Ky. Rev. Stat. § 533.020(4) (5 years for felonies, 2 years for misdemeanors); La. Code Crim. P., Arts. 893 & 894 (5 years for felonies, 2 years for misdemeanors); Miss. Code § 47-7-37 (5 years); Mo. Rev. Stat. § 599.016 (5 years for felonies, 2 years for misdemeanors); Nev. Rev. Stat. § 176A.500 (5 years); N.H. Rev. Stat. § 651:2(V)(a) (5 years for felonies, 2 years for misdemeanors); N.J. Stat. § 2C:45-2 (maximum prison sentence for offense or 5 years, whichever is shorter); N.C. Gen. Stat. § 15A-1342 (5 years); Ohio Rev. Code § 2929.15(A)(1) ("The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years."); Utah Code § 77-18-1(10) (3 years for felonies; 1 year for misdemeanors). In Connecticut, if a probation term is more than two years, the probation agent must submit a report after 18 months to the court concerning whether the probationer should be discharged at the two-year mark. See Conn. Public Act No. 08-102 (Substitute House Bill No. 5877).

The Code's preference for short probation terms stems in part from empirical research showing that new offenses and sentence violations are most likely to occur early in a supervision term. See James Byrne, Written Testimony before the United States Sentencing Commission, A Review of the Evidence on the Effectiveness of Alternative Sanctions and an Assessment of the Likely Impact of Federal Sentencing Guidelines Reform on Public Safety (July 10, 2009). One leading expert has observed that the early portion of the period of supervision is when probationers are most likely to "test" to see if the probation office will pay close attention to sentence conditions, and how "serious" the probation system is. Faye Taxman, Probation, Intermediate Sanctions, and Community-Based Corrections, in Joan Petersilia and Kevin R. Reitz, The Oxford Handbook of Sentencing and Corrections (2012), at 378. See also Doris Layton MacKenzie and Spencer De Li, The Impact of Formal and Informal Social Controls on the Criminal Activities of Probationers, 39 Journal of Research in Crime and Delinquency 243 (2002).

j. Authorized conditions of probation. Numerous conditions are attached to the majority of probation sentences. One near-universal criticism of U.S. probation practices is that too many conditions are imposed on average, including many unrealistic requirements, so that the typical probationer cannot hope to comply with all sentence terms. Over the years, the use of special probation conditions has increased. Joan Petersilia, Reforming Probation and Parole (2002), at 31. A surfeit of conditions creates a dynamic in which individual conditions are unlikely to be enforced when violated, so that sentence requirements lose credibility with offenders. See Reinventing Probation Council, Transforming Probation Through Leadership: The "Broken Windows" Model (2000), at 6, 24 ("The enforcement of the conditions of probation remains all too often sporadic and ineffectual. . . . All too frequently offenders on probation come to the realization that they can expect two or more 'free ones' when it comes to dirty urine samples, electronic monitoring violations, or failure to comply with their supervision conditions. . . .

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[O]ffenders subject to probation learn that behavior in violation of the rules, even serious violations, will not necessarily result in their revocation and removal from supervision”). The following account, based on a trial judge’s experiences, illustrates the problem:

> Nearly half of the people appearing before [the judge] were convicted offenders with drug problems who had been sentenced to probation rather than prison and then repeatedly violated the terms of that probation by missing appointments or testing positive for drugs. Whether out of neglect or leniency, probation officers would tend to overlook a probationer’s first 5 or 10 violations, giving the offender the impression that he could ignore the rules. But eventually, the officers would get fed up and recommend that [the judge] revoke probation and send the offender to jail to serve out his sentence. That struck [the judge] as too harsh, but the alternative—winking at probation violations—struck him as too soft. “I thought, This is crazy, this is a crazy way to change people’s behavior.” . . .
>
> “When the system isn’t consistent and predictable, when people are punished randomly, they think, My probation officer doesn’t like me, or, Someone’s prejudiced against me,” [the judge] told me, “rather than seeing that everyone who breaks a rule is treated equally, in precisely the same way.”

Jeffrey Rosen, Prisoners of Parole, New York Times, January 8, 2010; see also Mark Kleiman, When Brute Force Fails: How to Have Less Crime and Less Punishment (2009), at 34-35. Thus, one of the underlying policies of § 6.03 is that conditions attached to probation sentences should be sufficiently important to warrant enforcement efforts when they are breached, see also § 6.15.

The law governing the imposition of release conditions is broadly permissive: courts and correctional agencies may legally impose almost any condition on a probationer or parolee, on the ground that any conceivable condition of release will be less punitive than the authorized term of confinement. See, e.g., N.C. Gen. Stat. § 15A-1343(a) (“The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.”). As a consequence, courts have been known to impose a wide range of conditions, ranging from the bizarre (“you may never sit in the front seat of a car”) to the controversial (“don’t get pregnant”) to the dangerous (“put a bumper sticker on your car announcing you are a sex offender”); see Cary Spivak and Dan Bice, Front Seat Ban Adds to Odd Legacy of Judge Schellinger, Milwaukee J. Sentinel, Apr. 18, 2003, at 1; Dan Slater, The Judge Says: Don’t Get Pregnant. A Lapsed Law Now Sees New Life, Wall Street Journal, September 25, 2008; Ross E. Milloy, Texas Judge Orders Notices Warning of Sex Offenders, New York Times, May 29, 2001 (reporting that after “a judge ordered 21 registered sex criminals to post signs on their homes and automobiles warning the public of their crimes, . . . the results were almost immediate. One of the offenders attempted suicide, two were evicted from their homes, several had their property vandalized and one offender's father had his life threatened, according to court testimony.”). Even when individual conditions are reasonable in themselves, there are no legal controls on the cumulative effects of large numbers of release conditions. See Kit van Stelle and Janae Goodrich, The 2008/2009 Study of Probation and Parole Revocation, University Of Wisconsin Population Health Institute (2009), at 158 (Wisconsin study found an average of 30 conditions per offender).

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Individuals who are subjected to particularly onerous conditions of supervision may challenge them as impermissibly infringing on constitutional rights. However, courts typically treat such rights as "diminished" during the period of supervision. See Judicial Review of Probation Conditions, 67 Colum. L. Rev. 181-207 (1967); Heinz R. Hink, The Application of Constitutional Standards of Protection to Probation, 29 U. Chi. L. Rev. 483, 486-487 (1962); Jasmine S. Wynton, MySpace, YourSpace, But Not Their Space: The Constitutionality of Banning Sex Offenders from Social Networking Sites, 60 Duke L.J. 1859, 1886 (2011) ("Offenders on probation, parole, or supervised release have diminished constitutional rights and thus receive less constitutional protection than those who are no longer under state supervision.").] Thus, for reasons both practical and legal, conditions of release "are rarely subjected to any appellate review." When they do face review, it tends to be "extremely deferential." See Andrew Horwitz, Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 Wash. & Lee L. Rev. 75, 110 (2000).

Many probation conditions are tied to the offender's known risks, such as prohibitions on weapons for violent offenders, drug use for those with substance-abuse related convictions, and socializing with co-defendants or convicted felons for probationers whose criminal activity has been influenced by gang affiliations. One 1995 study of probationers found that "two out of five probationers were required to enroll in substance abuse treatment. . . . Nearly a third of all probationers were subject to mandatory drug testing." Thomas Bonzcar, Characteristics of Adults on Probation, 1995, (Bureau of Justice Statistics, 1997). Other conditions, however, govern aspects of life that are not in themselves criminal, or even immoral. Supervision rules commonly impose curfews, prohibit alcohol consumption, require participation in educational programs, restrict travel, and require approval for changes in residence. Additional administrative conditions may require offenders to attend meetings with community corrections officers (often at a distance from the offenders' homes), pay restitution and fees for supervision and required treatment programs, submit monthly financial forms with supporting documentation, obtain permission before travelling outside the jurisdiction, and notify the agent immediately of any change in residence or employment. When conditions have no nexus to offenders' criminal propensities, they serve as impediments to success, waste supervisory resources, fail to advance public safety, and pose the risk of unnecessary revocation. See Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015 (2013).

Based on available research and experience, courts should consider the use of special "fast-track" probation for high-risk offenders. Project H.O.P.E., pioneered in Hawaii, is a highly regarded model in which probation conditions are enforced consistently and speedily, with an array of graduated sanctions including short terms of incarceration. No violations are tolerated in this approach, though the sanctions imposed for minor infractions are mild. The parameters of the program are made clear to offenders at the outset, in a "warning hearing." They are placed on notice that any past experience with probation will have little resemblance to their current sentence. One goal of the program is to break the cycle of inconsistent and unpredictable penalties found in traditional probation practice, which undermines the sanction's credibility and legitimacy in the eyes of many probationers. There are now replications across several sites in the United States. Evaluations of the H.O.P.E. model have suggested that it can reduce technical violations and recidivism among offenders, while also reducing the use of revocations and incarceration as sanctions for sentence violations. Once sanctions for sentence violations are reliably employed, studies suggest, the rate of transgressions by probationers falls. The H.O.P.E. model is thus a promising evidence-

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based strategy that appears to achieve increased crime reduction at lower cost than familiar probation practices. See Mark Kleiman, When Brute Force Fails: How to Have Less Crime and Less Punishment (2009).

The question of the use of jail as a condition of probation is important nationwide, but is an especially critical issue in some jurisdictions. In the 1990s, the Justice Department estimated that 26 percent of felony probation sentences included a jail term, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 1992 (1996), with an average duration of seven months, Bureau of Justice Statistics, Correctional Populations in the United States, 1992 (1995). Some states make more frequent use of the split sentence than others. For example, in Minnesota two-thirds of felony probationers are required to spend an average jail term of 3.5 months as a condition of their probation sentences. Richard S. Frase, What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?, in Michael Tonry ed., Crime and Justice: A Review of Research 201, 255 (2009); Minn. Stat. § 609.135, subd. 4 ("The court may, as a condition of probation, require the defendant to serve up to one year incarceration in a county jail, a county regional jail, a county work farm, county workhouse or other local correctional facility").

Commentary in the original Code laid out the following reasoning in favor of the availability of "split sentences" or probation terms that included a jail stay of no more than 30 days as one "condition" of probation:

> There are several contexts in which a mixed sentence might be desirable. It may be, for example, that parole is unavailable for misdemeanants, and that a mixed sentence is the only practical means of providing for supervision after a jail commitment. Such a sentence might also be employed when a sentence that did not involve at least some jail time would be thought unduly to depreciate the seriousness of the offense, or when a short "taste of jail" is seen as a good way to reduce the incentives of the defendant to commit further crimes. In addition, its availability would encourage the use of probation in cases where the court might otherwise be reluctant to use that measure alone and might, in the absence of the ability to employ such a sanction, commit the defendant to prison for an extended term of years.

Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.02, Comment 8 at p. 55.

l. Judicial modification of conditions of probation. See American Probation and Parole Association, Effective Responses to Offender Behavior: Lessons Learned for Probation and Parole Supervision (2013), at 14 ("research indicates that the number of incentives provided to probationers and parolees should be larger than the number of sanctions imposed during the supervision process"); Tony Fabelo, Geraldine Nagy, and Seth Prins, A Ten-Step Guide to Transforming Probation Departments to Reduce Recidivism (Council of State Governments Justice Center 2011), at 27 ("The probation agency should instruct officers to use incentives to promote positive behavior whenever appropriate. Research suggests that using positive incentives alongside punitive sanctions reduces recidivism rates; incentives should be used four times as often as sanctions "to enhance individual motivation toward positive behavior change and reduced recidivism." Effective and common incentives include early termination from supervision, reduced restitution hours, and reduced contacts with the officer."); Eric J. Wodahl, Brett Garland, Scott E. Culhane and William P. McCarty, Utilizing Behavioral Interventions to Improve Supervision Outcomes in Community-Based Corrections, 38 Crim. Justice & Beh. 386, 400 (2011) (finding that a four-to-one ratio between rewards and punishments promotes highest success rates on community supervision).

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1 **§ 6.04. Economic Sanctions; General Provisions.**[19]

2 **(1) The court may impose a sentence that includes one or more economic sanctions**
3 **under §§ 6.04A through 6.04D for any felony or misdemeanor.**

4 **(2) The court shall fix the total amount of all economic sanctions that may be imposed**
5 **on an offender, and no agency or entity may assess or collect economic sanctions in excess**
6 **of the amount approved by the court.**

7 **(3) The court may require immediate payment of an economic sanction when the**
8 **offender has sufficient means to do so, or may order payment in installments.**

9 **(4) The time period for enforcement of an economic sanction [other than victim**
10 **restitution] shall not exceed three years from the date sentence is imposed or the offender is**
11 **released from incarceration, whichever is later. If an economic sanction has not been paid**
12 **as required, it may be reduced to the form of a civil judgment.**

13 **(5) When imposing economic sanctions, the court shall apply any relevant sentencing**
14 **guidelines.**

15 **(6) No economic sanction may be imposed unless the offender would retain sufficient**
16 **means for reasonable living expenses and family obligations after compliance with the**
17 **sanction.**

18 **(7) If the court refrains from imposing an economic sanction because of the limitation**
19 **in subsection (6), the court may not substitute incarceration for the unavailable economic**
20 **sanction.**

21 **(8) The agencies or entities charged with collection of economic sanctions may not be**
22 **the recipients of monies collected and may not impose fees on offenders for delinquent**
23 **payments or services rendered.**

24 **(9) The courts are encouraged to offer incentives to offenders who meet identified goals**
25 **toward satisfaction of economic sanctions, such as payment of installments within a**
26 **designated time period. Incentives contemplated by this subsection include shortening of a**
27 **probation or postrelease-supervision term, removal or lightening of sentence conditions,**
28 **and full or partial forgiveness of economic sanctions [other than victim restitution].**

29 **(10) If the court imposes multiple economic sanctions including victim restitution, the**
30 **court shall order that payment of victim restitution take priority over the other economic**
31 **sanctions.**

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[19] This Section was approved with one amendment by vote of the ALI membership at the 2014 Annual Meeting. Before amendment, subsection (6) included bracketed language that would have exempted victim restitution sanctions from the subsections's general rule; see Tentative Draft No. 3.

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1 **(11) The court may modify or remove an economic sanction at any time. The court**
2 **shall modify an economic sanction found to be inconsistent with this Section.**

3 **Comment:** [20]

4 *a. Scope.* As a feature of U.S. sentencing policy, economic sanctions have proliferated since
5 the original Model Penal Code was drafted and have increased in average amounts, while efforts
6 for their collection have intensified. The most salutary change has been the expanded use of
7 victim-restitution orders, which the Code would give priority over all other economic penalties.
8 At the same time, there has been steady growth in fine amounts, asset forfeitures, and a congeries
9 of costs, fees, and assessments levied against offenders. In many cases, offenders' total debt
10 burdens overwhelm their abilities to establish minimally sound financial lives for themselves and
11 their families. One widespread practice in American law is to impose economic penalties that
12 stand little chance of being collected, with insufficient concern for their criminogenic effects and
13 long-term impact on public safety.

14 The development of economic sanctioning policy in the United States has at times
15 responded to fiscal considerations rather than criminal-justice policy needs, driven by shortages
16 in funding rather than a belief in the crime-reductive efficacy of the sanctions employed. Times
17 of distress in the nation's economy have pushed state and local governments toward efforts to
18 recoup budgetary shortfalls from convicted offenders. At the same time, the inflation in
19 imprisonment as the principal currency of criminal punishment in the United States has made it
20 more difficult for economic penalties to hold credibility as stand-alone sentences, or as
21 alternatives to prison. Measured in public perception, the economic sanctions most offenders are
22 capable of paying are of scant punitive value when compared with incarceration.

23 In contrast to the policies in many other Western democracies, the growth of monetary
24 sanctions in America has not displaced the use of prison and jail sentences. Large upswings in
25 national incarceration rates have run alongside the multiplication of offenders' debt burdens.
26 Meanwhile, as economic and other penalties have become more severe, wealth and income
27 inequalities have become increasingly pronounced in our society, with those on the lowest rungs
28 of the economic ladder most frequently arrested, charged, and convicted of crimes—and most
29 frequently faced with the challenge of reintegration into the law-abiding work economy while
30 burdened with a criminal record.

31 Some of the new economic-sanctioning policies have raised questions of conflict of interest
32 in the administration of criminal law, felt most by agencies authorized to seize or collect assets
33 from offenders and then retain some or all of those assets for their own use. Asset forfeitures and
34 a variety of criminal-justice costs, fees, and assessments, little used before the 1970s and 1980s,

[20] This Comment has not been revised since § 6.04's approval (with amendment) in 2014. All Comments will be updated for the Code's hardbound volumes.

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have in recent decades become major revenue sources for law-enforcement agencies, courts, corrections agencies, and correctional-service providers.

It is an understatement to observe that research and policy debate have not kept stride with these important trends. Questions of the achievable goals of financial penalties in contemporary American justice systems have not been adequately investigated, theoretically or empirically. Issues of fairness in their use, in a society that does comparatively little to combat extreme poverty, have been neglected. In the absence of a sound and comprehensive economic-sanctions policy, victims' claims to restitution are often submerged, and society's interest in seeing offenders reintegrated into the law-abiding community is compromised. Ultimately, a poorly designed economic-sanctions policy impedes public-safety goals. Lawmakers in every state should give thoughtful attention to these interconnected subjects.

Though the landscape of economic penalties calls out for reform, there are practical limits on how directive the proposals in model legislation can be. Rudimentary data are lacking on how economic sanctions are employed across U.S. jurisdictions today, which is a poor basis for a massive reordering of those marketplaces. Operationally, there is a dearth of promising experiments or "success stories" in the field—again providing little purchase for a Model Code. The general approach of § 6.04 is to navigate as best it can in waters that are poorly charted, laying down clear principles so far as current knowledge and ethical sensibilities allow, while leaving considerable room for experimentation and development of the law at the state level.

b. Guiding premises. The Code posits several guiding premises for development of a 21st-century law and policy of economic sanctions.

Preserving a floor of reasonable financial subsistence

First, the Code presumes that economic sanctions are not viable for indigent or near-indigent offenders, and should not be imposed when they would choke off an offender's ability to provide reasonable necessities of life for himself and his dependents. While federal constitutional law in theory cuts off the collectability of economic sanctions with reference to offenders' "ability to pay," this sets too low a floor for public-policy purposes. Also, because constitutional ability-to-pay considerations usually do not arise until enforcement proceedings have been brought, they do not reliably act as a brake on the imposition of unrealistic economic sanctions in the first instance.

The law should work toward a new concept of "reasonable law-abiding subsistence" for offenders and their dependents that limits governments' abilities to impose and collect financial penalties. This principle of restraint is required not because criminals deserve society's munificence, but because it advances public safety. Many stakeholders have interests in offenders' successful integration into communities and the legitimate workplace. These include offenders' families, communities, potential crime victims, and society at large. Much like bankruptcy law, a primary goal of the sentencing system should be to position ex-offenders so they may become productive and successful participants in the law-abiding economy; see

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§ 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (one general purpose of the sentencing system is the "reintegration of offenders into the law-abiding community").

The reasonable-subsistence policy gains strength from the Institute's judgment that the affirmative justifications of economic penalties—as used in America—are powerful only in certain settings, and not in the mine run of cases involving indigent or near-indigent defendants. The freedom with which economic sanctions are assessed does not proceed from a widespread belief that they are sufficient punishments for any but the least serious offenses. Economic sanctions in practice yield little retributive satisfaction but also provoke little objection. Given the unpopularity of criminal offenders, the piling on of fines, fees, and forfeitures has found no natural endpoint. The Code posits that a policy-driven stopping point can be located with reference to the overriding public-safety goal of improving offenders' chances of successful reentry.

Highest purposes of economic sanctions

Second, the Code would preserve, and in some instances expand, the use of economic sanctions for defendants of sufficient means, who might be strongly affected by those penalties without being driven below the threshold of reasonable law-abiding subsistence. While not a majority of offenders, there is a significant subset for whom economic penalties can further such goals as proportionate punishment, victim restitution, general deterrence, specific deterrence, and disgorgement of criminally gotten gains. As the original Code also assumed, some classes of offenses require the availability of muscular financial penalties—albeit often for use in conjunction with other sanctions (in original § 7.02(2)(a), where "the defendant has derived a pecuniary gain from the crime"). Effective criminal-justice response to many kinds of organized crime, corporate offending, environmental crime, and fraudulent financial schemes requires an array of economic penalties that can mete out punishments proportionate to the enormous monetary harms suffered by victims, disgorge illegal profits, lower the ex ante incentives of crimes involving large returns and small risks of detection, and disable the operations of criminal enterprises by depriving them of necessary resources. Indeed, historically, for crimes at the high end of the spectrum of white-collar crime, one serious problem in American law has often been the failure of state codes to authorize economic sanctions of sufficient severity to serve the purposes of deterrence and punishment.

When they are enforced with seriousness and do not drive offenders into poverty, economic sanctions have advantages not shared by other forms of criminal punishments. They may be used at relatively low cost to the state—certainly when compared to the expenses associated with prisons and jails—and often at less cost than community supervision. As one prominent scholar has noted, if a person commits a serious crime and thus provokes the state to incarcerate him at an average cost of $25,000 per year (the exact sum varying across jurisdictions), "society has been victimized doubly."

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The fiscal advantages of economic penalties should not be overstated, however. Studies have found that existing collection programs for financial penalties sometimes break even, often spend more on overhead and administration than the funds collected, and seldom realize a "profit." In addition, offenders' failures to make payment contribute to sentence revocations, so the costs of incarceration are delayed but not averted.

Economic sanctions as potential substitutes for incarceration

Third, many have urged that economic penalties, despite current problems in their use, will ultimately be important sanctioning tools to a nation engaged in downsizing its prison systems. These claims are predictive in nature, and rely on European rather than U.S. precedents. Still, some observers of American criminal justice have argued that undue limitations on the use of economic penalties may close off an important avenue of deincarceration policy. The relevant Code provisions are written to keep the door of experimentation open.

If new ways are discovered to employ economic sanctions as alternatives to prison or jail, eligibility for diversion must also extend to those defendants who are exempted from financial penalties on grounds of wealth and income. For such cases, there should be a system of interchangeability between fines and other nonincarcerative penalties that can tax defendants through in-kind labor, such as community-service orders, or that merely approximate the punitive impact of a fine, such as unpleasant conditions of probation. The Code takes a firm view that no one should be incarcerated when another better-heeled offender would be permitted to pay a monetary penalty instead.

Revenue generation is not a purpose of the sentencing system

Fourth, the revised Code recommends that economic sanctions not be used to generate revenue unless there is an independent criminal-justice purpose that justifies the sanctions imposed. While criminal offenders may be attractive targets for special taxation because of their culpable acts and unpopularity, they usually lack the means to make outsized contributions to government programming compared to ordinary taxpayers. Working justice and corrections systems benefit all citizens, and should not be paid for by the poorest among us.

Adherence to this principle becomes especially difficult in the realm of correctional fees and assessments, which are often justified on the ground that desirable programs, including some that provide great rehabilitative benefit to offenders, could not exist if offenders were not tapped as funding sources. Fees paid to support programs that have been empirically tested for effectiveness arguably confer a benefit on offenders that is related to the purposes of sentencing. Reflecting the difficult tension between these considerations, the Code offers alternative provisions governing economic sanctions of costs, fees, and assessments. In the first and preferred alternative, they are prohibited entirely. In the second and second-best, they are permitted reluctantly and with safeguards attached.

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1 *c. Antecedents in the original Code.* The revised Code's position on economic sanctions
2 resembles that of the 1962 Model Penal Code, although a great deal of updated analysis has
3 become necessary in the intervening years. The original Code's treatment of economic sanctions
4 was collapsed into two provisions dealing almost exclusively with fines, §§ 6.03 and 7.02. The
5 official Comment to original § 7.02 began with the clear statement that "[t]his section articulates
6 the policy of the Model Code to discourage use of fines as a routine or even frequent punishment
7 for the commission of crime." As explained elsewhere in the Comment:

8 One of the serious difficulties in the use of fines is that to a very large extent the
9 impact of the sanction turns on the means of the defendant: a defendant of wealth
10 is often unaffected by the fine and may be more than willing to treat the fine as an
11 acceptable cost of engaging in prohibited conduct; a defendant of very limited
12 assets, however, may be devastated by even a small fine that causes economic
13 hardship both to him and to his family out of proportion to the gravity of the
14 offense. . . .

15 It may be argued against this scheme that the indigent escapes fines completely
16 while others have to pay and that a jail sentence may still have to be imposed in
17 order to prevent the indigent from escaping criminal punishment altogether. By
18 discouraging widespread use of fines . . . the Model Code blunts the force of this
19 point. . . .

20 The use of a fine also has distinctly negative value for the administration of penal
21 law when its real rationale is the financial advantage of the agency levying the
22 fine.

23 *d. Types of economic sanctions.* Subsection (1) cross-references the economic sanctions
24 governed by the general provisions of § 6.04. These include victim restitution (§ 6.04A), fines
25 and means-based fines (§ 6.04B), asset forfeitures (§ 6.04C), and costs, fees, and assessments
26 (§ 6.04D).

27 *e. Consolidation of economic sanctions into a total sum.* One guiding premise of
28 § 6.04 is that all economic sanctions relate to one another, are cumulative in their impacts on
29 offenders, and must be considered by sentencing courts as a package. To this end, subsection (2)
30 places the sentencing court in control of the total amount of all economic sanctions that will be
31 imposed on an offender.

32 *f. Payment in installments; limits on installment payments.* Although economic sanctions in
33 a perfect world would all be collectible on the day of sentencing, subsection (3) recognizes that
34 most offenders will be unable to pay except through an installment plan. Courts are given
35 express authority to arrange a payment schedule in this way, so long as offenders' obligations do
36 not at any time offend the restraining principle in subsection (6).

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Subsection (4) places a three-year limit on the duration of the installment period, after which the economic sanction may be reduced to the form of a civil judgment. This ceiling serves two purposes. First, experience has shown that the courts' practical abilities to collect the financial obligation of offenders fall off sharply as payment periods extend over more than one or two years. Second, the time limit in subsection (4) will work as an effective limit on severity of punishments that is related to the wealth and earning power of individual defendants. Even for impecunious offenders, there should be a cutoff date beyond which a return to full participation in the free economy is guaranteed. Subsection (4) would further authorize reduction of fine obligations to civil judgments for offenders who have fallen into arrears in installment payments.

In bracketed language, subsection (4) recognizes that some jurisdictions may choose to except victim restitution from the three-year cutoff date. In general, the revised Code gives elevated importance to victim restitution as compared with other economic sanctions. Further, in those rare instances in which a sentenced offender comes into wealth years after a victim-restitution order, many consider it unseemly to continue to excuse nonpayment. It would be reasonable for a state legislature to conclude that this priority outweighs the general policies of subsection (4).

g. Use of sentencing guidelines. In the Code's scheme, all types of criminal sentences are within the sentencing commission's purview. See § 6B.02(6) ("The guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission.").

h. Principled limits on severity. Subsection (6) sets forth a principled limit on the aggregate severity of economic sanctions, whether they are imposed individually or in combination. Subsection (6) supplements the general limitations on sentence severity found elsewhere in the Code; see § 1.02(2)(a)(i) (one general purpose of sentencing is "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"); § 6.02(4) ("In evaluating the total [proportionality] of punishment . . . the court should consider the effects of collateral sanctions likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined."). As with other statutory ceilings on punishment severity in the revised Code, subsection (6) creates a legal standard that is binding on sentencing courts and enforceable through the appellate process. It also applies to sentencing commissions, corrections officials, community-corrections agencies, and other actors in the justice system; see § 1.02(2) and Comment *a*.

Subsection (6) places an important substantive restraint on the authority of courts to order economic sanctions in criminal cases. It states that the total package of economic sanctions must be arranged so that offenders "retain sufficient means for reasonable living expenses and family obligations." To permit otherwise would be to allow economic penalties to override the goal of returning offenders to productive lives in the law-abiding society, would create perverse

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incentives for offenders to resort to the marketplace of criminal offending, and would sacrifice overriding goals of public safety; see Comment *c* above.

The ceiling in subsection (6) is not intended to mirror federal constitutional law as laid out in Bearden v. Georgia, 461 U.S. 660 (1983), which requires courts to consider an offender's ability to pay—among other factors—before imposing a prison sentence for nonpayment of an economic penalty. Indeed, the reasonable-subsistence standard differs from *Bearden* in both its underpinnings and application. Subsection (6) is based on grounds of public policy, not the minimum requirements of due process applicable to the states. It seeks to advance goals of crime avoidance through the rehabilitation and reintegration of offenders returned to the community. Whereas federal constitutional law does not activate until the state seeks to punish an offender for nonpayment of an economic sanction, subsection (6) sets a ceiling on the imposition of economic penalties in the first instance. Most importantly of all, subsection (6) is intended to further offenders' chances to achieve financial stability and independence—a consideration that plays no role in constitutional analysis. There will be many instances in which an economic sanction cannot permissibly be imposed under subsection (6) even though the offender has the raw "ability to pay" the sanction, if doing so would leave the offender unable to meet the reasonable and minimal expenses of his own life and those of his dependents.

The principle of limitation in subsection (6) is meant to be applied in every case, and is not subject to a balancing of competing interests. In this respect, it differs from the Code's counterpart provisions applicable to probation and postrelease supervision; see § 6.03(9) and Comment *k* ("[p]robationers sometimes pose risks to public safety that are best met with restrictive sentencing conditions, such as tight monitoring requirements, frequent drug testing, and travel limitations—all of which might impose a burden on the reintegration process"); § 6.09(9) and Comment *j* (similar analysis for prison releasees). In contrast with community supervision, financial penalties do not employ surveillance or other controls on offenders to minimize recidivism risk. Among the utilitarian goals of punishment, therefore, when economic sanctions are at issue, there is no strong countervailing purpose to override the pursuit of public safety through reintegration. It is true that economic sanctions under the revised Code may sometimes be imposed to serve punitive ends, which require no utilitarian benefit. It is the judgment of the Institute—in the context of financial penalties—that considerations of retribution standing alone do not outweigh the imperative of reducing the numbers of crimes and victimizations in society. In the public perceptions of our culture, economic sanctions simply do not deliver enough punitive "value" to justify their use when they would be criminogenic.

Some jurisdictions may choose to adopt particularized rules to help implement the broad principal stated in subsection (6). One provision of this kind was considered during drafting of the revised Code. Although deemed too specific to be included in § 6.04, the following language would be one way to implement the spirit of subsection (6):

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No economic sanction may be imposed on an indigent offender as defined by the state's eligibility rules for appointment of counsel in a criminal case. Qualification for or receipt of any of the following public benefits shall serve as evidence that the offender would not retain sufficient means for reasonable living expenses and family obligations after compliance with one or more economic sanctions: [list of benefits as appropriate in each state].

Subsection (6) must be read together with subsection (3), which allows courts to order payment of any economic sanction in installments over time, and with subsection (10), which prioritizes payment of victim restitution over all other types of economic sanctions. A defendant able to pay any financial sanction at all under subsection (6), in full or in installments, would therefore pay first toward a victim-restitution order, and would make no payment toward other economic sanctions until the restitution obligation was satisfied in full.

i. Bar on the use of incarceration as a substitute for economic sanctions. Subsection (7) addresses the situation in which the sentencing judge would have imposed one or more economic sanctions on an offender, but does not do so because of the restrictive principle in subsection (6). In such circumstances, it would be unjust and wasteful of resources to impose a confinement sanction in lieu of economic penalties. Many other substitute sanctions are available, such as probation—or the use of more burdensome probation conditions than would otherwise be ordered. The punitive impact of a fine, for example, can be replaced by a different but equally unwelcome obligation. Community service may be especially useful as a substitute for an economic sanction that cannot be imposed because of the financial circumstances of the offender; see § 6.03 and Comment *g*. Seen as in-kind labor, community service can be assigned a dollar value. In crafting a community-service order, however, courts should take care not to interfere with offenders' abilities to meet their employment obligations. It is seldom easy for ex-offenders to find steady and satisfying jobs, but doing so is one of the best-documented predictors of reduced recidivism.

j. Prohibition of conflicts of interest. Subsection (8) states that, "The agencies or entities charged with collection of economic sanctions may not be the recipients of monies collected and may not impose fees on offenders for delinquent payments or services rendered." See Comments *a* and *c*, above. Subsection (8) also makes specific reference to the problem of late fees, payment-plan fees, and interest charges against offenders who are unable to make immediate payment of costs, fees, and assessments. These so-called "poverty penalties" can add up to appreciable sums. For example, among current state laws, 30 to 40 percent surcharges for delinquent payments are common, while some states or collections agencies impose late fees ranging from $10 to $300 per missed payment. Some states also charge offenders fees for entering into payment plans, without exemption for poverty.

The principle in subsection (8) is echoed in specific provisions relating to asset forfeitures and criminal-justice costs, fees, and assessments; see §§ 6.04C(2) ("The legitimate purposes of

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asset forfeitures do not include the generation of revenue for law-enforcement agencies."); 6.04C(5) ("A state or local law-enforcement agency that has seized forfeitable assets may not retain the assets, or proceeds from the assets, for its own use."); 6.04D(1) (first alternative version) ("No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B, shall be held responsible for the payment of costs, fees, and assessments."); 6.04D, Comment *d* ("In current law, the agencies that impose costs, fees, and assessments are frequently the beneficiaries of any funds received. The Code treats this as a conflict of interest . . ."). Subsection (8) also has roots in the 1962 Code, see original § 7.02, Comment ("The use of a fine also has distinctly negative value for the administration of penal law when its real rationale is the financial advantage of the agency levying the fine").

k. Building incentives into economic sanctions. Social-science research for many decades has shown that behavioral change is more readily facilitated through rewards than punishments. American sentencing practice has begun to exploit this knowledge in the realm of community-supervision sanctions, where there is much experimentation with the use of "carrots" as well as "sticks" as incentives for compliance with sentence conditions. See § 6.03(12) and Comment *l*; § 6.09(11) and Comment *l* (encouraging the use of incentives for offenders on probation and postrelease supervision to meet specified goals short of completion of entirety of sentence). Subsection (9) implements the same strategy by encouraging courts to structure economic sanctions in ways that promise rewards to offenders who comply with payment obligations over a substantial period of time. Because so few economic penalties are satisfied in full under current law, and administrative costs for their enforcement are often greater than the amounts collected, the offer of monetary discounts to offenders will in some cases yield net gains. Other possible rewards for compliance include the shortening of probation or postrelease-supervision terms, or the removal or lightening of sentence conditions.

Bracketed language in subsection (9) would allow state legislatures to except victim restitution from the economic sanctions that may be modified as a reward for partial but substantial compliance with sentence requirements. On principle a jurisdiction may take the view that victim-restitution payments should never be discounted, see Comment *h* above, or may want to keep the possibility of full collection open indefinitely for those rare cases in which offenders' financial circumstances greatly improve, see Comment *f* above. A decision to include the statutory exemption may not increase the net amount of restitution that is collected on behalf of crime victims, however. It is possible, for example, that an offender might be encouraged to pay half of a restitution order over a designated period of time, if given the incentive that the total amount due will be reduced, but that the same offender would make no payment at all or pay less than half in the absence of such an incentive.

l. Prioritization among economic sanctions. Subsection (10) responds to the reality that many defendants will have the wherewithal to satisfy some but not all of the economic sanctions they receive, or those that a court may contemplate imposing on them. Consistent with practice

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in many states, and the American Bar Association's Standards for Criminal Justice, the revised Code gives priority to the imposition and collection of victim restitution over other economic sanctions.

m. Courts' authority to modify economic sanctions. Subsection (11) grants sentencing courts authority to modify or waive economic sanctions imposed by law if necessary to comply with the strictures of § 6.04 on a continuing basis, or if such modifications would be effective means of providing incentives for compliance under subsection (10). The general view of the revised Code is that the lives of many sentenced offenders hold little certainty or stability, and the basic circumstances of their lives are fluid and subject to downward trajectories. As with probationary sanctions, the workability of economic sanctions only encounters real-world testing after the day of sentencing, and facts relied upon by the sentencing court can change dramatically over weeks, months, and years. Subsection (11) grants the court full authority to revise economic penalties "at any time," and requires modification when the penalties, in application, are shown to violate any of the substantive requirements of § 6.04 as a whole.

REPORTERS' NOTE [21]

a. Scope. On the expanding use of economic sanctions, see R. Barry Ruback and Valerie Clark, Economic Sanctions in Pennsylvania: Complex and Inconsistent, 49 Duquesne L. Rev. 751, 752-753 (2011):

> [I]n the past two decades, economic sanctions have become increasingly more common, being imposed on sixty-six percent of prisoners in 2004, up from twenty-five percent in 1991. Moreover, for three reasons these sanctions are likely to be used more frequently in the future. First, the costs of the criminal justice system have risen substantially; one dollar of every fifteen dollars in state general funds is spent on corrections and courts have cut staff and shortened hours. Offenders are now expected to pay at least part of the costs of criminal justice operations, including the cost of incarceration. Second, there are increasing pressures for intermediate sanctions that are more severe than mere probation, but less severe, less expensive, and more effective than imprisonment. To a great extent, this need for intermediate sanctions is driven by the fact that the number of incarcerated individuals is high, more than 1.6 million at year-end 2009. Despite this high number, imprisonment is now less likely than it used to be because of overcrowded conditions and more individuals, more than 4.2 million, are now on probation. Third, concern for victims has increased the likelihood that restitution will be awarded (footnotes omitted).

See also Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, Criminal Justice Debt: A Barrier to Reentry (Brennan Center for Justice 2010) (examining practices in the 15 states with the nation's highest prison populations) ("Across the board, we found that states are introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution.") ("Fourteen of the fifteen states also utilize 'poverty penalties'—piling on additional late fees, payment plan fees, and interest when individuals are unable to pay their debts all at once, often enriching private debt collectors in the process.

[21] This Reporters' Note has not been revised since § 6.04's approval (as amended) in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Some of the collection fees are exorbitant and exceed ordinary standards of fairness. For example, Alabama charges a 30 percent collection fee, while Florida permits private debt collectors to tack on a 40 percent surcharge to underlying debt."); Katherine Beckett and Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol'y 509, 512 (2011) ("legislatures have authorized many new fees and fines in recent years, and criminal justice agencies increasingly impose them. This trend coincides with the rapid expansion of the penal apparatus that began in the late 1970s").

On the comparative failure of the United States to make use of fines as alternatives to imprisonment, see Pat O'Malley, Politicizing the Case for Fines, 10 Criminology & Pub. Pol'y 546, 546, 549 (2011) ("most common-law countries and many in Europe use discretionary fines along the lines of those available in the United States, and although these have problems, as do all sanctions, they are almost everywhere [outside the U.S.] the predominant sentencing option. . . . Although, in Europe, this substitution of fines for at least some short terms of imprisonment appeared at the end of the 19th century, the same thing did not occur in the United States."). In contrast with the United States, financial penalties are widely used as principal sanctions in other countries—not as "add-ons" to sentences of probation or confinement. Fines are the mainstay of criminal-sentencing policy in Germany, see Federal Ministry of Justices, Second Periodical Report on Crime and Crime Control in Germany, Abridged Version (2007), at 81 ("In 2004, the sanctions given to 94 percent of all persons convicted under general criminal law were either fines (80.6 percent) or suspended prison sentences (13.7 percent)"). Criminal fines are imposed in 77 percent of cases in England and Wales. D. Moxon, M. Sutton, & C. Hedderman, Unit Fines: Experiments in Four Courts (1990).

b. Guiding premises. On the increasing burden on offenders brought about by proliferating economic sanctions, and the negative effects on offender reintegration, see Katherine Beckett and Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol'y 509, 517-518 (2011) ("[L]egal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation. . . . [B]ecause the wages of the convicted (and their spouses) are subject to garnishment, legal debt creates a disincentive to find work. . . . [E]mployers generally dislike hiring those whose wages are garnished because of the cumbersome bureaucratic processes this entails."). On the poverty of most defendants, see Pew Charitable Trusts, Collateral Costs: Incarceration's Effect on Economic Mobility (2010); Brennan Center for Justice, Eligible for Justice: Guidelines for Appointing Defense Counsel (2008) (80 to 90 percent of criminal defendants qualify as indigents for purposes of appointment of counsel); Bruce Western, Punishment and Inequality in America (2006) (almost 65 percent of imprisoned offenders have no high-school degree; incarceration deepens poverty by reducing future employment prospects and earnings). On the double victimization of society from the criminal act plus the cost of punishment, see Daniel S. Nagin, Thoughts on the Broader Implications of the "Miracle of the Cells," 7 Criminology & Pub. Pol'y 37, 38 (2008).

For recommendations that some or all economic sanctions be abolished, see Katherine Beckett and Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol'y 509 (2011) (recommending abolition of fines and fees but not restitution, and not fines on the European day-fine model); Mary Fainsod Katzenstein and Mitali Nagrecha, A New Punishment Regime, 10 Criminology & Pub. Pol'y 555, 565 (2011) ("we do not think it politically likely (nor desirable) that all financial obligations against individuals in the criminal justice system be abolished. Some restitution assessments and some levels of child support will and

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should be collected. What we do think should be abolished is the debt collection regime as characterized by the thorough suffusion of the criminal justice system that is largely populated by low-income individuals with financial levies that simply cannot be paid."); R. Barry Ruback, The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society, 99 Minn. L. Rev. 1179, 1782 (2014) ("Costs and fees are the least defensible sanction, and I argue that they should be prohibited.").

c. Antecedents in the original Code. The original Code's position, that the use of fines should be discouraged, is reflected in a small number of states that have adopted versions of original § 7.02. See 5 Hawaii Stat. § 706-641 ("In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose"); Kan. Stat. § 21-6612 (same); State v. Bastian, 150 P.3d 912 (Kan. Ct. App. 2007) ($300 fine for possession of drug paraphernalia vacated when trial court failed to make specific findings as required by statute for the imposition of a fine, and failed to consider the defendant's financial resources and the burden a fine would impose). See also National Advisory Commission on Criminal Justice Standards and Goals (1973) (also expressing a negative view on the use of fines on the ground that they "have little correctional value and are biased against the poor.").

e. Consolidation of economic sanctions into a total sum. On the problem of multiple entities authorized to extract financial sanctions from offenders, see R. Barry Ruback and Valerie Clark, Economic Sanctions in Pennsylvania: Complex and Inconsistent, 49 Duquesne L. Rev. 751 (2011); Katherine Beckett and Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol'y 509, 513 (2011) ("It is not just the courts that have been authorized to impose monetary sanctions; a broad range of criminal justice agencies now are permitted to levy such fees."). For a proposal that the sentencing judge should act as the unitary decisionmaker for the assessment of all economic sanctions, see Rachel McLean and Michael D. Thompson, Repaying Debts (Council of State Governments Justice Center 2007), at 18 ("To hold people accountable and to ensure that they can and will meet the financial obligations assessed at the time of sentencing, judges should determine one sum that an individual should pay as a sanction for his or her crime(s). Judges can then work backward to divide the sum among its intended recipients, including victims (in the form of restitution) and criminal justice agencies (in the form of fines, fees, and surcharges).").

h. Principled limits on severity. Existing constitutional law does little to regulate the severity of economic sanctions, but speaks to efforts for their collection. Due process protections apply when a state seeks to enforce economic sanctions in sentence-revocation proceedings, and require consideration of the offender's ability to pay—among other factors—before a community sentence may be revoked and the offender imprisoned for nonpayment. See Bearden v. Georgia, 461 U.S. 660, 672-674 (1983):

> [I]in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not

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> adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. . . .
>
> By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

The real-world effects of *Bearden* have been mixed. See American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 5 ("Today, courts across the United States routinely disregard the protections and principles the Supreme Court established in Bearden v. Georgia over twenty years ago. … [D]ay after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them."); Mary Fainsod Katzenstein and Mitali Nagrecha, A New Punishment Regime, 10 Criminology & Pub. Pol'y 555, 565 (2011) ("even the strongly articulated 'ability-to-pay' ruling developed in the Supreme Court's decision in Bearden v. Georgia (1983) has been substantially diluted.")

In most jurisdictions, judges are not required to assess offenders' ability to pay before imposing economic sanctions. Instead, consideration comes in the enforcement setting, and only when the enforcement authority (typically a judge or parole board) contemplates the use of incarceration as a sanction for nonpayment. See American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 31; Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, Criminal Justice Debt: A Barrier to Reentry (Brennan Center for Justice 2010). See also R. Barry Ruback and Mark H. Bergstrom, Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications, 33 Crim. Just. and Behavior 242, 260 (2006) ("When they impose fines, judges in many states' systems rarely have information about the offender's ability to pay."). For a recommendation that ability-to-pay type assessments should be made by the court before economic sanctions are imposed, see American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 11.

i. Bar on the use of imprisonment as a substitute for economic sanctions. In some states, there is express statutory authority for the principle set forth in § 6.04(7). See, e.g., Iowa Code § 909.7 ("A defendant is presumed to be able to pay a fine. However, if the defendant proves to the satisfaction of the court that the defendant cannot pay the fine, the defendant shall not be sentenced to confinement for the failure to pay the fine"). On the substitution of community penalties for economic sanctions when the offender is unable to pay, see Iowa Code § 910.2(2):

> When the offender is not reasonably able to pay all or a part of the crime victim compensation program reimbursement, public agency restitution, court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender, contribution to a local anticrime organization, or medical assistance program restitution, the court may require the offender … to perform a needed public service for a governmental agency or for a private nonprofit agency which provides a service to the youth, elderly, or poor of the community.

On the limits of community service as a substitute for financial penalties, see Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, Criminal Justice Debt: A Barrier to Reentry (Brennan Center for Justice 2010), at 15 ("The design of community service programs also matters. For example, defenders in Illinois observed that when community

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service is imposed on individuals who are otherwise employed, it can be difficult for them to complete the necessary hours. For this reason, community service should only be imposed at the defendant's request, or when an unemployed defendant has been unable to make payments. Similarly, judges should have discretion as to how many hours of community service should be required to pay off criminal justice debt, rather than mandating by statute a fixed dollar value per hour. If a person faces thousands of dollars of debt, a fixed dollar equivalent of service hours may not be realistic.") (footnote omitted).

j. Prohibition of conflicts of interest. See generally Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry (2010), at 17-18 ("In thirteen states [out of 15 in the study], individuals can be charged interest or late fees if they fall behind on payments—even if they lack any resources to make the payments or have conflicting obligations such as a child support. The added debt can be significant. . . ."). For examples of "poverty penalties" in the form of late fees, see Ala. Code § 12-17-225.4; Ariz. Rev. Stat. § 12-116.03; Fla. Stat. § 28.246(6); Cal. Penal Code § 1214.1(A); 70 Ill. Comp. Stat. 5/5-9-3(e); N.C. Gen. Stat. § 7A-321(b)(1); Ohio Rev. Code § 2335.19(b); Pa. Cons. Stat. § 9730.1(b)(2); Tex. Code Crim. Proc. art. 103.0031(b). For examples of payment-plan fees, see Fla. Stat. § 28.24(26)(b)-(c); Va. Code § 19.2-354(A).

k. Building incentives into economic sanctions. See Rachel McLean and Michael D. Thompson, Repaying Debts (Council of State Governments Justice Center 2007), at 37 (recommending that states "develop a range of incentives" for offenders "willing to meet their financial obligations," including "waivers of fines, fees, and surcharges."); Wash. Stat. § 10.82.090(2) (enabling courts to forgive interest on financial obligations as incentive for payment or good-faith efforts to make payment).

l. Prioritization among economic sanctions. See American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.16(d)(iv) ("Sentencing courts, in imposing a fine, should not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring an offender to make restitution or reparation to the victim of the offense."). Many jurisdictions provide that victim compensation may or must be paid before other economic penalties. See, e.g., Iowa Code § 910.2 ("victims shall be paid in full before fines, penalties, and surcharges, crime victim compensation program reimbursement, public agencies, court costs including correctional fees approved pursuant to section 356.7, court-appointed attorney fees ordered pursuant to section 815.9, including the expenses of a public defender, contributions to a local anticrime organization, or the medical assistance program are paid."); Minn. Stat. § 609.10. subd. 2(b) ("When the defendant does not pay the entire amount of court-ordered restitution and the fine at the same time, the court may order that all restitution shall be paid before the fine is paid."); N.Y. Penal Law § 420.10(1)(b) ("When the court imposes both (i) a fine and (ii) restitution or reparation and such designated surcharge upon an individual and imposes a schedule of payments, the court shall also direct that payment of restitution or reparation and such designated surcharge take priority over the payment of the fine."); Wis. Stat. § 973.20(12)(b) (with limited exceptions, "payments shall be applied first to satisfy the ordered restitution in full, then to pay any fines or surcharges . . ., then to pay costs, fees, and surcharges . . . other than attorney fees and finally to reimburse county or state costs of legal representation."). For a survey of state laws, see Rachel McLean and Michael D. Thompson, Repaying Debts (Council of State Governments Justice Center 2007), at 48 n.31 (review of state practices in 2006 found that "the following states prioritize restitution over other economic penalties: Arizona, Florida, Hawaii, Idaho, Iowa, Michigan, and Wisconsin. States that prioritize other fines, fees, or surcharges include Alaska, Colorado, Connecticut, and Georgia.")

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1 *m. Courts' authority to modify economic sanctions.* For an example of a state provision similar to subsection
2 (12), see N.Y. Penal Law § 420.10(5) (court must modify order imposing fine, restitution, or reparation "if the court
3 is satisfied that the defendant is unable to pay the fine, restitution or reparation"; defendant "may at any time apply
4 to the court for resentence" on this basis).

5 ---

6

7 **§ 6.04A. Victim Restitution.**[22]

8 **(1) The sentencing court may order that the offender make restitution to the victim for**
9 **economic losses suffered as a direct result of the offense of conviction, provided the amount**
10 **of restitution can be calculated with reasonable accuracy.**

11 **(2) The purposes of victim restitution are to compensate victims for injuries suffered as**
12 **a direct result of criminal conduct and promote offenders' rehabilitation and reintegration**
13 **into the law-abiding community through the making of amends to crime victims.**

14 **(3) For purposes of this Section, a "victim" is any person who has suffered physical,**
15 **emotional, or financial harm as the direct result of the commission of a criminal offense. If**
16 **dead, incapacitated, or a minor, the victim may be represented by the victim's estate,**
17 **spouse, parent, legal guardian, sibling, grandparent, significant other, or other lawful**
18 **representative, as determined by the court.**

19 **(4) "Economic losses" under this Section include the cost of replacing or repairing**
20 **property, reasonable expenses related to medical care, mental-health care, and reasonable**
21 **funeral expenses.**

22 **(5) "Economic losses" under this Section do not include general, exemplary, or punitive**
23 **damages, losses that require estimation of consequential damages, such as pain and**
24 **suffering or lost profits, or losses attributable to victims' failure to take reasonable steps to**
25 **mitigate their losses.**

26 **(6) The sentencing court shall take the financial circumstances of the defendant into**
27 **consideration when deciding whether to order victim restitution under this Section and the**
28 **amount of the order; and, if necessary to comply with § 6.04(6), the sentencing court shall**
29 **order partial restitution to the victim or shall refrain from awarding restitution.**

30 **(7) When more than one victim has suffered economic losses as a direct result of the**
31 **offense of conviction, the court shall determine priority among the victims on the basis of**
32 **the seriousness of the losses each victim has suffered, their economic circumstances, and**
33 **other equitable considerations.**

[22] This Section was approved in 2016; see Tentative Draft No. 4. It is a wholly redrafted version of an earlier provision approved (with amendment) in 2014; see Tentative Draft No. 3.

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(8) When the criminal conduct of more than one person has caused a victim's economic losses under this Section, including persons not before the court, the court shall set the amount of restitution owed by an individual offender to reflect his or her relative role in the causal process that brought about the victim's losses. In exercising its discretion under this subsection, the sentencing court should consider the following factors:

(a) the number of persons believed to have contributed to the victim's total economic losses;

(b) the degree to which the offender played a direct or major role, relative to other persons, in bringing about the victim's total economic losses; and

(c) any other facts relevant to the defendant's relative causal role in bringing about the victim's economic losses.

Joint and several liability for payment of the full amount of restitution may be imposed on an offender in the court's discretion, when reasonable in light of the factors in subsection (8)(a) through (c).

(9) The sentencing court shall determine the amount of economic losses by a preponderance of the evidence.

(10) A restitution order under this Section shall not preclude the victim from proceeding in a civil action to recover damages from the offender. Any amount paid to a victim by an offender under this Section shall be set off against any amount later recovered as compensatory damages by the victim in a civil proceeding against that offender. If the victim has recovered economic losses from a defendant prior to sentencing, the court shall give credit for that recovery when calculating any amount of restitution to be ordered at sentencing against that defendant.

Comment: [23]

a. Scope. All states now authorize victim-restitution orders as criminal sentences. States differ on many subsidiary questions, including whether restitution orders are mandatory or discretionary with the sentencing court, the scope of recoverable losses, and procedures of proof. In some states, victims' rights to restitution are a matter of state constitutional law.

The revised Code encourages states to reexamine their economic sanctioning policies from top to bottom, in ways that would probably scale back their use in some contexts, and eliminate their use in others. See § 6.04, Comments *a* and *b* (Tentative Draft No. 3, 2014). Within that changed landscape, however, the Code prioritizes restitution over all other economic sanctions. See id. § 6.04(10) ("If the court imposes multiple economic sanctions including victim

[23] This Comment has not been revised since § 6.04A's approval in 2016. All Comments will be updated for the Code's hardbound volumes.

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restitution, the court shall order that payment of victim restitution take priority over the other economic sanctions.").

b. State constitutional provisions. In a number of states, the legislature's ability to prescribe victim-restitution law to conform with Model Penal Code recommendations may be limited by victims'-rights provisions of the state constitution. Of the 33 states with victims'-rights constitutional amendments, 20 mention the right to restitution, sometimes stipulating that restitution must be a mandatory penalty.

c. Mandatory versus discretionary victim restitution. There is a split in authority in state legislation on the question of whether victim restitution should be mandatory or discretionary with the sentencing judge. Roughly an equal number of states stand on either side of the divide. If mandatory, victims' interests are considered paramount, even if the defendant lacks the ability to pay restitution or its payment would cause substantial financial hardship for the defendant or the defendant's family. While many criminal offenders are from the lowest economic strata of society, the same is also true of many crime victims. One line of argument is that, when choosing among two people in a position of hardship, or the economic subsistence of their families, the choice should not favor the person who has been found guilty of a crime. Even when victim-restitution orders are mandatory as a matter of statutory law, in most cases it is unconstitutional to incarcerate a person for failure to make required restitution payments when that person lacks the ability to pay and is not willfully refusing to pay; see Bearden v. Georgia, 461 U.S. 660, 672-674 (1983):

> [I]in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. . . .

Typically in states where restitution is discretionary at sentencing, the sentencing court may take a defendant's financial condition into account before deciding whether to impose a restitution order. In one of its most important policy recommendations, the revised Code bars imposition of all economic sanctions "unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction"; see § 6.04(6) (Tentative Draft No. 3, 2014) (as amended by vote of the membership at the 2014 Annual Meeting). The rationale for this ban is the belief that public safety will be advanced if the

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law of economic sanctions gives each offender a fair chance to "get on his feet" within the law-abiding community.

Unreasonably heavy criminal-justice debt burdens carry a host of negative effects:

Falling behind in payments often leads to further sanctions that deepen the hole for offenders, including suspension of driver's licenses, extended periods of community supervision, arrest warrants, and sentence revocation. Unrealistic financial obligations interfere with offenders' abilities to obtain credit, pay for transportation (often essential to employment), pursue educational opportunities, and sustain family ties. Damaged credit can make it hard to find housing or land a job. Processes for the collection of criminal-justice debt can also disrupt employment relationships—as when garnishment of wages is used—or may simply reduce the incentives of ex-offenders to earn in the legitimate economy. If the effect of financial penalties is to reduce a relatively low-wage job to a tiny net income, it becomes tempting—and perhaps rational—for an offender to look for larger gains in the illegal economy.

The bulk of social-science research indicates that decent housing, strong families, and satisfying work are among the most important "protective" factors associated with desistance from crime. Criminal-justice policies that block or dilute these protective factors would appear to be profoundly misconceived. When unrealistic economic penalties are visited on offenders, they can inspire feelings of despair or futility, or perceptions of courts' sentences as illegitimate. None of these are desirable outcomes.

Weighing the competing considerations of mandatory versus discretionary restitution sanctions, subsection (1) embraces a discretionary approach. Policies of public safety, the avoidance of criminogenic applications of criminal penalties, and offender reintegration all favor this choice. In the Institute's view, these considerations outweigh victims' interests in obtaining restitution orders on financially marginal offenders. Cases with indigent or near-indigent offenders present the smallest probability that the order will be satisfied, in any event. For defendants with the wherewithal to make restitution payments, the Code prioritizes restitution over all other economic sanctions; see § 6.04(10) (Tentative Draft No. 3, 2014) ("If the court imposes multiple economic sanctions including victim restitution, the court shall order that payment of victim restitution take priority over the other economic sanctions.").

The question of whether the revised Code's victim-restitution provision would provide for a mandatory or discretionary penalty was resolved by vote of the membership at the 2014 Annual Meeting of the Institute.

d. Recovery limited to losses from the offense of conviction. States differ on the question of whether victim-restitution awards must be limited to losses caused by the offenses of which the defendant has been convicted, or whether awards may also be based on evidence of alleged criminal conduct that has not resulted in a conviction. The question comes up frequently in multi-count cases when some of the original charges have been dismissed under the terms of the

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1 plea agreement. The question can also arise with respect to charges that were never filed, or even
2 charges resulting in acquittals.

3 As a matter of general policy, the Code takes the view that criminal punishments should
4 correspond to convictions obtained. Sentencing authorities are not permitted to consider
5 allegations of offense conduct that have not been proven or admitted in a criminal proceeding.
6 See § 6B.06(2)(b) (Tentative Draft No. 1, 2007) and § 7.03(2)(b) (Council Draft No. 5, 2015).
7 Subsection (1) applies this policy choice by stating that restitution awards must be based on
8 losses directly caused by "the offense of conviction."

9 With respect to restitution awards, there is some chance that the Code's preferred policy
10 may also be a requirement of constitutional law. Recent Supreme Court cases, including
11 Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and
12 United States v. Booker, 543 U.S. 220 (2005), raise the possibility that the Sixth Amendment and
13 Due Process Clause require questions of fact necessary to support restitution awards to be
14 decided by juries under the standard of proof beyond a reasonable doubt. Nearly all lower courts
15 have concluded that jury factfinding is not constitutionally required in this setting, but the
16 Supreme Court has not spoken to the question.

17 *e. Purposes of victim restitution.* The primary purpose of victim restitution as a criminal
18 sanction is to compensate crime victims for economic injuries suffered as a result of criminal
19 conduct that are clearly ascertainable with the expenditure of reasonable effort by the sentencing
20 court. Subsection (1) limits victims' recoverable losses to those that "can be calculated with
21 reasonable accuracy." Difficult restitutionary claims should not be allowed to overwhelm the
22 sentencing process with their complexity or subjectivity. They may also involve questions of
23 community sensibility more properly submitted to civil juries, such as the assessment of punitive
24 damages.

25 Crime victims have a strong moral claim to restitution from those who brought about their
26 injuries. They also possess legal rights to recovery in civil process, although these would have to
27 be vindicated in separate and potentially distended lawsuits in the absence of a criminal court's
28 award. Section 6.04A does not create new entitlements for crime victims so much as it spares
29 them the transaction costs and delays that attend civil litigation. When criminal-restitution orders
30 can reasonably satisfy the claims of victims, the judicial system is also spared the burden of a
31 separate civil case.

32 A secondary purpose of victim restitution is to promote offenders' rehabilitation and
33 reintegration into the law-abiding community through the making of amends to crime victims.
34 Worldwide, experiments in "restorative justice" have pursued the theory that—at least in some
35 cases—the criminal process can be aimed toward the healing of victims, offenders, and
36 communities. Restorative justice sanctions often take the form of mediated agreements on
37 appropriate sentences with the assent of both victims and offenders—and sometimes the
38 agreement of their families and representatives of their communities. One prominent goal of

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restorative justice innovations is to see offenders make reparations to victims, including in-person apologies. There is empirical evidence that some such programs deliver more frequent payment of restitution to crime victims than traditional criminal courts. There is also evidence that restorative justice programming can reduce recidivism rates. One psychological explanation for such positive results is that offenders are given a pathway to reacceptance in the community—and the making of amends to crime victims is part of the process. While § 6.04A does not itself adopt a restorative justice approach, experience in that field supports the belief that an offender's payment of victim restitution can also facilitate rehabilitation and reduce recidivism.

f. Definition of "victim." State codes vary considerably in how simply or elaborately they define the term "victim" in criminal restitution provisions. Subsection (3) opts for a streamlined definition, that a victim is "any person who has suffered physical, emotional, or financial harm as the direct result of the commission of a criminal offense," with any further articulation left to the courts. Subsection (3) addresses circumstances in which the victim is dead, incapacitated, or a minor, and gives courts discretion to determine an appropriate representative.

The Code leaves the question of which entities should be considered "persons" under subsection (3) to the laws of individual states. Current state laws vary greatly on this score, and there is no comparative research on experiences under different approaches. In current law the entities most often excluded from the definition of "victim" for purposes of criminal restitution are insurance companies and governmental agencies. Entities excluded from restitution in criminal sentencing proceedings retain their rights of recovery through civil litigation.

g. Losses recoverable; definition of "economic losses." Jurisdictions vary in their provisions of what victim losses will support a criminal restitution award. The majority approach is to limit amounts recoverable at sentencing to liquidated out-of-pocket losses that may be readily ascertained by the sentencing court. For other kinds of damages, including punitive damages, lost profits, and pain and suffering, victims must pursue their civil remedies. The revised Code adopts the majority view in subsections (4) and (5).

This approach is consistent with the American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.15(i) ("Claimants seeking general, exemplary, or punitive damages, or asserting losses that require estimation of consequential damages, such as pain and suffering or lost profits, should be limited to their civil remedies."). Broader definitions exist in many jurisdictions, however, and some definitions of recoverable losses are very broad indeed. Current federal law, for example, allows awards of "community restitution" payable by drug offenders based on sentencing courts' determinations of the amount of "public harm" caused by their offenses.

h. Consideration of offender's financial circumstances. Jurisdictions divide on the question of whether an offender's financial circumstances may (or must) be considered before a sentencing court may award victim restitution.

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1 In many states, courts are required to consider the defendant's financial circumstances when
2 fashioning a restitution order. Such consideration is foreclosed in the substantial number of states
3 where criminal restitution is a mandatory penalty; see Comment *c* above. In some jurisdictions,
4 the mandatory character of criminal restitution is a stricture of state constitutional law. Some
5 state codes include express provisions that the offender's economic circumstances may not be
6 considered when a sentencing court awards restitution. This issue was resolved by vote of the
7 Institute membership at the 2014 Annual Meeting.

8 On the broad question of whether offenders' financial circumstances may be considered, the
9 revised Code is in accord with the recommendations of the Uniform State Law Commissioners.
10 See National Conference of Commissioners on Uniform State Laws (also known as the Uniform
11 Law Commission), Uniform Victims of Crime Act (1993), § 402(b) ("In determining the amount
12 and method of payment, the court shall consider the financial resources and future ability of the
13 defendant to pay."). The Code's position is at odds with the ABA Sentencing Standards, which
14 provide that the offender's financial circumstances may affect the schedule of collection of a
15 restitution of an award, but not the award itself. See American Bar Association, Standards for
16 Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.15(c)(ii) ("The agency should
17 provide that sentencing courts may require offenders to pay the full amount of the sanction
18 forthwith or, taking into account the financial circumstances of an offender, to pay the amount in
19 scheduled installments.").

20 *i. Multiple victims.* Subsection (7) provides that, in cases of multiple victims, the sentencing
21 court must determine priority among the victims when determining what share each victim will
22 have in the total amount of victim restitution paid by the offender. The provision gives
23 sentencing courts broad latitude as to how this can best be done in particular cases. Importantly,
24 prioritization is not limited to the mathematical determination of each victim's losses. Priorities
25 are to be based in part on the seriousness of each victim's losses, but also on "their [respective]
26 economic circumstances, and other equitable considerations." This allows the courts to make
27 individualized judgments, an authority that is essential in the many cases in which offenders lack
28 the means to make full restitution to all victims.

29 *j. Multiple offenders*. Subsection (8) deals with the problem of apportioning responsibility
30 for victim restitution when more than one person has engaged in criminal conduct that has
31 contributed to the victim's economic losses. This is a thorny question that reaches the courts in a
32 wide variety of fact patterns.

33 Subsection (8) lays down no hard rules for individual, or joint and several, liability of
34 criminal defendants to pay restitution, but leaves these questions to the discretion of sentencing
35 courts in light of the factors set out in subsection (8)(a) through (c). These factors are adapted
36 from the Supreme Court's decision in Paroline v. United States, 572 U.S. __, 134 S. Ct. 1710
37 (2014).

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Paroline held that it would be anomalous, unfair, disproportionate, and possibly unconstitutional to hold a single offender liable for a victim's total losses in a case in which many thousands of other individuals shared causal responsibility for those losses—including thousands of unidentified offenders who had not been (and realistically would never be) apprehended or prosecuted. The Court stated that, in such an instance, it would be inappropriate to transplant joint-and-several-liability standards of causation from tort law and the context of civil proceedings. The *Paroline* decision did not foreclose joint and several liability in criminal restitution cases in which a smaller number of persons contributed to the victim's injuries.

The *Paroline* opinion provides guidance on the standard and thought process that should be used for the fair apportionment of victim restitution when an individual offender is one among many responsible for the victim's injuries. Because subsection (8) borrows from *Paroline*'s language and analysis, this Comment will rehearse the reasoning of the case in some detail.

Paroline addressed the multiple-offender causation problem in the context of a child-pornography prosecution under 18 U.S.C. § 2259 (part of the Violence Against Women Act of 1994). The question before the Court was whether an individual possessor of two pornographic images of an identified child victim, among many thousands of possessors of images of the victim who were not before the court, could be held responsible for restitution in the full amount of the victim's losses recoverable under the statute—in this case, in the alleged amount of $3 million. The Court held that this was not permissible, and created a formula for determining the responsibility of an individual offender to make restitution in such a case.

Although a statutory-interpretation decision, *Paroline* suggested that, in "aggregate causation" cases where many offenders have contributed to a victim's injuries, the imposition of too large a share of restitution on a single offender would raise constitutional concerns under the Excessive Fines Clause of the Eighth Amendment. See 134 S. Ct. at 1725-1726 (stating that the victim's suggested approach "is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment."); 134 S. Ct. at 1726 ("there is a real question whether holding a single possessor [of child pornography] liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate"). The Court held, 134 S. Ct. at 1727:

> [W]here it is impossible to trace a particular amount of [the victim's aggregate losses] to the individual defendant by recourse to a more traditional causal inquiry, a court . . . should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. . . . The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role.

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Subsection (8)(c) borrows directly from this language when it provides that the sentencing court should allocate victim-restitution liability to an individual offender in a way that reflects that individual's relative contribution to the causal process that brought about the victim's losses.

The *Paroline* Court conceded that there is no exact formula for the appropriate amount of restitution to be paid by a single defendant, and acknowledged that any standard it created would necessarily leave much room for the exercise of discretion by sentencing judges. The Court suggested a number of factors sentencing courts may consider as "rough guideposts" to proportionate restitution orders in child-pornography-possession cases. Most of these factors may be translated to other types of crimes. See 134 S. Ct. at 1728-1729:

> [A sentencing] court must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses. This cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment. . . .
>
> There are a variety of factors district courts might consider in determining a proper amount of restitution . . . . These could include the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.
>
> These factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders. They should rather serve as rough guideposts for determining an amount that fits the offense.

The factors recited by the *Paroline* Court are adapted to supply the factors a sentencing court should consider under subsection (8)(a) through (c). Subsection (8)(b) (stating that a sentencing court should consider whether the offender played a direct or major role, relative to other persons, in bringing about the victim's total economic losses), is not a close paraphrase of the Court's opinion, but is derived from the Court's suggestion that, in a child-pornography case, greater amounts of restitution would be owed by defendants who "reproduced or distributed images of the victim," or "had any connection to the initial production of the images."

k. Process for proof of economic losses. When contested, most state codes require the relevant facts to be proven by a preponderance of the evidence. The revised Code adopts this policy choice in subsection (9), which is consistent with the longstanding recommendations of the Uniform State Law Commissioners and the American Bar Association.

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There is a theoretical chance that subsection (9) is unconstitutional. Some commentators have argued that Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and related cases require that any factfinding legally required to establish the amount of a restitution award must be performed by juries under the reasonable-doubt standard. All lower courts that have addressed this question have ruled to the contrary. (Still, all lower federal courts and all state courts except one had failed to correctly anticipate the Court's 2004 ruling in *Blakely*).

The revised Code makes provision for unforeseen constitutional rulings on this and other *Apprendi*-related topics. In the unlikely event that the preponderance-of-evidence standard in subsection (9) is found to be unconstitutional under the Court's Sixth-Amendment-at-sentencing jurisprudence, § 7.07B (Council Draft No. 5, 2015) would automatically provide that facts necessary to support a victim-restitution award be litigated before juries under the reasonable-doubt standard, unless those rights are waived by the defendant. See subsections (1) and (2) of § 7.07B:

> **(1) "Jury-sentencing facts," for purposes of this Section, are facts that, under the federal or state constitution, must be found by a jury before those facts may serve as a basis for a sentencing decision.**
>
> **(2) Except as provided in subsection (8), unless admitted by the defendant, a jury-sentencing fact may not form the basis of a sentencing decision unless it is first tried to a jury and proven beyond a reasonable doubt.**

l. Effects of victim-restitution orders on civil proceedings. Subsection (10) codifies the consensus view of the relationship between victim-restitution orders in criminal proceedings and separate actions for damages that may be filed in civil court by crime victims. Imposition of the criminal sanction may not preclude a separate civil action, especially because the losses recoverable in the forum of the criminal court are much more narrowly defined than the damages available to victims in the civil courtroom. In addition, the subsection prevents double recovery by victims by stating that any amounts received in victim restitution must be subtracted from a later civil award, and vice versa.

REPORTERS' NOTE [24]

a. Scope. All states authorize victim restitution as a criminal sanction; see Peggy M. Tobolowsky, Mario T. Gaboury, Arrick L. Jackson, and Ashley G. Blackburn, Crime Victim Rights and Remedies, 2d ed. (2010), at 157.

b. State constitutional provisions. For a nationwide count of victim-restitution provisions in state constitutions; see Peggy M. Tobolowski, Mario T. Gaboury, Arrick L. Jackson, and Ashley G. Blackburn, Crime Victim Rights and Remedies, Second Edition (2010), at 153. For examples of state constitutions that guarantee crime victims' right to restitution, see Ariz. Const., Art. 2 § 2.1(8) ("a victim of crime has a right . . . [t]o receive prompt restitution from

[24] This Reporters' Note has not been revised since § 6.04A's approval in 2016. All Reporters' Notes will be updated for the Code's hardbound volumes.

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the person or persons convicted of the criminal conduct that caused the victim's loss or injury"); Cal. Const., Art. 1 § 28(b)(13)(B) ("Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss."); Mich. Const., Art. 1 § 24(1) ("Crime victims, as defined by law, shall have the following rights, as provided by law: . . . The right to restitution"); Tex. Const., Art. 1 § 30(b)(4) ("On the request of a crime victim, the crime victim has the following rights: … the right to restitution"). For an example of a state constitution that allows or appears to allow the legislature to adopt criminal restitution provisions that are not mandatory, see Const. of N.C., Art. 1 § 37(1)(c) ("Victims of crime, as prescribed by law, shall be entitled to the following basic rights: . . . The right as prescribed by law to receive restitution").

c. Mandatory versus discretionary victim restitution. Some state codes grant sentencing courts discretion on whether victim restitution should be ordered in individual cases, and some state laws recognize the defendant's ability to pay as determinative. See Ariz. Rev. Stat. § 13-804(A) (2013) ("On a defendant's conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct."); Minn. Stat. § 609.10. subd. 1(a)(5) (upon conviction of a felony, the court "may sentence the defendant . . . to payment of court-ordered restitution"); New York Penal Law § 65.10 (2) and (2)(g) ("[w]hen imposing a sentence of probation or of conditional discharge, the court shall, as a condition of the sentence, consider restitution or reparation . . . ."; the court may order the defendant to "[m]ake restitution of the fruits of his or her offense or make reparation, in an amount he can afford to pay, for the actual out-of-pocket loss caused thereby"); 12 R.I. Gen. Laws § 12-19-32 ("a judge at the time of sentencing may order restitution which may be in the form of monetary payment or some type of community restitution."); Tex. Crim. Proc. Code, Art. 42.037(a) ("In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B, Chapter 56, to the extent that fund has paid compensation to or on behalf of the victim. If the court does not order restitution or orders partial restitution under this subsection, the court shall state on the record the reasons for not making the order or for the limited order."); Vt. Stat. § 7043(a)(1) ("Restitution shall be considered in every case in which a victim of a crime . . . has suffered a material loss."); Wash. Code § 9.94A.750(5) ("Restitution may be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section. In addition, restitution may be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement."). For discretionary approaches that tilt toward the granting of restitution, see The President's Task Force on Victims of Crime, Final Report (1982), at 66, 78-79 (advocating "presumptive" restitution; recommending that judges "should order restitution to the victim in all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record.") Cal. Penal Code § 1204.4(c) ("The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine.").

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1 Some state codes remove sentencing judges' discretion over restitution, making the sanction mandatory when
2 predicate circumstances are met. See, e.g., Alaska Stat. § 12.55.045(a) ("The court shall, when presented with
3 credible evidence, unless the victim or other person expressly declines restitution, order a defendant convicted of an
4 offense to make restitution as provided in this section, including restitution to the victim or other person injured by
5 the offense, to a public, private, or private nonprofit organization that has provided or is or will be providing
6 counseling, medical, or shelter services to the victim or other person injured by the offense, or as otherwise
7 authorized by law."); Colo. Rev. Stat. § 18-1.3-603(1) (sentences "shall include consideration of restitution,"
8 appearing to create a discretionary penalty, but the only exception to a required award of restitution in subsection
9 (1)(a) through (d) is when the court makes a finding under subsection (1)(d) that no victim suffered a pecuniary
10 loss); see also id. § 18-1.3-205 ("[a]s a condition of every sentence to probation, the court shall order that the
11 defendant make full restitution"); Del. Code Ann tit. 12, § 4204(9) ("Wherever a victim of crime suffers a monetary
12 loss as a result of the defendant's criminal conduct, the sentencing court shall impose as a special condition of the
13 sentence that the defendant make payment of restitution to the victim in such amount as to make the victim whole,
14 insofar as possible, for the loss sustained."); Haw. Rev. Stat. § 706-646(2) ("The court shall order the defendant to
15 make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's
16 offense when requested by the victim."); 18 Pa. C.S. § 1106(c)(1) ("The court shall order full restitution . . .
17 [r]egardless of the current financial resources of the defendant, so as to provide the victim with the fullest
18 compensation for the loss."). The American Bar Association policy is that sanctions of "restitution or reparation"
19 should be authorized but not mandated in the criminal code. See American Bar Association, Standards for Criminal
20 Justice: Sentencing, Third Edition (1994), Standard 18-3.15(a).

21 A number of jurisdictions take an intermediate course, making restitution mandatory in some categories of
22 cases but not others. Illinois employs a mixed approach where some enumerated offenses require the courts to order
23 restitution, but for nonenumerated offenses the courts maintain discretion. 730 Ill. Comp. Stat. § 5/5-5-6 ("In all
24 other cases, except cases in which restitution is required under this Section, the court must at the sentence hearing
25 determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If
26 the court determines that an order directing the offender to make restitution is appropriate, the offender may be
27 sentenced to make restitution."). Massachusetts only requires courts to order restitution in a few defined situations
28 such as motor vehicle theft and fraud. Mass. Gen. Laws ch. 276, § 92A ("A person found guilty of violating the
29 provisions of sections twenty-seven, twenty-eight, one hundred and eleven B and one hundred and thirty-nine of
30 chapter two hundred and sixty-six shall, in all cases, upon conviction, in addition to any other punishment, be
31 ordered to make restitution . . ."). However, Massachusetts' courts reserve the ability to award restitution
32 discretionarily. See Commonwealth. v. Denehy, 2 N.E.3d 161, 173–74 (Mass. 2014) ("Massachusetts lacks any
33 statutory prescription for imposing restitution as part of sentencing other than a general legislative encouragement to
34 make victims whole. . . . The power to order restitution in criminal cases "derives from the judge's power to order
35 conditions of probation."); Commonwealth. v. Nawn, 474 N.E. 2d 545, 550 (Mass. 1985) (describing restitution as a
36 "consideration in criminal sentencing."). Federal law currently provides for mandatory restitution for most, but not
37 all, offense categories, see 18 U.S.C. § 2259 (mandatory restitution for all offenses involving sexual exploitation and
38 other abuse of children) (expressly providing that the financial circumstances of the offender may not be taken into
39 account); 18 U.S.C. § 3663A (mandatory restitution for all crimes of violence and offenses against property
40 including any offense committed by fraud or deceit, and certain other designated crimes). For the remaining

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offenses, the largest category being drug offenses, sentencing courts are given discretion over whether to make a restitution award, see § 18 U.S.C. § 3663. It should be noted that restitution for drug crimes is not commonly available in the states. Federal law authorizes awards of "community restitution" to be paid by drug offenders based on a determination of the amount of "public harm" caused by the offense.

d. Recovery limited to losses from the offense of conviction. The law in many states is in accord with the revised Code. See Alaska Stat. 12.55.045 (courts may "order a defendant convicted of an offense to make restitution as provided in this section, including restitution to the victim or other person injured by the offense, to a public, private, or private nonprofit organization that has provided or is or will be providing counseling, medical, or shelter services to the victim or other person injured by the offense, or as otherwise authorized by law."), Nelson v. State, 628 P.2d 884, 895 (Alaska 1980) ("The state conceded that, given the strict construction this court has given to the sentencing power of trial courts, the court was not authorized to require restitution for items beyond those as to which Nelson and Herring were actually convicted."); Ariz. Rev. Stat. § 13-804(B) ("In ordering restitution for economic loss pursuant to § 13-603, subsection C or subsection A of this section, the court shall consider all losses caused by the criminal offense or offenses for which the defendant has been convicted."); State v. Latimer, 604 N.W.2d 103, 105 (Minn. 1999) (stating that under Minnesota law, "[r]estitution is only proper where the victim's losses are 'directly caused' by the conduct for which the defendant was convicted."); New York Penal Law § 60.27(4)(a) ("the term 'offense' shall include the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense."); 18 Pa. Cons. Stat. § 1106(a) (The court may order restitution "Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime . . ."); Hanna v. State, 426 S.W.3d 87, 91 (Tex. Crim. App. 2014) ("However, the legislature has also recognized limits on the right to restitution: . . . it may be ordered only to a victim of an offense for which the defendant is charged."); State v. Miszak, 848 P.2d 1329, 1330 (Wash. Ct. App. 1993) ("The general rule is that restitution may be ordered only for losses incurred as a result of the precise offense charged.").

In opposition to the view recommended in the Code, see People v. Steinbeck, 186 P.3d 54, 60 (Colo. App. 2007) ("We reject defendant's argument that because the charge of the crime, leaving the scene of an accident resulting in death, did not allege that he caused the victim's death, he cannot be ordered to pay restitution for losses associated with the victim's death as part of his sentence. The restitution statute does not require that a defendant be charged with a specific act to be ordered to pay restitution. The statute only requires that the conduct underlying the basis of the defendant's criminal conviction proximately caused the victim's losses."); Commonwealth v. McIntyre, 767 N.E.2d 578, 583-584 (Mass. 2002) ("We now hold, in addition to the other established principles, that restitution must bear a causal connection to the defendant's crime . . . and hold that the scope of restitution is limited to 'loss or damage [that] is causally connected to the offense and bears a significant relationship to the offense.' . . . Furthermore, 'we look to the underlying facts of the charged offense, not the name of the crime [of which the defendant was convicted, or] to which the defendant entered a plea.'") (citations omitted) ; cf. 13 Vermont Statutes § 7043(e)(3) ("An order of restitution may require the offender to pay restitution for an offense for which

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the offender was not convicted if the offender knowingly and voluntarily executes a plea agreement which provides that the offender pay restitution for that offense.").

For case law establishing the Sixth Amendment and Due Process rights that would potentially apply at restitution proceedings, see Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U. S. 220 (2005); Cunningham v. California, 549 U. S. 270 (2007); Oregon v. Ice, 555 U.S. 160 (2009); and Alleyne v. United States, 133 S. Ct. 2151 (2013).

For examples of lower court decisions rejecting application of the *Apprendi* rule to restitution determinations, see United States v. Williams, 445 F.3d 1302, 1310 (11th Cir. 2006), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219, 1221 (11th Cir. 2007); United States v. Milkiewicz, 470 F.3d 390, 391 (1st Cir. 2006); United States v. Reifler, 446 F.3d 65, 104 (2d Cir. 2006); United States v. Leahy, 438 F.3d 328, 331 (3d Cir. 2006) (en banc); United States v. Nichols, 149 F. App'x 149, 153 (4th Cir. 2005); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 453 (6th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); People v. Smith, 181 P.3d 324, 327 (Colo. App. 2007); State v. Clapper, 732 N.W.2d 657, 661, 663 (Neb. 2007); State v. McMillan, 111 P.3d 1136, 1139 (Or. Ct. App. 2005); State v. Kinneman, 119 P.3d 350, 355 (Wash. 2005) (en banc). A representative case is People v. Horne, 767 N.E.2d 132, 139 (N.Y. 2002) (holding that imposition of restitution order did not violate *Apprendi* rule) ("Federal appellate courts that have addressed *Apprendi* challenges in the restitution context have universally held the *Apprendi* rule inapplicable to restitution orders. Because the federal restitution statute permits a sentence of restitution for any offense "in the full amount of each victim's losses as determined by the court" (18 USC § 3664[f][1][A]), the sentencing court's factual determinations neither expand nor exceed the maximum restitution sentence authorized for any offense").

For arguments that the *Apprendi* line of cases requires jury determination of facts necessary to support restitution awards that go beyond the facts of offenses of conviction, see Melanie D. Wilson, In Booker's Shadow: Restitution Forces A Second Debate on Honesty in Sentencing, 39 Ind. L. Rev. 379 (2006); Laura I. Appleman, Retributive Justice and Hidden Sentencing, 68 Ohio St. L.J. 1307, 1379-1384 (2007); William M. Acker, Jr., The Mandatory Victims Restitution Act Is Unconstitutional: Will the Courts Say so after Southern Union v. United States?, 64 Ala. L. Rev. 803 (2013); James Barta, Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution under the Sixth Amendment, 51 Am. Crim. L. Rev. 463, 463-464 (2014).

While the lower courts are in near-universal accord that criminal restitution falls outside *Apprendi* requirements, the lower courts were also aligned, nearly universally, against the holding of Blakely v. Washington, 542 U.S. 296 (2004), before that case was decided by the Supreme Court. See Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082 (2005) (observing that every lower federal court, and all state courts except one, had failed to anticipate the *Blakely* Court's holding that facts supportive of aggravating factors under presumptive sentencing guidelines must be determined by juries under the reasonable doubt standard).

e. Purposes of victim restitution. See Commonwealth v. Brown, 981 A.2d 893, 895-896 (Pa. 2009) ("the primary purpose of restitution is rehabilitation of the offender by impressing upon him or her that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as

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possible. . . . Thus, recompense to the victim is only a secondary benefit, as restitution is not an award of damages. Although restitution is penal in nature, it is highly favored in the law and encouraged so that the criminal will understand the egregiousness of his or her conduct, be deterred from repeating the conduct, and be encouraged to live in a responsible way. . . . Thus, restitution, at its core, involves concepts of rehabilitation and deterrence.") (citations omitted); Colo. Rev. Stat. § 18-1.3-601(1) (purposes of restitution include rehabilitation of offenders, including specific deterrence from future criminality, and reintegration of offenders as productive members of society; purposes also include lessening of financial burdens inflicted on victims, compensation of victims' suffering and hardship, and preservation of victims' individual dignity); People v. Amorosi, 750 N.E.2d 41 (N.Y. 2001) ("The dual goals of the restitution statute are to insure that victims will be made whole and that offenders will be both rehabilitated and deterred from future wrongdoing."); People v. Cookson, 820 P.2d 278, 282 (Cal. 1991) ("aside from making the victim whole, restitution serves valid punitive, deterrent, and rehabilitative objectives by requiring the defendant to return his ill-gotten gains and helping him appreciate the harm done to the victim."); State v. Murray, 621 P.2d 334, 339 (Haw. 1980) ("That it has a purpose beyond the reparation of a direct victim is evident from the committee reports issued in conjunction with the adoption of the amendatory legislation . . . [t]hese reports are couched in terms of a criminal's repaying "society" and "the persons injured" by his acts; they also express an opinion that he may 'develop . . . self-respect and pride in knowing that he . . . has righted the wrong committed.' Hence, we can only conclude the amendment in question has a purpose and design that encompasses the punishment and the rehabilitation of the offender.") (citation omitted); contra Alaska Stat. § 12.55.045(a)(1)–(2) ("In determining the amount and method of payment of restitution or compensation, the court shall take into account the . . . public policy that favors requiring criminals to compensate for damages and injury to their victims;"); State v. Guilliams, 90 P.3d 785, 789 (Ariz. Ct. App. 2004) ("The purpose of restitution is to make the victim whole, not to punish."); People v. Fontana, 622 N.E. 2d 893, 903 (Ill. App. Ct. 1993) ("As noted above, the purpose of . . . [the Illinois restitution statutory provision] is to make victims whole for any injury received at the hands of the defendant, and to make the defendant pay for all of the damages he caused to the victim.") (citations omitted).

The Supreme Court has recognized rehabilitation among the purposes of criminal restitution provisions, see Kelly v. Robinson, 479 U. S. 36, 49, n. 10 (1986) (noting that restitution is "an effective rehabilitative penalty"). The U.S. Supreme Court has also mentioned punishment among the purposes of restitution—a view that is not endorsed in the revised Code. See Paroline v. United States, 572 U.S. __, 134 S. Ct. 1710 (2014), Slip Op. at 19, 20:

> The primary goal of restitution is remedial or compensatory, cf. Bajakajian, supra, at 329, but it also serves punitive purposes, see Pasquantino v. United States, 544 U. S. 349, 365 (2005) ("The purpose of awarding restitution" under 18 U. S. C. §3663A "is . . . to mete out appropriate criminal punishment"). . . . See Kelly, supra, at 49, n. 10 ("Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused").

For an argument that the use of victim restitution as punishment goes beyond its original purposes, see Cortney Lollar, What Is Restitution? (forthcoming 2015).

On restorative justice programs, including their empirical assessment, see Lawrence W. Sherman and Heather Strang, Restorative Justice as Evidence-Based Sentencing, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (2012); Joanna Shapland et al., Does Restorative Justice Affect

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Reconviction? The Fourth Report from the Evaluation of Three Schemes (Ministry of Justice, England and Wales, 2008); John Braithwaite, Restorative Justice and Responsive Regulation (2002).

f. Definition of "victim." See National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime Act (1992), § (4)(a). See also Statutory Note for this provision (collecting state restitution statutes). Under federal law, the community itself is sometimes defined as a victim for purposes of criminal restitution; sentencing court have discretion to order drug offenders to make "community restitution." See 18 U.S.C. § 3663(c)(2)(A) ("An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission."); id. § 3663(c)(3)(B)(6) (referring to this form of restitution as "community restitution"). The Model Penal Code does not endorse such a broad and amorphous conception of victims entitled to restitution as part of the criminal sentence.

For states with definitions of "victim" similar to that in the Code, see, e.g., Alaska Stat. § 12.55.185(19) ("'victim' means . . . (A) a person against whom an offense has been perpetrated; . . . (B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated: . . . an individual living in a spousal relationship with the person specified in (A) of this paragraph; or . . . a parent, adult child, guardian, or custodian of the person; . . . (C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead: . . . a person living in a spousal relationship with the deceased before the deceased died; . . . an adult child, parent, brother, sister, grandparent, or grandchild of the deceased; . . . any other interested person, as may be designated by a person having authority in law to do so."); 725 Ill. Comp. Stat. § 120/3(a) (defining victim as "(1) a person physically injured in this State as a result of a violent crime perpetrated or attempted against that person or (2) a person who suffers injury to or loss of property as a result of a violent crime perpetrated or attempted against that person or (3) a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime perpetrated against the person killed or the spouse, parent, child or sibling of any person granted rights under this Act who is physically or mentally incapable of exercising such rights, except where the spouse, parent, child or sibling is also the defendant or prisoner or (4) any person against whom a violent crime has been committed or (5) any person who has suffered personal injury as a result of a violation of Section 11-501 of the Illinois Vehicle Code, or of a similar provision of a local ordinance, or of Section 9-3 of the Criminal Code of 1961 or the Criminal Code of 2012 or (6) in proceedings under the Juvenile Court Act of 1987, both parents, legal guardians, foster parents, or a single adult representative of a minor or person with a disability who is a crime victim."); 13 Vt. Stat. § 5301 ("'Victim' means a person who sustains physical, emotional, or financial injury or death as a direct result of the commission or attempted commission of a crime or act of delinquency and shall also include the family members of a minor, a person who has been found to be incompetent, or a homicide victim."); Wash. Rev. Code § 9.94A.030 ("'Victim' means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.").

Other states opt for more elaborated definitions of "victim," which often expressly include corporations, government entities, and other interested parties. See Cal. Penal Code § 1202.4(k) ("For purposes of this section, 'victim' shall include all of the following: (1) The immediate surviving family of the actual victim. (2) A corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a direct victim of

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1 a crime. (3) A person who has sustained economic loss as the result of a crime and who satisfies any of the
2 following conditions: (A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild
3 of the victim. (B) At the time of the crime was living in the household of the victim. (C) At the time of the crime
4 was a person who had previously lived in the household of the victim for a period of not less than two years in a
5 relationship substantially similar to a relationship listed in subparagraph (A). (D) Is another family member of the
6 victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime. (E) Is the primary
7 caretaker of a minor victim. (4) A person who is eligible to receive assistance from the Restitution Fund pursuant to
8 Chapter 5 (commencing with Section 13950) of Part 4 of Division 3 of Title 2 of the Government Code.
9 (5) A governmental entity that is responsible for repairing, replacing, or restoring public or privately owned property
10 that has been defaced with graffiti or other inscribed material, as defined in subdivision (e) of Section 594, and that
11 has sustained an economic loss as the result of a violation of Section 594, 594.3, 594.4, 640.5,640.6, or 640.7 of the
12 Penal Code."); Colo. Rev. Stat. § 18-1.3-602(4)(a) ("'Victim' means any person aggrieved by the conduct of an
13 offender and includes but is not limited to the following: . . . (III) [a]ny person who has suffered losses because of a
14 contractual relationship with, including but not limited to an insurer, or because of liability under section 14-6-110,
15 C.R.S., for a person described in subparagraph (I) or (II) of this paragraph (a); (IV) [a]ny victim compensation board
16 that has paid a victim compensation claim. . . (VI) [a]ny person who had to expend resources for the purposes
17 described in paragraphs (b), (c), and (d) of subsection (3) of this section."); Minn. Stat. § 611A.01(b) ("'Victim'
18 means a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a
19 crime, and for purposes of sections 611A.04 and 611A.045, also includes (1) a corporation that incurs loss or harm
20 as a result of a crime, (2) a government entity that incurs loss or harm as a result of a crime, and (3) any other entity
21 authorized to receive restitution under section 609.10 or 609.125."); Haw. Rev. Stat. § 706-646(1) ("(1) As used in
22 this section, 'victim' includes any of the following: (a) [t]he direct victim of a crime including a business entity,
23 trust, or governmental entity; (b) [i]f the victim dies as a result of the crime, a surviving relative of the victim as
24 defined in chapter 351; (c) [a] governmental entity that has reimbursed the victim for losses arising as a result of the
25 crime or paid for medical care provided to the victim as a result of the crime; or (d) [a]ny duly incorporated humane
26 society or duly incorporated society for the prevention of cruelty to animals, contracted with the county or State to
27 enforce animal-related statutes or ordinances, that impounds, holds, or receives custody of a pet animal pursuant
28 to section 711-1109.1, 711-1109.2, or 711-1110.5; provided that this section does not apply to costs that have
29 already been contracted and provided for by the counties or State."); N.Y. Penal Law § 60.27(4)(b) ("the term
30 'victim' shall include the victim of the offense, the representative of a crime victim as defined in subdivision six of
31 section six hundred twenty-one of the executive law, an individual whose identity was assumed or whose personal
32 identifying information was used in violation of section 190.78, 190.79 or 190.80 of this chapter, or any person who
33 has suffered a financial loss as a direct result of the acts of a defendant in violation of section 190.78, 190.79,
34 190.80, 190.82 or 190.83 of this chapter, a good samaritan as defined in section six hundred twenty-one of the
35 executive law and the office of victim services or other governmental agency that has received an application for or
36 has provided financial assistance or compensation to the victim. A victim shall also mean any owner or lawful
37 producer of a master recording, or a trade association that represents such owner or lawful producer, that has
38 suffered injury as a result of an offense as defined in article two hundred seventy-five of this chapter."); id.
39 § 60.27(9) ("the term 'victim' as used in this section, in addition to its ordinary meaning, shall mean any law
40 enforcement agency of the state of New York or of any subdivision thereof which has expended funds in the

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purchase of any controlled substance from such person or his agent as part of the investigation leading to such conviction.); id. § 60.27(10) ("the term 'victim' as used in this section, in addition to its ordinary meaning, shall mean any municipality or volunteer fire company which has expended funds or will expend funds for the purpose of restoration, rehabilitation or clean-up of the site of the arson."); id. § 60.27(13) ("the term 'victim' as used in this subdivision, in addition to the ordinary meaning, shall mean any school, municipality, fire district, fire company, fire corporation, ambulance association, ambulance corporation, or other legal or public entity engaged in providing emergency services which has expended funds for the purpose of responding to a false report of an incident or false bomb. . . .")

Across the states, there are a number of approaches to entities' rights to claim restitution at criminal sentencing. Iowa is the only state that bars insurance companies and the government from receiving restitution by statute; see Iowa Code Ann. § 910.1(5) ("However, for purposes of this chapter, an insurer is not a victim and does not have a right of subrogation."). The courts in 10 states have interpreted the term "victim" in criminal restitution statutes to exclude insurance companies and government entities. See People v. Birkett, 980 P.2d 912, 916 (Cal. 1999); State v. Perez, 966 So. 2d 813, 816 (La. Ct. App. 2007);State v. Miller, 645 A.2d 1140, 1141 (Me. 1994); State v. Esler, 553 N.W.2d 61, 65 (Minn. Ct. App. 1996); Martinez v. State, 974 P.2d 133, 135 (Nev. 1999); State v. Springer, 574 A.2d 1381, 1383 (N.H. 1990); State v. Stanley, 339 S.E.2d 668, 671 (N.C. 1986); State v. Moss, 930 N.E.2d 838, 841(Ohio Ct. App. 2010); State v. Alford, 970 S.W.2d 944, 946 (Tenn. 1998) (holding that an insurer is not a victim because they are not they direct object of the crime and because they pay the actual victim due to a contractual obligation); State v. Webb, 559 A.2d 658, 660 (Vt. 1989). Fourteen states explicitly permit entities to receive criminal restitution by statute. See Colo. Rev. Stat. § 18-1.3-602(4)(a); Fla. Stat. Ann. § 775.089(c)(1)-(2); Haw. Rev. Stat. § 706-646(1) (including government entities and humane societies); Idaho Code Ann. § 19-5304 (e); 730 Ill. Comp. Stat. Ann. 5/5-5-6; Md. Code Ann., Crim. Proc. § 11-606(a); Mont. Code Ann. § 46-18-243 (2)(a); Or. Rev. Stat. Ann. § 137.103(4)–(5); S.D. Codified Laws § 23A-28-2(5); S.C. Code Ann. § 17-25-324; Utah Code Ann. § 77-38a-102 (including the "Utah Office for Victims of Crime"); Wis. Stat. Ann. § 973.20(5)(d) ("If justice so requires, reimburse any insurer, surety or other person who has compensated a victim for a loss otherwise compensable under this section."); Wyo. Stat. Ann. § 7-9-101(v) (including insurance companies only if they lack a right of subrogation and insured has no duty of repayment). Cf. 18 Pa. Stat. Ann. § 11.103 (listing insurance companies and government agencies as potential recipients of restitution). An additional twenty, courts have interpreted the word "victim" to include victim's compensation funds or insurance companies. See Hagler v. State, 625 So. 2d 1190, 1191 (Ala. Crim. App. 1993) (holding that insurer is a victim); Lonis v. State, 998 P.2d 441, 448 (Alaska Ct. App. 2000); State v. Merrill, 665 P.2d 1022, 1023 (Ariz. Ct. App. 1983); Singleton v. State, 357 S.W.3d 891, 894 (Ark. 2009); Nathan v. State, 962 A.2d 256 (Del. 2008); Little v. State, 839 N.E.2d 807, 810 (Ind. Ct. App. 2005); People v. Norman, 454 N.W.2d 393, 395 (Mich. Ct. App. 1989); In Interest of B.D., 720 So. 2d 476, 482 (Miss. 1998); State v. Holecek, 621 N.W.2d 100, 105 (Neb. 2000); State v. Hill, 714 A.2d 311, 314 (N.J.1998); State v. Vick, 587 N.W.2d 567, 568 (N.D. 1998); People v. Hall-Wilson, 505 N.E.2d 584, 585 (N.Y. 1987) (holding that offender could be liable to security company that reimbursed their employee for economic harm suffered); Alger v. Com., 450 S.E.2d 765, 767 (Va. 1994); LaFleur v. State, 848 S.W.2d 266, 272 (Tex. App. 1993); State v. Ewing, 7 P.3d 835, 836 (Wash. 2000); State v. Wasson, 778 S.E.2d 687, 690 (W. Va. 2015); Cf. Williams v. State, 715 S.E.2d 440, 441 (Ga. Ct. App. 2011) (affirming restitution to an insurance company); State v. Schmitter, 222 P.3d 1019 (Kan. Ct. App. 2010); State v. Brooks, 862 P.2d 57, 63 (N.M. Ct. App.), aff'd in part on other

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1 grounds, rev'd in part on other grounds, 877 P.2d 557. For an argument against extending the definition of crime
2 victim to entity claimants in criminal restitution proceedings, see Cortney E. Lollar, *What Is Criminal Restitution?*,
3 100 Iowa L. Rev. 93, 138 (2014).

4 *g. Losses recoverable; definition of "economic losses."* The black-letter language of subsection (4) draws
5 selectively from the somewhat broader definition of "economic loss" in National Conference of Commissioners on
6 Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime Act (1992),
7 § 401(a). For relevant state statutes, see Ariz. Rev. Stat. § 13-105(16) ("'Economic loss' means any loss incurred by
8 a person as a result of the commission of an offense. Economic loss includes lost interest, lost earnings and other
9 losses that would not have been incurred but for the offense. Economic loss does not include losses incurred by the
10 convicted person, damages for pain and suffering, punitive damages or consequential damages."); Cal. Penal Code
11 § 1202.4(f)(3) (Economic loss is determined by considering "(A) Full or partial payment for the value of stolen or
12 damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the
13 actual cost of repairing the property when repair is possible. (B) Medical expenses. (C) Mental health counseling
14 expenses. (D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or
15 profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. Lost wages
16 shall include commission income as well as base wages. Commission income shall be established by evidence of
17 commission income during the 12-month period prior to the date of the crime for which restitution is being ordered,
18 unless good cause for a shorter time period is shown. (E) Wages or profits lost by the victim, and if the victim is a
19 minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or
20 in assisting the police or prosecution. Lost wages shall include commission income as well as base wages.
21 Commission income shall be established by evidence of commission income during the 12-month period prior to the
22 date of the crime for which restitution is being ordered, unless good cause for a shorter time period is shown. (F)
23 Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288. (G)
24 Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the
25 court. (H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of
26 the victim. (I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited
27 to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses,
28 clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be
29 necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the
30 emotional well-being of the victim. (J) Expenses to install or increase residential security incurred related to
31 a violent felony, as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device
32 or system, or replacing or increasing the number of locks. (K) Expenses to retrofit a residence or vehicle, or both, to
33 make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled,
34 whether the disability is partial or total, as a direct result of the crime. (L) Expenses for a period of time reasonably
35 necessary to make the victim whole, for the costs to monitor the credit report of, and for the costs to repair the credit
36 of, a victim of identity theft, as defined in Section 530.5."); Colo. Rev. Stat. § 18-1.3-602(3)(a) ("'Restitution'
37 means any pecuniary loss suffered by a victim and includes but is not limited to all out-of-pocket expenses, interest,
38 loss of use of money, anticipated future expenses, rewards paid by victims, money advanced by law enforcement
39 agencies, money advanced by a governmental agency for a service animal,
40 adjustment expenses, and other losses or injuries proximately caused by an offender's conduct and that can be reason

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ably calculated and recompensed in money."); Colo. Rev. Stat. § 18-1.3-602(3)(a) ("'Restitution' does not include damages for physical or mental pain and suffering, loss of consortium, loss of enjoyment of life, loss of future earnings, or punitive damages."); Del. Code tit. 12, § 4106(a) ("Any person convicted of stealing, taking, receiving, converting, defacing or destroying property, shall be liable to each victim of the offense for the value of the property or property rights lost to the victim and for the value of any property which has diminished in worth as a result of the actions of such convicted offender and shall be ordered by the court to make restitution. . . . The convicted offender shall also be liable for direct out-of-pocket losses, loss of earnings and other expenses and inconveniences incurred by victim as a direct result of the crime."); Haw. Rev. Stat. § 706-646(3) ("Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to: (a) [f]ull value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible; (b) [m]edical expenses; and (c) [f]uneral and burial expenses incurred as a result of the crime."); 730 Ill. Comp. Stat. § 5/5-5-6(b) ("In fixing the amount of restitution to be paid in cash, the court shall allow credit for property returned in kind, for property damages ordered to be repaired by the defendant, and for property ordered to be restored by the defendant; and after granting the credit, the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses, losses, damages, and injuries proximately caused by the same criminal conduct of the defendant, and insurance carriers who have indemnified the named victim or other victims for the out-of-pocket expenses, losses, damages, or injuries, provided that in no event shall restitution be ordered to be paid on account of pain and suffering."); Mass. Gen. Law ch. 276, § 92A ("The term 'financial loss' shall be interpreted to include but shall not be limited to, loss of earnings, out-of-pocket expenses, and replacement costs. Losses due to pain and suffering are not financial loss. Restitution shall be interpreted to include monetary reimbursement, work or service, or a combination thereof, provided to any person, organization, corporation, or governmental entity, the court determines, has suffered said damage or financial loss, or to perform such work or service for any other person, organization, corporation or governmental entity as the court may determine."); Minn. Stat. § 611A.04, subd. 1(a) ("A request for restitution may include, but is not limited to, any out-of-pocket losses resulting from the crime, including medical and therapy costs, replacement of wages and services, expenses incurred to return a child who was a victim of a crime under section 609.26 to the child's parents or lawful custodian, and funeral expenses."); New York Penal Law § 60.27(1) (restitution embraces "the fruits of [the defendant's] offense or reparation for the actual out-of-pocket loss caused thereby . . . [and] any costs or losses incurred due to any adverse action taken against the victim . . . . Adverse action as used in this subdivision shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action."); 18 Pa. Stat. § 1106(a) ("Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor."); Tex. Crim. Proc. Code Art. 42.037(b)(1)–(2) ("(1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant: (A) to return the property to the owner of the property or someone designated by the owner; or (B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of: (i) the value of the property on the date of the damage, loss, or destruction; or (ii) the value of the property on the date of sentencing,

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1 less the value of any part of the property that is returned on the date the property is returned. (2) If the offense results
2 in personal injury to a victim, the court may order the defendant to make restitution to: (A) the victim for any
3 expenses incurred by the victim as a result of the offense; or (B) the compensation to victims of crime fund to the
4 extent that fund has paid compensation to or on behalf of the victim."); 13 Vt. Stat. § 7043(2)–(3) ("(2) For purposes
5 of this section, 'material loss' means uninsured property loss, uninsured out-of-pocket monetary loss, uninsured lost
6 wages, and uninsured medical expenses. (3) In cases where restitution is ordered to the victim as a result of a human
7 trafficking conviction under chapter 60 of this title, "material loss" shall also mean: (A) attorney's fees and costs;
8 and (B) the greater of either: (i) the gross income or value of the labor performed for the offender by the victim; or
9 (ii) the value of the labor performed by the victim as guaranteed by the minimum wage and overtime provisions of
10 21 V.S.A. § 385."); Wash. Code § 9.94A.750(3) ("Except as provided in subsection (6) of this section, restitution
11 ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or
12 loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.
13 Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible
14 losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not
15 exceed double the amount of the offender's gain or the victim's loss from the commission of the offense.").

16 *h. Consideration of offender's financial circumstances*. See Minn. Stat. § 611A.045, subd. 1(a)(2) ("[I]n
17 determining whether to order restitution and the amount of the restitution, [the court] shall consider the following
18 factors: . . . (2) the income, resources, and obligations of the defendant."); Mass. Gen. Law. ch. 276, § 92A ("In so
19 determining, the court shall consider the financial resources of the defendant and the burden restitution will impose
20 on the defendant. The defendant's present and future ability to make such restitution shall be considered."); New
21 York Penal Law § 65.10 (2) and (2)(g) (sentencing court may order defendant to "[m]ake restitution of the fruits of
22 his or her offense or make reparation, in an amount he can afford to pay"); 13 Vt. Stat. § 7043(d)(2) ("the Court
23 shall make findings with respect to: . . . [t]he offender's current ability to pay restitution, based on all financial
24 information available to the Court, including information provided by the offender."); Wash. Code § 9.94A.750(1)
25 ("The court should take into consideration the total amount of the restitution owed, the offender's present, past, and
26 future ability to pay, as well as any assets that the offender may have."). See also Tex. Crim. Proc. Code § art.
27 42.037 ("The court shall resolve any dispute relating to the proper amount or type of restitution. . . .The burden of
28 demonstrating the financial resources of the defendant and the financial needs of the defendant and the defendant's
29 dependents is on the defendant.") (demonstrating the defendant's ability to pay is a factor in awarding restitution);
30 cf. 12 R.I. Gen. Laws § 12-19-32 ("Any person subject to the provisions of this chapter may request an ability to pay
31 hearing by filing the request with the court which imposed the original sentence."). Accord, National Conference of
32 Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime
33 Act (1992), § 402(b) ("In determining the amount and method of payment, the court shall consider the financial
34 resources and future ability of the defendant to pay."); id. § 402(e) ("The sentencing court at any time may modify
35 the order for payment in accordance with the defendant's ability to pay.").

36 Some authorities expressly provide that the financial means of offenders may not be considered. See, e.g.,
37 Ariz. Rev. Stat. § 13-804(C) ("The court shall not consider the economic circumstances of the
38 defendant in determining the amount of restitution."); Alaska Stat. § 12.55.045(g) ("The court may not, in ordering
39 the amount of restitution, consider the defendant's ability to pay restitution."); 18 U.S.C. § 2259(b)(4)(B)(i) ("A

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court may not decline to issue an order under this section because of . . . the economic circumstances of the defendant"); Cal. Penal Code § 1202.4(g) ("The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order."); Haw. Rev. Stat.§ 706-646(3) ("In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order."); People v. Day, 958 N.E.2d 300, 314 (Ill. Ct. App. 2011) ("However, the trial court is not required to consider a defendant's financial circumstances when setting the amount of restitution; the trial court is required to consider the ability to pay only when determining the time and manner of payment or when considering a petition to revoke restitution."); 18 Pa. Stat. § 1106(c)(1)(i) ("The court shall order full restitution: . . . [r]egardless of the current financial resources of the defendant, so as to provide the victim with the fullest compensation for the loss."); The ABA Sentencing Standards mention the defendant's financial circumstances as relevant only to the schedule of payment, not the award of restitution in the first instance. See American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.15(c)(ii) ("The agency should provide that sentencing courts may require offenders to pay the full amount of the sanction forthwith or, taking into account the financial circumstances of an offender, to pay the amount in scheduled installments.") The Commentary to Standard 18-3.15 takes note of the debate on this issue, id. at 111:

> In drafting the Standards there was a minority view that the total amount of a restitution order ought to be set with an eye toward an offender's ability to pay. This position finds some support in the ABA's Restitution Guidelines.ls A competing view prevailed in the Standards Committee, however. Based on the quasi-civil character of a restitution sanction, and the fact that a defendant's ability to pay would not be a factor in determining the amount of recovery in civil proceedings, the Committee decided that the gross amount of restitution should be fixed by the offender's gain or the victim's loss, but that the schedule of payment should be responsive to the offender's financial circumstances.

i. Multiple victims. See 18 U.S.C. § 3664(g)(2)(i) ("If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution"); Del. Code tit. 12, § 4106(d)(2) ("Where there are multiple victims, disbursements shall be in proportion to the amounts owed to each victim, with individuals to receive disbursements in full before insurance companies receive any disbursements."); Minn. Stat. § 611A.045 Subd.1(a)(1) ("If there is more than one victim of a crime, the court shall give priority to victims who are not governmental entities when ordering restitution."); Wash. Code § 9.94A.750(8) ("Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim.").

j. Multiple offenders. Subsection (8) draws from Paroline v. United States, 572 U.S. __, 134 S. Ct. 1710, 1727-1728 (2014):

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1 There remains the question of how district courts should go about determining the proper amount of
2 restitution. At a general level of abstraction, a court must assess as best it can from available evidence the
3 significance of the individual defendant's conduct in light of the broader causal process that produced the
4 victim's losses. This cannot be a precise mathematical inquiry and involves the use of discretion and
5 sound judgment. But that is neither unusual nor novel, either in the wider context of criminal sentencing
6 or in the more specific domain of restitution. It is well recognized that district courts by necessity
7 "exercise . . . discretion in fashioning a restitution order." §3664(a). Indeed, a district court is expressly
8 authorized to conduct a similar inquiry where multiple defendants who have "contributed to the loss of a
9 victim" appear before it. §3664(h). In that case it may "apportion liability among the defendants to reflect
10 the level of contribution to the victim's loss . . . of each defendant." Ibid.

11 For examples of pre-*Paroline* statutory provisions, see 18 U.S.C. § 3664(g)(2)(h) ("If the court finds that more
12 than one defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of
13 the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to
14 the victim's loss and economic circumstances of each defendant"); Ariz. Rev. Stat. § 13-804(F) ("If more than one
15 defendant is convicted of the offense that caused the loss, the defendants are jointly and severally liable for the
16 restitution."); Colo. Rev. Stat. § 18-1.3-603(5) ("If more than one defendant owes restitution to the same victim for
17 the same pecuniary loss, the orders for restitution shall be joint and several obligations of the defendants."); 730 Ill.
18 Comp. Stat. § 5/5-5-6(c) ("In cases where more than one defendant is accountable for the same criminal conduct that
19 results in out-of-pocket expenses, losses, damages, or injuries, each defendant shall be ordered to pay restitution in
20 the amount of the total actual out-of-pocket expenses, losses, damages, or injuries to the victim proximately caused
21 by the conduct of all of the defendants who are legally accountable for the offense. . . . As between the defendants,
22 the court may apportion the restitution that is payable in proportion to each co-defendant's culpability in the
23 commission of the offense."); Me. Rev. Stat. tit. 17-A, § 1326-E ("If the victim's financial loss has been caused by
24 more than one offender, the order must designate that the restitution is to be paid on a joint and several basis, unless
25 the court specifically determines that one defendant should not equally share the burden"); Wis. Stat. Ann.
26 § 973.20(7) ("If more than one defendant is ordered to make payments to the same person, the court may apportion
27 liability between the defendants or specify joint and several liability").

28 *k. Process for proof of economic losses.* On the applicable burden of proof for criminal restitution awards, see
29 Tex. Crim. Proc. Code, Art. 42.037 (k) ("The court shall resolve any dispute relating to the proper amount or type of
30 restitution. The standard of proof is a preponderance of the evidence. The burden of demonstrating the amount of the
31 loss sustained by a victim as a result of the offense is on the prosecuting attorney. The burden of demonstrating the
32 financial resources of the defendant and the financial needs of the defendant and the defendant's dependents is on the
33 defendant. The burden of demonstrating other matters as the court deems appropriate is on the party designated by
34 the court as justice requires."); Mass. R. Evid. § 1114(b) ("A restitution order must be based on evidence presented
35 to the court unless the parties enter into a stipulation. The defendant has the right to counsel and the right to be heard
36 at a restitution hearing. Cross-examination of the victim is limited to the issue of restitution and does not extend to
37 matters concerning guilt or innocence. Hearsay is admissible, but an award of restitution cannot rest entirely on
38 unsubstantiated and unreliable hearsay. The Commonwealth has the burden of proving both a causal connection
39 between the crime and the victim's economic loss and the amount of the loss by a preponderance of the evidence.");

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1 Minn. State. § 611A.045, Subd. 3 ("A dispute as to the proper amount or type of restitution must be resolved by the
2 court by the preponderance of the evidence. The burden of demonstrating the amount of loss sustained by a victim
3 as a result of the offense and the appropriateness of a particular type of restitution is on the prosecution"); see also
4 State v. Fader, 358 N.W.2d 42, 48 (Minn. 1984) (remanding for reconsideration of restitution award and first-degree
5 criminal-sexual-conduct case because record provided no factual basis for a $10,000 restitution order).

6 Many states do not define the burden of proof at a restitution hearing by statute, leaving the question to the
7 courts. Most judicial authorities have applied the preponderance-of-the-evidence standard even in the absence of
8 statutory command. See, e.g., Alaska Stat. § 12.55.045(a) ("The court shall, when presented with credible evidence,
9 unless the victim or other person expressly declines restitution, order a defendant convicted of an offense to make
10 restitution as provided in this section . . ."), Noffsinger v. State, 850 P.2d 647, 650 (Alaska 1993) ("If uncertainty
11 exists, the appropriate amount for restitution must be proved by a preponderance of the evidence."); Ariz. Rev. Stat.
12 § 13-804 ("the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as
13 restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's
14 conduct."), In re Stephanie B., 65 P.3d. 114, 118 (Ariz. Ct. App. 2003) ("The burden of proof applicable to
15 restitution is proof by a preponderance of the evidence.") (citations omitted); Cal. Penal Code § 1202.4(f)(1)
16 ("The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.
17 The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims,
18 or the defendant."), People v. Sy, 166 Cal. Rptr. 3d 778, 794 (Cal. Ct. App. 2014) ("the standard of proof at a
19 restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt."); Colo. Rev. Stat.
20 § 18-1.3-603(2) ("The court shall base its order for restitution upon information presented to the court by the
21 prosecuting attorney . . ."), People v. Carpenter, 885 P.2d 334, 336 (Colo. Ct. App. 1994) ("We conclude that a
22 preponderance of the evidence is a sufficient and proper burden of persuasion in proceedings to establish restitution
23 in criminal cases."); Del. Code tit.12, § 4106(b) ("In accordance with the evidence presented to the court, the court
24 shall determine the nature and amount of restitution, if any, to be made to each victim of the crime of each convicted
25 offender."), Benton v. State, 711 A.2d 792, 797 (Del. 1998) ("At sentencing, restitution may be based on those
26 factors which are established by a preponderance of the evidence."); Haw. Rev. Stat. § 706-646(2) ("The court shall
27 order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result
28 of the defendant's offense when requested by the victim."), State v. DeMello, 310 P.3d. 1033, 1044 (Haw. Ct. App.
29 2013) ("Given the Legislature's intent that the restitution process serve as an expedited alternative to a civil lawsuit,
30 we agree with the multitude of other states deciding the matter and adopt a preponderance of the evidence standard
31 in restitution proceedings in Hawai'i."); People v. Tzitzikalakis, 8 N.Y.3d 217, 221, 832 N.Y.S.2d 120, 864 N.E.2d
32 44 (2007); State v. VanDusen, 691 A.2d 1053, 1055 (Vt. 1997) ("at sentencing, matters need be proven only by a
33 preponderance of the evidence . . ."); Wash. Code § 9.94A.750(3) ("restitution ordered by a court pursuant to a
34 criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses
35 incurred for treatment for injury to persons, and lost wages resulting from injury."), State v. Hughes, 110 P.3d 192,
36 211 (Wash. 2005) ("To determine the amount of restitution, the trial court can either rely on a defendant's
37 acknowledgment or it can determine the amount by a preponderance of evidence."). In New York, to meet its
38 burden, the government must show "the amount taken minus the benefit conferred." People v. Tzitzikalakis, 8
39 N.Y.3d 217, 222 (2007).

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In support of the constitutionality of subsection (9) under *Apprendi* and *Blakely*, see People v. Horne, 767 N.E.2d 132, 139 (N.Y. 2002) (holding imposition of restitution order did not violate *Apprendi* rule) ("Federal appellate courts that have addressed *Apprendi* challenges in the restitution context have universally held the *Apprendi* rule inapplicable to restitution orders. Because the federal restitution statute permits a sentence of restitution for any offense "in the full amount of each victim's losses as determined by the court" (18 USC § 3664[f][1][A]), the sentencing court's factual determinations neither expand nor exceed the maximum restitution sentence authorized for any offense"). For examples of lower court decisions rejecting application of the *Apprendi* rule to restitution determinations, see United States v. Williams, 445 F.3d 1302, 1310 (11th Cir. 2006), abrogated on other grounds by United States v. Lewis, 492 F.3d 1219, 1221 (11th Cir. 2007); United States v. Milkiewicz, 470 F.3d 390, 391 (1st Cir. 2006); United States v. Reifler, 446 F.3d 65, 104 (2d Cir. 2006); United States v. Leahy, 438 F.3d 328, 331 (3d Cir. 2006) (en banc); United States v. Nichols, 149 F. App'x 149, 153 (4th Cir. 2005); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 453 (6th Cir. 2005); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); People v. Smith, 181 P.3d 324, 327 (Colo. App. 2007); State v. Clapper, 732 N.W.2d 657, 661, 663 (Neb. 2007); State v. McMillan, 111 P.3d 1136, 1139 (Or. Ct.App. 2005); State v. Kinneman, 119 P.3d 350, 355 (Wash. 2005) (en banc).

l. Effects of victim-restitution orders on civil proceedings. Most but not all state codes are consistent with the revised Code in specifying that a recovery of restitution in criminal proceedings should be set off against a later civil recovery. Alaska Stat. § 12.55.045(b) ("An order of restitution in favor of a person does not preclude that person from bringing a separate civil action and proving in that action damages in excess of the amount of the restitution order that is actually paid."); Colo. Rev. Stat. § 18-1.3-603(6) ("Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in any federal or state civil proceeding."); Del. Code tit. 12, § 4106(e) ("An order of restitution may not preclude the victim from proceeding in a civil action to recover damages from the offender. A civil verdict shall be reduced by the amount of restitution paid under the criminal restitution order."); Haw. Rev. Stat. 706-646(4) ("The restitution ordered shall not affect the right of a victim to recover under section 351-33 or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33."); 730 Ill. Comp. Stat. § 5/5-5-6(n) ("(n) An order of restitution under this Section does not bar a civil action for: (1) Damages that the court did not require the person to pay to the victim under the restitution order but arise from an injury or property damages that is the basis of restitution ordered by the court; and (2) Other damages suffered by the victim."); Minn. Stat. § 611A.04 Subd. 3 ("A decision for or against restitution in any criminal or juvenile proceeding is not a bar to any civil action by the victim or by the state pursuant to section 611A.61 against the offender. The offender shall be given credit, in any order for judgment in favor of a victim in a civil action, for any restitution paid to the victim for the same injuries for which the judgment is awarded."); New York Penal Law § 60.27(6) ("Any payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment."); 18 Pa. Stat. § 1106(g) ("No judgment or order of restitution shall debar the owner of the property or the victim who sustained personal injury, by appropriate action, to recover from the offender as otherwise provided by law, provided that any civil award shall be reduced by the amount paid under the criminal judgment."); 13 Vt. Stat. § 7043(h) ("Restitution ordered under this section shall not preclude a person from pursuing an independent civil action for all claims not covered by the restitution order."); Wash. Code

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§ 9.94A.750(8) ("This section does not limit civil remedies or defenses available to the victim or offender including support enforcement remedies for support ordered under subsection (6) of this section for a child born as a result of a rape of a child victim.").

On the question of estoppel, see Ariz. Rev. Stat. § 13-807 ("A defendant who is convicted in a criminal proceeding is precluded from subsequently denying in any civil proceeding brought by the victim or this state against the criminal defendant the essential allegations of the criminal offense of which he was adjudged guilty, including judgments of guilt resulting from no contest pleas."); Tex. Crim. Proc. Code, Art. 42.037(l) ("Conviction of a defendant for an offense involving the act giving rise to restitution under this article estops the defendant from denying the essential allegations of that offense in any subsequent federal civil proceeding or state civil proceeding brought by the victim, to the extent consistent with state law.") 18 U.S.C. § 3664(l) ("A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.").

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§ 6.04B. Fines.[25]

(1) A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(a) [$200,000] in the case of a felony of the first degree;

(b) [$100,000] in the case of a felony of the second degree;

(c) [$50,000] in the case of a felony of the third degree;

(d) [$25,000] in the case of a felony of the fourth degree;

(e) [$10,000] in the case of a felony of the fifth degree;

[*The number and gradations of maximum authorized fine amounts will depend on the number of felony grades created in § 6.01.*]

(f) [$5000] in the case of a misdemeanor; and

(g) [$1000] in the case of a petty misdemeanor.

[25] This Section was originally approved with one amendment in 2014; see Tentative Draft No. 3. The bracketed language appearing twice in subsection (h) originally stated "[five times]" rather than "[three times]."

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1 **(h) An amount up to [three times] the pecuniary gain derived from the offense by**
2 **the offender or [three times] the loss or damage suffered by crime victims as a result of**
3 **the offense of conviction.**

4 **(2) The purposes of fines are to exact proportionate punishments and further the goals**
5 **of general deterrence and offender rehabilitation without placing a substantial burden on**
6 **the defendant's ability to reintegrate into the law-abiding community.**

7 **(3) The [sentencing commission] [state supreme court] is authorized to promulgate a**
8 **means-based fine plan. Means-based fines, for purposes of this Section, are fines that are**
9 **adjusted in amount in relation to the wealth and/or income of defendants, so that the**
10 **punitive force of financial penalties will be comparable for offenders of varying economic**
11 **means. One example of a means-based fine contemplated in this Section is the "day fine,"**
12 **which assigns fine amounts with reference to units of an offender's daily net income.**

13 **(4) Means-based fine amounts shall be calculated with reference to:**

14 **(a) the purposes in subsection (2); and**

15 **(b) the net income of the defendant, adjusted for the number of dependents**
16 **supported by the defendant, or other criteria reasonably calculated to measure the**
17 **wealth, income, and family obligations of the defendant.**

18 **(5) Means-based fines under the plan may exceed the maximum fine amounts in**
19 **subsection (1).**

20 **(6) The means-based fine plan must include procedures to provide the courts with**
21 **reasonably accurate information about the defendant's financial circumstances as needed**
22 **for the calculation of means-based fine amounts.**

23 **(7) A means-based fine shall function as a substitute for a fine that could otherwise**
24 **have been imposed under subsection (1), and may not be imposed in addition to such a fine.**

25 **Comment:** [26]

26 *a. Scope.* This provision authorizes two alternative systems of fines: traditional fines, to be
27 set in accordance with the schedule of maximum penalty amounts, and means-based fines, which
28 vary according to the wealth and income of defendants. Subsection (7) provides that these are
29 mutually exclusive punishments. While a state may choose to authorize both types of fines, they
30 may not be imposed in the same case.

31 *b. Traditional fines*. The 1962 Model Penal Code sought to sharply limit the use of fines as
32 criminal penalties. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985),
33 § 7.02, Comment [1] ("This section articulates the policy of the Model Code to discourage use of

[26] This Comment has not been revised since § 6.04B's approval (as amended) in 2014. All Comments will be updated for the Code's hardbound volumes.

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fines as a routine or even frequent punishment for the commission of crime."); see also revised § 6.04 and Comment *c*. As part of this policy, the original Code set low maximum fine amounts, descending by grade of offense. See Model Penal Code § 6.03 (1962) (maximum fine amount of $10,000 for felonies of the first or second degree). Many states continue to adhere to the spirit of the original Code's recommendations, and authorize low maximum fine amounts for even the most serious felonies—as little as $5000 in one state. There is dramatic diversity in approach from state to state, however. One state permits fines as great as $1 million—and a number of states have no fixed-dollar ceilings for some types of crimes. Even more so than for imprisonment, there is no coherent American fining policy across jurisdictions.

The revised Code recommends much more severe fine amounts than the original Code, and opts for maximum fines that would fall among the upper one-half of all U.S. jurisdictions. The primary rationale for this change in policy is to allow states room for the prosecution and punishment of major financial crimes, including organizational offenses and large-scale fraudulent schemes. In many such cases, the dollar amounts at stake are far greater than for the average "street" crime, and some offenders will have the means to pay large fine amounts without implicating the limitations on severity of economic sanctions stated in §§ 6.02(4) ("The court may not impose any combination of sanctions if their total severity would result in disproportionate punishment under § 1.02(2)(a)(i).") and 6.04(6) ("No economic sanction [other than victim restitution] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."). For example, for a corporate defendant convicted of homicide, a fine of $200,000 would be neither disproportionate nor threatening to public safety because of its debilitating effects on offender rehabilitation. All specific maximum amounts in subsection (1) are stated in brackets, signaling that there is wide latitude for policy choice in this domain, and also allowing for changes in currency values over time.

Subsections (1) and (2) address questions of maximum fine amounts, and the essential principles that should be followed by courts in setting fines within those ceilings. While these provisions are both general and permissive, they should be read with the understanding that, in the revised Code, the sentencing commission is charged with responsibility to develop guidelines for the imposition of fines and other economic sanctions; see § 6B.02(6) (Tentative Draft No. 1, 2007) ("The guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission"). See also § 6.04(5) ("When imposing economic sanctions, the court shall apply any relevant sentencing guidelines").

There is no inherent fine amount that is suited to each grade of offense, and the felt impact of fines will vary greatly depending on defendants' individual circumstances. The maximum dollar amounts in subsection (1)(a) through (g) are also vulnerable to the changing value of currency over years and decades. The amounts supplied in brackets are heavily influenced by the grading schemes of existing state laws at the time of the Code's drafting, and are scaled to

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increase along with the severity of offense classifications. The rather high sums reflected in the provision are crafted to allow for the most serious offense at each grade of felony and misdemeanor, while also imagining an unusual offender who could be made to pay such amounts within the structures of § 6.04(6) ("No economic sanction [other than victim restitution] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."). While such cases are far from the norm in American criminal-justice systems, it would frustrate the societal purposes of sentencing to fail to make allowances for them when they arise.

Subsection (1)(h) is a fine-setting rule with no absolute ceiling, and is intended in part to address cases that fall outside of the envelope of possibilities contemplated in subsection (1)(a) through (g). The provision has roots in original Model Penal Code § 6.03(5) (1962) (authorizing fines above stated dollar ceilings in "any higher amount equal to double the pecuniary gain derived from the offense by the offender"). The revised provision is more aggressive than its precursor, in two ways. It would allow fine calculations to respond to victim losses as well as offender gains, and it authorizes sentencing courts to apply a multiplier of up to three times those losses or gains. A principal goal of subsection (1)(h) is the deterrence of major financial crimes, so its formula for maximum fines takes stock of the low risk of detection that often accompanies those crimes. The multiplier of three in subsection (1)(h) is stated in brackets. Existing state legislation on this model includes multipliers of two or three. The operation of this provision will be limited in some cases under the Code's overall approach to economic sanctions. The impact of subsection (1)(h) will be significantly constrained by the Code's requirements that sanctions may not be disproportionately severe—separately or in combination, see §§ 1.02(2)(a)(i) and 6.02(4), and that economic sanctions may not be imposed if they would reduce offenders to circumstances in which they are unable to provide reasonable support for themselves and their families, see § 6.04(6) and subsection (2) of this provision.

c. Purposes of fines. The dominant purposes of fines are punishment and offender rehabilitation through the mechanism of specific deterrence. In either case, subsection (2) admonishes that fines should not place "a substantial burden on the defendant's ability to reintegrate into the law-abiding community." If economic sanctions become criminogenic, that is, if they contribute to criminal conduct that could otherwise have been avoided, then the sentencing system has operated in a profoundly self-defeating way. Subsection (2) follows the Code's general policy for all economic penalties, with the possible exception of victim restitution; see § 6.04(6) and Comments *b* and *h*.

d. Means-based fines. Subsections (3) through (7) encourage state justice systems to experiment with means-based or "day-fine" schemes similar to those used in some European nations. Because these terminologies are not in common usage among American criminal-justice policymakers, subsection (3) defines the terms "means-based fines" and "day fines."

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Prior efforts and pilot programs to implement means-based fines have failed to take root in the United States. Nonetheless, the Code recommends that this alternative approach to financial penalties continue to be explored in the ongoing evolution of American sentencing law. The political landscape of criminal justice has been changing in the United States, with dropping crime rates over the course of two decades and chronic budgetary stress on corrections systems. In some European jurisdictions, day fines have been employed as effective substitutes for incarceration. For some classes of crimes in the United States, such as drug-possession offenses, which result in large numbers of needless prison sentences, a more developed jurisprudence of economic sanctions may at some point in the future provide useful alternatives to the use of confinement.

REPORTERS' NOTE [27]

a. Scope. The revised Code rejects calls in the academic literature to abolish the criminal fine altogether. See Katherine Beckett and Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol'y 509 (2011) (recommending abolition of fines and fees, but not restitution, and not fines on the European day-fine model); Mary Fainsod Katzenstein and Mitali Nagrecha, A New Punishment Regime, 10 Criminology & Pub. Pol'y 555, 565 (2011) ("we do not think it politically likely (nor desirable) that all financial obligations against individuals in the criminal justice system be abolished. Some restitution assessments and some levels of child support will and should be collected. What we do think should be abolished is the debt collection regime as characterized by the thorough suffusion of the criminal justice system that is largely populated by low-income individuals with financial levies that simply cannot be paid.").

b. Traditional fines. There is little rhyme or reason in the fixing of maximum fines in American legislation. For states that authorize fine amounts that are roughly similar to the recommendations in § 6.04B(1)—that is, in the same general ballpark, see Alaska Stat. § 12.55.035 ($500,000 for murder in the first or second degree and other designated offenses, $250,000 for class A felonies, $100,000 for class B felonies, $50,000 for class C felonies, $10,000 for class A misdemeanors, and $2000 for class B misdemeanors); Ariz. Rev. Stat. § 13-801(A) ("A sentence to pay a fine for a felony shall be a sentence to pay an amount fixed by the court not more than one hundred fifty thousand dollars."); Colo. Rev. Stat. § 18-1.3-401(1)(a)(III)(A) ($1 million for Class 2 felonies, $750,000 for Class 3 felonies, $500,000 for Class 4 felonies, and $100,000 for Class 5 and 6 felonies); 11 Del. Code § 4205(k) (without any stated maximum, "the court may impose such fines and penalties as it deems appropriate"); N.J. Stat. 2C:43-3 ($200,000 for first-degree felonies, $150,000 for second-degree felonies, $15,000 for third-degree felonies, and $10,000 for fourth-degree felonies); N.Y. Penal Law § 80.00 ($100,000 for A-I felonies, $50,000 for A-II felonies, $30,000 for B felonies, and $15,000 for C felonies); Or. Rev. Stat. § 161.625 ($500,000 for murder or aggravated murder, $375,000 for Class A felonies, $250,000 for Class B felonies, $125,000 for Class C felonies); Va. Code § 18.2-10 ($100,000 for Class 1 through Class 4 felonies, and $2500 for Class 5 and Class 6 felonies); Wis. Stat. § 939.50 ($100,000 for Class C and D felonies, $50,000 for Class E felonies, $25,000 for Class F and G felonies, and $10,000 for Class H and I felonies).

[27] This Reporters' Note has not been revised since § 6.04B's approval (as amended) in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 Many states authorize fine amounts that are considerably lower than recommended in the Code. See, e.g.,
2 Conn. Gen. Stat. § 53a-41 (maximum fine for any felony is $20,000); Fla. Stat. § 775.083 (maximum fine for any
3 felony is $15,000); Iowa Code § 902.9(1) (maximum fine for any felony of $10,000; no fines authorized for felonies
4 more serious that Class "C" felonies); Hawaii Rev. Stat. § 706-640 (maximum fine for any felony is $50,000);
5 Maine Rev. Stat. § 1301 (maximum fine for any felony is $50,000); Missouri Stat. § 560.011 (maximum fine for any
6 felony is $5000; no fines authorized for Class A and B felonies); Pa. Cons. Stat. § 1101(1)(2) (maximum fine of
7 $50,000 for murder and $25,000 for felonies of the first and second degree); Tenn. Code § 40-35-111 (maximum
8 fine of $50,000 for most serious felonies); Tex. Code § 12.32(b) (maximum fine for any felony is $10,000); Wash.
9 Rev. Code § 9A.20.021(1)(a) (maximum fine for any felony is $50,000).

10 The formula in § 6.04B(1)(h) is similar to the legislation in many states. At least one state allows fines in the
11 amount of three times the offender's pecuniary gain, the gain sought by the offender, or losses suffered by crime
12 victims; see Alaska Stat. § 12.55.035(c)(2), (3). The more common formula, following Model Penal Code § 6.03(5)
13 (1962), is to allow maximum fines of double the amount of the offender's gain—although the base measure is often
14 supplemented by the amount of loss to victims, as well. See N.J. Stat. § 2C:43-3(e) ("Any higher amount equal to
15 double the pecuniary gain to the offender or loss to the victim caused by the conduct constituting the offense by the
16 offender."). The problem of fine amounts too low to be effective deterrents in the setting of corporate crime was first
17 noted by John C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problems of
18 Corporate Punishment, 79 Mich. L. Rev. 386, 389-393 (1981) (discussing "the deterrence trap" in the economic
19 incentives of prevention of corporate offending).

20 *d. Means-based fines.* "Day fines" or "means-based fines" have been used successfully in a modest number of
21 European states, including Germany, Finland, Sweden, and Denmark. Their purchase elsewhere has been small. See
22 Pat O'Malley, Politicizing the Case for Fines, 10 Criminology & Pub. Pol'y 546, 546 (2011) ("day fines are not
23 universally used outside the United States; in fact, only a handful of countries use them, and some jurisdictions
24 including the English, Dutch, French, and Australian have decided not to go down that path."). The raison d'être of
25 the day fine is to replace confinement sentences with financial penalties that are meaningful, enforceable, and scaled
26 to the wealth of individual defendants. In theory, day fines can vary greatly in absolute amount, yet hold equivalent
27 retributive force when imposed on differently situated offenders. Similar schemes have been tested and have met
28 with little success in pilot programs in the United States. See Susan Turner and Judith Greene, The FARE Probation
29 Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County, 21 Justice
30 System J. 1 (1999); Bureau of Justice Assistance, How to Use Day Fines (Structured Fines) as a Criminal Sanction
31 (1996); Sally T. Hillsman and Judith A. Greene, The Use of Fines an Intermediate Sanction, in James M. Byrne,
32 Arthur J. Lurigio, and Joan Petersilia eds., Smart Sentencing: The Emergence of Intermediate Sanctions (1992);
33 Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational
34 Sentencing System (1990), at 140-147; Judith Greene and Sally Hillsman, Tailoring Criminal Fines to the Financial
35 Means of the Offender, 72 Judicature 38 (1988).

36 In the United States, a small number of state legislatures authorized the creation of day-fine programs in the
37 1980s and 1990s, but none has come into widespread use. For example, a 1994 Alaska statute instructed the state
38 supreme court to develop a system of day fines for misdemeanants, with a schedule of presumptive sentences
39 expressed in day-fine units, but no program was ever created and the law was repealed in 2009. Alaska Stat.

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§ 12.55.036. In 1990, the Minnesota Sentencing Guidelines Commission was given statutory responsibility to invent a day-fine system for those receiving a "probationary felony, gross misdemeanor, or misdemeanor sentence," but very little materialized from this statutory command; see Minn. Stat. § 244.16; Minn. Sent. Guidelines § 3.A.2(5) (informing courts, with no further explanation, that "[i]f fines are imposed [as part of felony probation sentences], the Commission urges the expanded use of day fines, which standardizes the financial impact of the sanction among offenders with different income levels"). A handful of other state codes contain references to "day fines," with no details concerning their administration. See, e.g., Ala. Code § 12-25-32(2)(a)(8); Missouri Stat. § 217.777(5)(1).

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§ 6.04C. Asset Forfeitures.[28]

(1) The sentencing court may order that assets be forfeited following an offender's conviction for a felony offense. [This Section sets out the exclusive process for asset forfeitures in the state and supersedes other provisions in state or local law, except that civil and administrative processes for the forfeiture of stolen property and contraband are not affected by this Section.]

(2) The purposes of asset forfeitures are to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies.

(3) Assets subject to forfeiture include:

(a) proceeds and property derived from the commission of the offense;

(b) proceeds and property directly traceable to proceeds and property derived from the commission of the offense; and

(c) instrumentalities used by the defendant or the defendant's accomplices or co-conspirators in the commission of the offense.

(4) Assets subject to forfeiture under subsection (3)(c), in which third parties are partial or joint owners, may not be forfeited unless the third parties have been convicted of offenses for which forfeiture of the assets is an authorized sanction.

[28] This Section was originally approved in 2014; see Tentative Draft No. 3.

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(5) Forfeited assets, and proceeds from those assets, shall be deposited into [the victims-compensation fund]. A state or local law-enforcement agency that has seized forfeitable assets may not retain the assets, or proceeds from the assets, for its own use. If a state or local law-enforcement agency receives forfeited assets, or proceeds from those assets, from any other governmental agency or department, including any federal agency or department, such assets or proceeds shall be deposited into [the victims-compensation fund] and may not be retained by the receiving state or local law-enforcement agency.

Comment: [29]

a. Scope. Section 6.04C includes alternative recommendations to states' lawmakers. Bracketed language in subsection (1) gives legislatures the choice of enacting a provision that speaks only to asset forfeiture as a criminal sentence, or that applies more broadly to current institutions of civil forfeiture, as well.

b. Purposes of forfeiture. The sanction of asset forfeiture is legitimately employed to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. At the same time, the legitimate purposes of asset forfeitures do not include generation of revenue for law-enforcement agencies. Subsection (2) lays out these underlying principles. The widespread practice of allowing law-enforcement agencies to retain some or all of forfeited property, or its proceeds, creates a serious conflict of interest in the work of those agencies. Asset forfeiture has become a large-scale activity in federal law and in many states, with most activity conducted under the rubric of civil forfeitures.

c. Criminal and civil forfeiture. Section 6.04C(1) offers alternative recommendations to state legislatures. Without the bracketed language, the provision speaks narrowly to forfeitures that are imposed as a criminal sentence. Such forfeitures are a small fraction of all asset forfeitures effected in the United States today.

If the bracketed language in subsection (1) is included, the scope of the provision is greatly enlarged. Again, § 6.04C would address forfeiture as a criminal penalty, but would also abrogate most forms of civil forfeiture. For adopting states, it would represent a legislative policy determination that asset forfeitures, previously denominated as civil penalties for criminal conduct, are better classified as criminal punishments outright. Given the punitive severity of many forfeitures, there is a strong case for such reclassification. Indeed, the Supreme Court has already found civil forfeitures to be "quasi-criminal" for some purposes under the Eighth Amendment's Excessive Fines Clause. Under the bracketed alternative in subsection (1), forfeitures formerly conceived as civil measures would become subject to the full range of constitutional protections attendant to criminal prosecutions—and to statutory protections of the

[29] This Comment has not been revised since § 6.04C's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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Criminal Code. Perhaps the strongest case for bringing asset forfeitures entirely into the criminal-sentencing process is the record of law-enforcement conflicts of interest in use of the civil-forfeiture power; see Comment *e* below.

d. Third-party interests. Subsection (4) would expand the protections commonly extended to third parties with ownership interests in property subject to forfeiture, shielding their interests unless they are themselves convicted of a criminal offense.

e. Law-enforcement conflicts of interest. Subsection (5) would eliminate conflicts of interest among law-enforcement agencies, for any forfeitures governed by § 6.04C, by prohibiting the seizing agency from retaining forfeited assets or their proceeds—a measure also endorsed by the Uniform Law Commission for civil forfeitures. The Code follows the practice in a minority of states, where law-enforcement agencies are not entitled to retain any portion of forfeited assets. In order to make the prohibition fully effective it is also necessary, as a matter of state law, to foreclose the practice of "adoptive forfeiture" or "equitable sharing," by which state agencies receive a substantial share of forfeited assets seized by federal authorities in their jurisdiction.

The Code's suggested destination for forfeited assets, and proceeds from those assets, is the state's victim-compensation fund, created in § 6.04A(3). This disposition effectuates the Code's policy that victim restitution should be given priority over other economic sanctions, see § 6.04(10) ("If the court imposes multiple economic sanctions including victim restitution, the court shall order that payment of victim restitution take priority over the other economic sanctions"). The Institute's preference is stated in bracketed language, however. Many other worthy recipients of forfeited assets can be imagined, and this is ultimately an issue for legislative discretion.

REPORTERS' NOTE [30]

a. Scope. The total amount of assets forfeited under federal, state, and local laws—both civil and criminal—is not easily calculated. Thousands of separate laws exist across different levels of government; see Steven F. Kessler, Civil and Criminal Forfeiture: Federal and State Practice (1993). The Department of Justice reports the amounts that flow annually through the federal Asset Forfeiture Program, and how these funds are disbursed between state and federal law-enforcement agencies—but reliable information on forfeitures effected solely through state and local laws is not available. In fiscal year 2011, the Department of Justice reported that nearly $1.7 billion was received into the Asset Forfeiture Fund, including over $1.4 billion in forfeited cash or currency. See U.S. Department of Justice, Total Net Deposits to the Fund by State of Deposit as of September 30, 2011, at http://www.justice.gov/jmd/afp/02fundreport/2011affr/report1.htm; Assets Forfeiture Fund and Seized Asset Deposit Fund Method of Disposition of Forfeited Property - Fiscal Year 2011, at http://www.justice.gov/jmd/afp/02fundreport/2011affr/report5.htm. More than $438 million of this was returned to state agencies as "equitable sharing"; see Equitable Sharing Payments of Cash and Sale Proceeds Executed During

[30] This Reporters' Note has not been revised since § 6.04C's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 Fiscal Year 2011, by Recipient Agency, at http://www.justice.gov/jmd/afp/02fundreport/2011affr/report2b.htm. The
2 large dollar amounts involved have become meaningful components of many law-enforcement budgets. One survey
3 of police agencies found that more than 60 percent reported they were dependent or "addicted" to the flow of assets
4 garnered through forfeitures, that the great majority of forfeited assets are connected with the drug trade, and are
5 often used to fund special police drug task forces. See John L. Worrall, Addicted to the Drug War: The Role of Civil
6 Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement, 29 J. of Crim. Justice 171, 221
7 (2001); see also Gregory Vecchi and Robert T. Sigler, Asset Forfeiture: A Study of Policy and Its Practice (2001).

8 *b. Purposes of forfeiture.* Proponents of asset forfeiture, as currently practiced, openly justify it as a means of
9 raising revenue for law-enforcement activities, in addition to its crime-suppressive purposes. See John L. Worrall
10 and Tomislav V. Kovandzic, Is Policing For-Profit? Answers from Asset Forfeiture, 7 Criminology & Public Policy
11 219, 237, 239 (2008) ("Budget constraints have forced police executives to seek additional sources of revenue for
12 their agencies. . . . Forfeiture is one other such source. . . . It is difficult to fault law-enforcement agencies for
13 exploiting legal arrangements that maximize their potential to offset the high costs associated with America's war on
14 drugs."). See also Legislation Opposed by the National Fraternal Order of Police, Fraternal Order of Police,
15 http://www.fop.net/legislative/oppose.shtml (last visited April 18, 2012) (showing that the Fraternal Order of Police,
16 a national organization representing thousands of law-enforcement officers, opposes any weakening of the Civil
17 Asset Forfeiture Reform Act of 2000); Lexington, A Truck in the Dock: How the Police Can Seize Your Stuff When
18 You Have Not Been Proven Guilty of Anything, The Economist (May 27, 2010) (reporting survey results that "40%
19 of police executives agreed that funds from civil-asset forfeiture were 'necessary as a budget supplement'"). The use
20 of forfeited assets as budgetary relief may create a vicious circle, however, with no net gain to police departments
21 over the long term. There is evidence that some local governments have reduced appropriations to police, in
22 anticipation of continuing revenues from forfeiture proceeds. See also Katherine Baicker and Mireille Jacobson,
23 Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets, 91 J. of Pub. Economics 2113 (2007).

24 *c. Criminal and civil forfeiture*. The grayness of the line between criminal and civil forfeiture has been
25 explored in a long line of Supreme Court decisions. See The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) ("no
26 personal conviction of the offender is necessary to enforce a forfeiture in rem . . . ."); Boyd v. United States, 116
27 U.S. 616, 634 (1886) ("proceedings instituted for the purpose of declaring the forfeiture of a man's property by
28 reason of offenses committed by him, though they may be civil in form, are in their nature criminal."); United States
29 v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971) (citing Boyd v. United States, 116 U.S. 616, 634 (1886); Austin
30 v. United States, 509 U.S. 602, 621-622 (1993) ("In light of the historical understanding of forfeiture as punishment
31 . . . and the evidence that Congress understood [certain civil forfeiture] provisions as serving to deter and to punish,
32 we cannot conclude that forfeiture under [those forfeiture statutes] serves solely a remedial purpose.") (subjecting
33 civil forfeitures to an excessive-fines inquiry under the Eighth Amendment); United States v. James Daniel Good
34 Real Property, 510 U.S. 43, 81-82 (1993) (Thomas, J., concurring in part and dissenting in part) ("like the majority, I
35 am disturbed by the breadth of new civil forfeiture statutes . . . . Given that current practice under [the law] appears
36 to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an
37 appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil
38 forfeiture."); United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that in rem forfeitures do not constitute
39 punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment). See also Krimstock v. Kelly, 306

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1 F.3d 40 (2d Cir. 2002) (opinion by Sotomayor, J.). For commentary on the case law, see Joy Chatman, Note, Losing
2 the Battle, But Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v.
3 United States, 38 St. Louis U. L.J. 739, 747 (1994); Barry L. Johnson, Purging the Cruel and Unusual: The
4 Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v.
5 Bajakajian, 2000 U. Ill. L. Rev. 461 (2000).

6 The broad literature critical of civil-forfeiture laws includes Todd Barnet, Legal Fiction and Forfeiture: An
7 Historical Analysis of the Civil Asset Forfeiture Reform Act, 40 Duquesne L. Rev. 77 (2001); Barclay Thomas
8 Johnson, Note, Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More
9 Civilized Civil Forfeiture System, 35 Ind. L. Rev. 1045 (2001); David Benjamin Ross, Comment, Civil Forfeiture:
10 A Fiction That Offends Due Process, 13 Regent U. L. Rev. 259 (2001); Eric Blumenson and Eva Nilsen, Policing
11 for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35 (1998); Leonard W. Levy, A License
12 to Steal: The Forfeiture of Property (1996). Calls for wholesale statutory reform include Institute for Justice, Asset
13 Forfeiture: Model State Law (2011); National Conference of Commissioners on Uniform State Laws (also known as
14 the Uniform Law Commission), Uniform Controlled Substances Act (1994).

15 *e. Law-enforcement conflicts of interest.* A few states do not allow law-enforcement or corrections agencies to
16 keep any portion of forfeiture proceeds. See Ind. Code § 16-42-20-5(e) (all forfeiture proceeds go to the state's
17 common school fund); Mo. Const., Art. IX, § 7; Mo. Stat. § 513.623; N.M. Stat. § 30-31-35(E), § 22-8-32(AX1) (0
18 percent); N.C. Const., Art. IX, § 7; N.C. Gen. Stat. § 90-112(d)(1); Vermont Stat. § 7252 ("All fines, forfeitures, and
19 penalties received by the district or superior court or by the judicial bureau, except as provided in section 7251 of
20 this title [providing for payment to villages, towns, or cities in some instances], shall belong and be paid to the state,
21 except for a $12.50 administrative charge for each offense or violation where a fine or penalty is assessed.").

22 Some states allow law-enforcement agencies to retain all of the proceeds from forfeitures initiated by those
23 same agencies. See 16 Del. Code § 4784(f)(3); D.C Code § 33-552(dX4XB); Idaho Code § 37-2744(e)(2)(C); Kan.
24 Stat. § 60-41.17(c)-(d); Maryland Crimes and Punishment Code §§ 297(f), 297(k)(3)(v) (1996); Mich. Comp Laws
25 § 333.7524; Mont. Code § 44-12-206; Nev. Rev. Stat. § 179.1187(2); N.D. Cent. Code §§ 19-03.1-36(5)(b), 54-12-
26 14; Ohio Rev. Code §§ 2933.43(D)(1)(c), 2925.43(B)(4)(c), 2925.44(B)(8)(c); Okla. Stat. §§ 2503(D)-(F), 2-
27 506(L)(3); S.D. Cod. Laws § 34-20B-89(2); Tenn. Code §§ 53-11-451(d)(4), 53-11-452(h)(2)(A); Wash. Rev. Code
28 §§ 7.43.100, 43.10.270, 69.50.505(f)(i).

29 The majority of states allow law-enforcement agencies to retain some portion of forfeited assets, usually
30 determined by formula and sometimes subject to a ceiling amount. See Ala. Code § 20-2-93(e) (distribution is based
31 on contribution to seizure); Alaska Stat. § 17.30.122 (distribution is at the discretion of the commissioner of
32 administration, within specified limits); Ariz. Rev. Stat. § 13-4315 (balance of forfeiture proceeds are paid into state
33 or local antiracketeering fund, for reimbursements for forfeiture costs, informants, and injured persons as specified);
34 Ark. Stat. § 5-64-505(k) (distribution of up to $250,000 is based on contribution to seizure, and any excess is to be
35 spent at the discretion of the state drug director); Cal. Health & Safety Code § 11489(a)(2)(A) (65 percent); Colo.
36 Rev. Stat. § 16-13-506 (After costs of forfeiture sale, 10 percent goes to judiciary, 10 percent to state law
37 enforcement, 1.5 percent to the district attorney, and the balance to the seizing agency.); Conn. Gen. Stat; §§ 54-
38 36h(f), 54-36i(c) (70 percent goes to the Department of Public Safety and local police departments); Fla. Stat.

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§ 932.7055(3)-(6) (distribution method varies depending on the seizing agency, but may not be spent on normal operating expenses of the law-enforcement agency); Ga. Code § 16-13-49(u)(4)(B) (distribution is based on contribution to seizure, except state agencies are capped at 25 percent of proceeds); Hawaii Rev. Stat. § 712A-16(2)(a) (25 percent up to a maximum of $3 million per year); ILCS ch. 720, §§ 550/12(g), 570/505(g) (distribution formula under the Cannabis Control Act and the Controlled Substances Act gives 10 percent to the state police, 25 percent to state's attorney, and 65 percent to police narcotics law-enforcement fund.); ILCS ch. 725, § 175/5(g)-(h) (distribution formula under the Narcotics Profit Forfeiture Act gives 25 percent to the state police, 25 percent to the state's attorney, and 50 percent to law enforcement, but if indictment is under the Statewide Grand Jury Act, 15 percent goes to the state's attorney, 25 percent to drug education, treatment, and prevention programs, and 60 percent to law enforcement.); Ky. Rev. Stat. § 218A.435 (10 percent is distributed to the Justice Cabinet for various drug- enforcement purposes and 36 percent to the Department of Corrections, but for forfeited coin or currency, 90 percent of the first $50,000 and 45 percent of any excess goes to the participating law-enforcement agency.); La. Rev. Stat. § 32:1550(k)(l) (60 percent goes to law enforcement, and 40 percent to the criminal courts); Mass. Laws, ch. 94C, § 47(d) (50 percent is distributed to prosecutors and 50 percent to the police); Minn. Stat. § 609.5315(5) (70 percent is distributed to the seizing agency and 20 percent to the prosecuting agency); Miss. Code § 41-29-181(2) (80 percent goes to the initiating law-enforcement agency and 20 percent is divided among the other participating agencies if any); Neb. Rev. Stat. §§ 28-431(4), 28-1439.02 (50 percent of cash forfeited is disbursed to the county drug-law-enforcement and -education fund); N.H. Rev. Stat. § 318-B:17-b(v)(a) (45 percent of the first $500,000); N.J. Stat. § 2C:64-6(a) (95 percent is distributed based on contribution to seizure); N.M. Stat. § 30-31-35(E), § 22-8-32(A)(1) (0 percent); 1997 N.Y. Laws 1349(h)(i) (after costs and 40 percent distribution to the substance-abuse-service fund, 75 percent of remaining balance to participating law-enforcement agency); 42 Pa. Cons. Stat. § 6801(f)-(h) (proceeds are equitably distributed between the district attorney and the attorney general for purposes of enforcing the Controlled Substance, Drug, Device and Cosmetic Act); R.I. Gen. Laws § 21-28-5.04(b)(3)(A)(i) (after costs, 20 percent is distributed to the attorney general for drug-related law-enforcement activities and 70 percent to state and local law enforcement divided proportionately by contribution to the investigation.); S.C. Code § 44-53-530(e) (75 percent is distributed to law-enforcement agencies and 20 percent to the prosecuting agency.); Tex. Crim. Pro. Code § 59.06(a)-(d), (h) (distribution is by local agreement between the state and law-enforcement agencies.); Utah Code § 58-37-13(8)(a) (upon request, 100 percent will go to the seizing agency for the enforcement of controlled-substance laws.); Va. Code § 19.2-386.14(A-B) (90 percent is distributed based on contribution to seizure, and 10 percent to a state fund for law enforcement.); Wis. Stat. § 961.55(5)(b) (up to 50 percent is distributed for expenses of forfeiture and sale, balance to the school fund.); Wyo. Stat. § 35-7-1049(e)-(j) (distribution is at the discretion of the commissioner.).

Where the retention of forfeited assets is barred under state law, state law-enforcement agencies may still participate in the federal "equitable sharing" program. See John L. Worrall and Tomislav V. Kovandzic, Is Policing For-Profit? Answers from Asset Forfeiture, 7 Criminology & Public Policy 219, 234 (2008) (results of empirical study indicate "that police agencies circumvent their restrictive state laws and pursue adoptive forfeitures so they can receive more forfeiture revenue."); Karen Dillon, Police Keep Cash Intended for Education, Kansas City Star, January 2, 1999. The "equitable sharing" or "adoptive forfeiture" process has been described as follows:

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> An adoptive forfeiture is a process whereby local law-enforcement officials can hand a case over to federal officials (e.g., Drug Enforcement Administration, which then passes it off to the U.S. Attorney's office in the case of civil-judicial forfeiture), provided the property in question is forfeitable under federal law. Most drug-related proceeds are forfeitable. Proceeds from successful forfeiture are managed by the Asset Forfeiture Fund in the U.S. Justice Department, and as much as 80% of adoptive forfeiture proceeds can be returned to the initiating state or local law-enforcement agency (or agencies). . . . Police departments in large U.S. cities routinely receive millions, if not tens of millions, of dollars in equitable-sharing payments each year.

John L. Worrall and Tomislav V. Kovandzic, Is Policing For-Profit? Answers from Asset Forfeiture, 7 Criminology & Public Policy 219, 227 (2008).

Some critics have charged that asset forfeiture has proven an ineffective component of drug- enforcement strategy or, more perniciously, has become as an end in itself that has distorted drug- enforcement policy. See Eric Blumenson and Eva Nilson, Policing For-Profit: The Drug War's Hidden Agenda, 65 U. Chi. L. Rev. 35 (1998) ("[T]he Drug War has achieved a self-perpetuating life of its own, because however irrational it may be as public policy, it is fully rational as a political and bureaucratic strategy. . . . This bureaucratic stake is financial, deriving from the lucrative rewards available to police and prosecutorial agencies that make drug law enforcement their highest priority."); John L. Worrall and Tomislav V. Kovandzic, Is Policing For-Profit? Answers from Asset Forfeiture, 7 Criminology & Public Policy 219, 231 (2008) ("[I]t is unrealistic to expect forfeiture to shut down drug networks. As it stands, law enforcement scarcely makes a dent in the drug problem").

Other critics have charged that the effects of asset-forfeiture laws are racially discriminatory, although statistical data on the question are not maintained. See Mary Murphy, Note, Race and Civil Forfeiture: A Disparate Impact Hypothesis, 16 Tex. J. C.L. & C.R. 77, 89 (2010) ("Presently, no available data addresses the racial breakdown of civil asset forfeiture actions."); Howard Witt, Highway robbery? Texas Police Seize Black Motorists' Cash, Cars, Chi. Trib. (Mar. 10, 2009) (describing a federal lawsuit which alleges that Texas state police targeted primarily black and Latino drivers and seized property under questionable circumstances); Steve Berry, Vogel Faces Bias Suit Over Cash Seizures, Orlando Sentinel, Jun. 18, 1993. See also Sandra Guerra Thompson, Did the War on Drugs Die with the Birth of the War on Terrorism?: A Closer Look at Civil Forfeiture and Racial Profiling after 9/11, 14 Fed. Sent. Rptr. 147 (2002) (citing studies and literature regarding racial profiling); Lexington, A Truck in the Dock: How the Police Can Seize Your Stuff When You Have Not Been Proven Guilty of Anything, The Economist (May 27, 2010) ("The poor are disproportionately at risk. … Public confidence in the police is higher in America than in many other countries, but among the groups who come into most frequent contact with them, such as black Americans, it is low. If the police want more cooperation from the civilians they serve, they need to keep their guns holstered more of the time, and their hands out of other people's pockets.").

While there are rarely "silver bullets" in criminal-justice reform, it has been plausibly suggested that the single measure of disposing of forfeited assets somewhere other than in the seizing agency would cure the worst defects of current forfeiture law. See Eric Blumenson and Eva Nilson, Policing For-Profit: The Drug War's Hidden Agenda, 65 U. Chi. L. Rev. 35, 41 (1998) (suggesting that all proceeds from asset forfeitures be deposited in a state treasury's general fund) ("[A] single measure—one mandating that forfeited assets be deposited in the Treasury's General

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Fund rather than retained by the seizing agency—would cure the forfeiture law of its most corrupting effects."). See National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Controlled Substances Act (1994), § 522(h) (net proceeds of civil forfeitures "must be deposited into the [general fund] of the State"). The Comment to § 522 of the Uniform Act recognizes the propriety of earmarking revenues for specific purposes, so long as "legislative oversight and control over the actual use of the proceeds of forfeitures" is ensured. Id. at 129.

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§ 6.04D. Costs, Fees, and Assessments.[31]

(1) No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B, shall be held responsible for the payment of costs, fees, and assessments.

(2) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

Alternative § 6.04D. Costs, Fees, and Assessments.

(1) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

(2) The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correctional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

(3) No costs, fees, or assessments may be imposed by any agency or entity in the absence of approval by the sentencing court.

(4) No costs, fees, or assessments may be imposed in excess of actual expenditures in the offender's case.

[31] This Section was originally approved in 2014; see Tentative Draft No. 3.

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Comment: [32]

a. Scope. Perhaps the subject of greatest difficulty in the Code's economic-sanctions provisions is the wide universe of practices for levying costs, fees, and assessments against offenders for expenses associated with their prosecution and defense, and those associated with their incarceration, community supervision, and their participation in rehabilitative programming. These assessments have grown enormously in numbers, varieties, and amounts since the time of the original Code, and they continue to proliferate. They are often assessed at different levels of government within a state, and no state maintains adequate jurisdiction-wide statistics on their use. There is evidence that these assessments are imposed with little uniformity, and with no thought given to their effects on proportionality of sentences or the offenders' efforts to reintegrate into the free community. No other nation appears to tax offenders with criminal-justice costs and fees to the same extent as the United States.

b. Abolition of costs, fees, and assessments. On principle, the Institute recommends abolition of all costs, fees, and assessments as defined in this Section. As stated in § 6.04, Comment *c*, persons convicted of crimes should not be regarded as a special class of taxpayers called upon to make up for inadequate legislative appropriations for criminal-justice agencies and programming. This recommendation is executed in the first alternative version of § 6.04D.

c. Retention with controls. There are strong competing public policies in this arena that lead the Institute to suggest an alternative approach that would allow for the imposition of costs, fees, and assessments with proper statutory controls. It is a plausible claim, often heard, that some programs made available to offenders for their rehabilitation could not be sustained without contributions from program participants. Many existing probation and parole agencies are heavily dependent on the collection of correctional fees for their basic operations. Aside from these pragmatic considerations, the assessment of costs and fees on offenders appears to be widely approved by the public.

That the Institute is prepared to countenance such assessments is far different from endorsement of present practices for their administration. Indeed, this is a neglected subpart of the corrections world that has developed in a patchwork fashion, producing a milieu of great complexity, fragmentation, and disparity. To meet this concern, the draft imposes the essential restriction that the levying of any such costs and fees must be approved by the sentencing court. The revised Code envisions that the court's approval may be granted generally, and in advance, to certain classes of costs and fees as a part of the original judgment and sentence. If there is not some process, centralized in one decisionmaker, for taking into sight all of the economic sanctions imposed on the offender, then the imperative of proportionality in sentencing is frustrated, and the policy of restoring offenders to productive lives in the free economy impeded.

[32] This Comment has not been revised since § 6.04D's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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1 *d. Conflicts of interest.* In current law, the agencies that impose costs, fees, and assessments
2 are frequently the beneficiaries of the funds received. The Code treats this as a conflict of interest
3 that is resolved in part by the requirements of prior judicial approval and the establishment at
4 sentencing of a total dollar amount that may be collected, see subsection (3) and § 6.04(2) ("The
5 court shall fix the total amount of all economic sanctions that may be imposed on an offender,
6 and no agency or entity may assess or collect economic sanctions in excess of the amount
7 approved by the court."). Subsection (4) adds that no costs, fees, or assessments may be imposed
8 in excess of actual expenditures in the offender's case. Any program to collect costs, fees, and
9 assessments is further subject to § 6.04(8) ("The agencies or entities charged with collection of
10 economic sanctions may not be the recipients of monies collected and may not impose fees on
11 offenders for delinquent payments or services rendered.").

12 **REPORTERS' NOTE** [33]

13 *a. Scope.* In some jurisdictions, the viability of correctional programming is partially or heavily dependent on
14 the financial contributions of offenders. See Dale Parent, Recovering Correctional Costs Through Offender Fees
15 (National Institute of Justice 1990) ("Among all probation and parole agencies responding [across 11 states], fee
16 receipts averaged 23.6 percent of their total operating budgets."); Carl Reynolds, Mary Cowherd, Andy Barbee,
17 Tony Fabelo, Ted Wood, and Jamie Yoon, A Framework to Improve How Fines, Fees, Restitution, and Child
18 Support Are Assessed and Collected from People Convicted of Crimes: Interim Report (Council of State
19 Governments Justice Center 2009), at 5 ("in 2006 probation fees made up 46 percent of the Travis County (Texas)
20 Community Supervision and Corrections Department's $18.3 million budget."). See also David E. Olson and Gerard
21 F. Ramker, Crime Does Not Pay, But Criminals May: Factors Influencing the Imposition and Collection of
22 Probation Fees, 22 Justice System J. 29, 30 (2001); Joan Petersilia, Probation in the United States, in Michael Tonry
23 ed., 22 Crime and Justice: A Review of Research 149, 171-173 (1997).

24 A study of economic sanctions imposed on convicted felony and misdemeanor offenders in Pennsylvania
25 during 2006-2007 found a staggering total of 2629 different types of economic sanctions in use across the state, at
26 different levels of government. R. Barry Ruback and Valerie Clark, Economic Sanctions in Pennsylvania: Complex
27 and Inconsistent, 49 Duquesne L. Rev. 751, 761 (2011) ("Of the 2,629 different sanctions, eighty-two were state
28 costs/fees, fifty-eight were state fines, 2,371 were county costs/fees, seventy-nine were county fines, and thirty-five
29 were restitution"). The array of economic sanctions in use varied widely from county to county, as did the mean and
30 median dollar amounts of sanctions imposed on individual offenders. Id. at 767, 770 ("Across the sixty-seven
31 counties in Pennsylvania, the number of different economic sanctions imposed varied from forty to one hundred
32 forty-seven. . . . Most of the variation between counties in the number of different economic sanctions imposed
33 came from sanctions unique to each county.").

34 States maintain little data on the assessment and collection of costs and fees, and are often reluctant to make
35 public the information they have. See American Civil Liberties Union, In for a Penny: The Rise of America's New

[33] This Reporters' Note has not been revised since § 6.04D's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Debtors' Prisons (2010), at 9, 11 (recommending that "[a]ll jurisdictions should collect and publish data regarding the assessment and collection of LFOs [legal financial obligations], the costs of collections (including the cost of incarceration), and how collected funds are distributed, broken down by race, type of crime, geographical location, and type of court.").

On the rarity of the use of criminal-justice costs and fees outside the United States, see Pat O'Malley, Politicizing the Case for Fines, 10 Criminology & Pub. Pol'y 546, 547-548 (2011) (fees are "much less prominent outside the United States, almost never being levied for imprisonment and only in recent years being levied in some jurisdictions for victim compensation and costs of fine enforcement."). On public attitudes toward costs and fees, see Traci R. Burch, Fixing the Broken System of Financial Sanctions, 10 Criminology & Pub. Pol'y 539, 539 (2011) ("the few studies that are available suggest that the public overwhelmingly supports the notion that offenders, particularly prisoners, should help pay for the cost of their punishment.").

d. Conflicts of interest. On the problem of conflicts of interest surrounding criminal-justice costs and fees, see Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, Criminal Justice Debt: A Barrier to Reentry (Brennan Center for Justice 2010), at 2 ("Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies. When courts are pressured to act, in essence, as collection arms of the state, their traditional independence suffers. When probation and parole officers must devote time to fee collection instead of public safety and rehabilitation, they too compromise their roles."). Evidence that conflict-of-interest problems worsened during the Great Recession is reported in American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 8 ("Imprisoning those who fail to pay fines and court costs is a relatively recent and growing phenomenon: States and counties, hard-pressed to find revenue to shore up failing budgets, see a ready source of funds in defendants who can be assessed LFOs [legal financial obligations] that must be repaid on pain of imprisonment, and have grown more aggressive in their collection efforts. Courts nationwide have assessed LFOs in ways that clearly reflect their increasing reliance on funding from some of the poorest defendants who appear before them. . . . Because many court and criminal justice systems are inadequately funded, judges view LFOs as a critical revenue stream."). The Council of State Governments recommended that states "curb the extent to which the operations of criminal justice agencies rely on the collection of fines, fees, and surcharges from people released from prisons and jails." Rachel McLean and Michael D. Thompson, Repaying Debts (Council of State Governments Justice Center 2007), at 34. The National Center for State Courts has admonished that the concept of self-supporting courts "is not consistent with judicial ethics or the demands of due process." Robert Tobin, Funding the State Courts: Issues and Approaches (National Center for State Courts 1996). The American Bar Association has recommended that courts should have "a predictable funding stream that is not tied to fee generation." American Bar Foundation, Commission on State Court Funding, Black Letter Recommendations of the ABA Commission on State Court Funding: Report (2004), at 7. One essential reform is to ensure that the agency of government that imposes and collects costs and fees not be the agency that benefits from those monies. See American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 28 ("to eliminate judicial incentives to assess high fines and fees against defendants, . . . revenue should be paid into the city's general budget, not earmarked for the courts."). The species of conflict of interest noted here may be especially problematic when payment obligations are imposed and administered by private service providers rather than governmental entities,

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1 such as private prisons and jails, and private correctional-treatment contractors. See American Civil Liberties Union,
2 In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 64.

3 ______________

4

5 **§ 6.06. Sentence of Incarceration.**[34]

6 **(1) A person convicted of a crime may be sentenced to incarceration as authorized in**
7 **this Section. "Incarceration" in this Code includes confinement in prison or jail.**

8 **(2) The court may impose incarceration:**

9 **(a) when necessary to incapacitate dangerous offenders, provided a sentence**
10 **imposed on this ground is not disproportionately severe; or**

11 **(b) when other sanctions would depreciate the seriousness of the offense,**
12 **thereby fostering disrespect for the law. When appropriate, the court may**
13 **consider the risks of harm created by an offender's criminal conduct, or the total**
14 **harms done to a large class of crime victims.**

15 **(3) The length of term of incarceration shall be no longer than needed to serve the**
16 **purposes for which it is imposed.**

17 **(4) Incarcerated offenders shall be guaranteed personal safety and subsistence, and**
18 **shall be provided reasonable medical care, mental-health care, and opportunities to**
19 **rehabilitate themselves and prepare for reintegration into the law-abiding community**
20 **following their release.**

21 **(5) When deciding whether to impose a sentence of incarceration and the length of**
22 **term, the court shall apply any relevant sentencing guidelines.**

23 **(6) A person who has been convicted of a felony may be sentenced by the court, subject**
24 **to Articles 6B and 7, to a term of incarceration within the following maximum terms:**

25 **(a) in the case of a felony of the first degree, the term shall not exceed life**
26 **imprisonment;**

27 **(b) in the case of a felony of the second degree, the term shall not exceed [20] years;**

28 **(c) in the case of a felony of the third degree, the term shall not exceed [10] years;**

29 **(d) in the case of a felony of the fourth degree, the term shall not exceed [five]**
30 **years;**

31 **(e) in the case of a felony of the fifth degree, the term shall not exceed [three] years.**

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[34] This Section was originally approved in 2011; see Tentative Draft No. 2. This draft adds amendments recommended by the Reporters as indicated above, which have been approved by the Council.

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[*The number and gradations of maximum authorized prison terms will depend on the number of felony grades created in § 6.01*.]

(7) A person who has been convicted of a misdemeanor or petty misdemeanor may be sentenced by the court, subject to Articles 6B and 7, to a term of incarceration within the following maximum terms:

(a) in the case of misdemeanor, the term shall not exceed [one year];

(b) in the case of petty misdemeanor, the term shall not exceed [six months].

(8) The court is not required to impose a minimum term of incarceration for any offense under this Code. This provision supersedes any contrary provision in the Code.

(9) Offenders sentenced to a term of incarceration shall be released after serving the term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 6.07 and 305.1, unless sentence is modified under §§ 305.6 and 305.7.

[(10) For offenses committed after the effective date of this provision, the authority of the parole board to grant parole release to incarcerated offenders is abolished.]

The Reporters' proposed changes in this provision, already approved by the Council, are indicated below:

§ 6.06. Sentence of Incarceration ~~Imprisonment~~

(1) A person convicted of a crime may be sentenced to incarceration as authorized in this Section. "Incarceration" in this Code includes confinement in prison or jail.

(2) The court may impose incarceration:

(a) when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or

(b) when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. When appropriate, the court may consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims.

(3) The length of term of incarceration shall be no longer than needed to serve the purposes for which it is imposed.

(4) Incarcerated offenders shall be guaranteed personal safety and subsistence, and shall be provided reasonable medical care, mental-health care, and opportunities to

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rehabilitate themselves and prepare for reintegration into the law-abiding community following their release.

(5) When deciding whether to impose a sentence of incarceration and the length of term, the court shall apply any relevant sentencing guidelines.

(6) ~~(1)~~ A person who has been convicted of a felony may be sentenced by the court, subject to Articles 6B and 7, to a ~~prison~~ term of incarceration within the following maximum ~~authorized~~ terms:

(a) in the case of a felony of the first degree, the ~~prison~~ term shall not exceed life imprisonment;

(b) in the case of a felony of the second degree, the ~~prison~~ term shall not exceed [20] years;

(c) in the case of a felony of the third degree, the ~~prison~~ term shall not exceed [10] years;

(d) in the case of a felony of the fourth degree, the ~~prison~~ term shall not exceed [five] years;

(e) in the case of a felony of the fifth degree, the ~~prison~~ term shall not exceed [three] years.

[*The number and gradations of maximum authorized prison terms will depend on the number of felony grades created in § 6.01.*]

(7) ~~(2)~~ A person who has been convicted of a misdemeanor or petty misdemeanor may be sentenced by the court, subject to Articles 6B and 7, to a ~~prison~~ term of incarceration within the following maximum ~~authorized~~ terms:

(a) in the case of misdemeanor, the ~~prison~~ term shall not exceed [one year];

(b) in the case of petty misdemeanor, the ~~prison~~ term shall not exceed [six months].

(8) ~~(3)~~ The court is not required to impose a minimum term of incarceration ~~imprisonment~~ for any offense under this Code. This provision supersedes any contrary provision in the Code.

(9) ~~(4)~~ Offenders sentenced to a term of incarceration ~~imprisonment~~ shall be released after serving the ~~prison~~ term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 6.06A and 305.1, unless sentence is modified under §§ 305.6 and 305.7.

[(10) ~~(5)~~ For offenses committed after the effective date of this provision, the authority of the parole board to grant parole release to incarcerated ~~imprisoned~~ offenders is abolished.]

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The Reporters' proposed changes in this Comment, already approved by the Council, are indicated below:

Comment: [35]

a. Scope. This Section revises and expands upon § 6.06 of the 1962 Model Penal Code ("Sentence of Imprisonment for Felony; Ordinary Terms"), which originally was presented in two alternative forms, and interlocked with former § 6.08 (misdemeanor penalties) and former §§ 6.07 and 6.09 (providing "extended terms" for felonies and misdemeanors under certain circumstances). See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985). The original Code's provisions on "extended terms" of incarceration have not been carried forward. Subsection (7), on misdemeanor penalties, revises § 6.08 of the 1962 Code and consolidates it within § 6.06. Subsections (2) and (3) address subjects formerly confronted in §§ 7.01, 7.03, and 7.04 of the original Code. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985).

New§ 6.06 establishes revised Code's general structure of "determinate" (rather than "indeterminate") prison sentences, and recommends a framework for the grading of offenses to fit within such a system. It also addresses the propriety of mandatory prison terms and the purposes of carceral sanctions. Within the revised Code, § 6.06 interlocks new § 7.02(4) ("Choices Among Sanctions") (Council Draft No. 5, 2015) on the question of when a sentence of incarceration should be imposed. An overview of § 6.06 is presented in this Comment *a*, followed by more extensive discussion in Comments *b* through *o*.

Determinate Sentencing System

The original version of § 6.06 was designed for an "indeterminate" sentencing system, in which parole boards and corrections officials held the lion's share of discretion to determine the lengths of prison terms. Trial courts were empowered only to set broad limits upon the discretionary decisions of those later-in-time actors, expressed in widely separated "minimum" and "maximum" terms for each prisoner. Much of the complexity, and the need for alternative mechanisms, in original §§ 6.06, 6.08, and 6.09 stemmed from the effort to define and coordinate the operation of both minimum and maximum penalties in specific classes of cases. Under the original Code, a judicially pronounced prison sentence was "indeterminate" or "indefinite" in the sense that it bore no predictable relation to the confinement term that would actually be served by the defendant. In an indeterminate structure, the "pronounced sentence" and "actual time served" were entirely different things. The revised provision reflects a much different approach.

[35] The bulk of this Comment has not been revised since § 6.06's approval in 2011. New material to accompany the black-letter amendments offered this draft is indicated by redlining in the text throughout the Comments. All Comments will be updated for the Code's hardbound volumes.

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In most prison cases under the new Code, sentencing courts will impose "determinate" sentences that are predictably related to actual confinement terms.

Subsections (9) and (10) express the Institute's preference for a determinate sentencing system over a system in which parole boards hold substantial authority to set actual lengths of prison terms. The new Code's recommendation of removal of parole *release* discretion—going to the timing of release—casts no doubt on the desirability of postrelease *supervision* programs for releasees. On the contrary, the Code identifies the "reintegration of offenders into the law-abiding community" as a central purpose of the sentencing system. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007); § 7.09 (Tentative Draft No. 3, 2014). Determinacy in sentence duration is not at war with this goal; some corrections experts have even suggested that planning for post-incarceration services is made easier when prisoners' release dates are foreseeable well in advance.

The elimination of parole-release authority is a fundamental decision about the design and operation of a sentencing system as a whole. For prison cases, it represents a major reapportionment of sentencing discretion from the parole board to sentencing courts. To a large degree, the policy choice turns on analysis of the relative competencies of these two decisionmakers to fix the severity of prison sanctions.

The Institute's recommendation on this question follows extensive study and debate. Much relevant background is contained in Appendix B, Reporter's Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). The principle reasons for favoring a determinate rather than an indeterminate structure may be summarized as follows:

> (1) A parole board is more poorly positioned than a sentencing court to determine proportionate lengths of prison terms in specific cases in light of offense gravity, harm to victims, or offender blameworthiness. Judicial determinations of proportionality, especially when aided by sentencing guidelines and subject to appellate review, should not be supplanted by a parole board's different view.
>
> (2) There is no credible evidence that a parole board can better effectuate the utilitarian goals of the sentencing system than a sentencing court. In particular, there is no persuasive evidence that parole boards can separate those inmates who have been rehabilitated from those who have not. Likewise, there is no persuasive evidence that parole boards can assess the risk of future offending in individual cases with greater accuracy than sentencing courts on the day of original sentencing.
>
> (3) The procedural protections available to prisoners in the parole-release context are unacceptably poor when compared to those attending judicial sentencing decisions. The parole process lacks transparency, employs no enforceable decision rules, often generates little or no record of proceedings,

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generally requires only that boilerplate reasons—or none at all—be given for decisions, includes no guarantee of appointed counsel, and provides no meaningful avenue of appeal. Even if all else were equal, considerations of fairness and regularity would favor the placement of prison-length decisionmaking authority in the courts.

(4) Research, historical inquiry, and the firsthand experience of practitioners support the judgment that parole boards, when acting as prison-release authorities, are failed institutions. During the drafting of the revised Code, no one has documented an example in contemporary practice, or from any historical era, of a parole-release system that has performed reasonably well in discharging its goals and would provide a salutary real-world basis for model legislation.

(5) In the last three decades, parole boards have shown themselves to be highly susceptible to political pressure. There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime. Increasingly, parole-release decisions have been skewed by risk aversion, as the institutional structure of parole holds individual board members responsible for the crimes committed by prison releasees—but no such risk follows decisions to refuse release.

(6) Parole-release discretion cannot be sponsored as an ostensible check on prison population growth. Over the past 30 years, the leading prison-growth states in the United States have been those operating with indeterminate-sentencing systems. In contrast, two-thirds of the states that have adopted determinate structures have experienced below-average prison growth when compared with other states. Every state that has operated with sentencing guidelines, while also eliminating the release authority of the parole board (the proposed sentencing structure of the revised Code), has experienced below-average prison growth.

Although there are fundamental differences between sentencing systems with and without parole-release mechanisms, no sentencing structure can be absolutely determinate. All existing American sentencing systems, even those that have long ago eliminated parole release, make room for a number of later-in-time official decisions—some of them after judicial imposition of sentence—that may alter the durations of prison stays. Subsection (4) cross-references the most important of these in the revised Code: § 6.07 ("Credit Against the Sentence for Time Spent in Custody") (Council Draft No. 5, 2015), § 305.1 ("Reductions of Prison Terms for Good Behavior") (Tentative Draft No. 2, 2011), § 305.6 ("Modification of Long-Term Prison Sentences; Principles for Legislation") (Tentative Draft No. 2, 2011), and § 305.7 ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons") (Tentative Draft No. 2, 2011). Under the institutional philosophy of the revised Code, provisions of this kind—pockets of indeterminacy

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within a generally determinate structure—have been crafted to advance their underlying purposes without upsetting the Code's broad preference for a determinate system in which judges are the primary sentencing authorities.

Mandatory Prison Sentences

Subsection 6.06(8) is a new provision based on the Institute's longstanding position—joined by two Presidential crime commissions, the American Bar Association, the Federal Judicial Conference, and the United States Sentencing Commission—that no mandatory-minimum prison sentence should be enacted for any offense. For the first time in the Model Code, this policy is voiced in express statutory language. In the original Code, the Institute's strong objection to such laws was implicit in the absence of any required minimum penalty throughout the recommended statutory text. Categorical disapproval was stated affirmatively in an Official Comment, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-127.

With the passage of more than 50 years since the original Code's approval, there are good reasons for the Institute to take a more aggressive posture in the articulation of its blanket policy on mandatory-minimum penalties—and to augment that policy in separate, more targeted provisions throughout the Code. Since 1962, authorized mandatory minimums have proliferated in every American jurisdiction, and have contributed to the growth in the nation's prison populations in the late 20th and early 21st centuries. Also during this time, concerns over the role of prosecutors in the sentencing process have greatly intensified—and there is no department of the criminal law more damaging to judicial sentencing discretion, or more egregious in its transfer of sentencing power to prosecutors, than the mandatory-minimum penalty.

During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitative objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more so than those in leadership roles, provoke nullification of the law by lawyers, judges, and jurors, and engender public perceptions in some communities that the criminal law lacks moral legitimacy.

Despite the amassed evidence, this remains an area of law in which knowledge and experience have had little impact on the lawmaking process. Privately, many legislators and other elected officials have confided that the short-term political rewards associated with the

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enactment of new mandatory penalties, and the high perceived costs of opposing such penalties, make it difficult to act on their personal views that such laws are ineffective, wasteful, and needlessly severe. After two decades of dropping crime rates, however, the political milieu has been changing. In recent years, some state legislatures have trimmed the scope of their mandatory-penalty laws—almost always in response to circumstances of budgetary emergency. Most of these actions must be characterized as incremental, not sweeping in scope, but they supply evidence that a retreat from mandatory sentencing policies is politically possible when broader costs and benefits are taken clearly in view.

The revised Code attacks the institution of mandatory-minimum sentences in the broadest terms, and also in numerous targeted provisions. For the first time, the issue is addressed expressly in black-letter statutory language. Subsection (3) stops short of a "constitution-like" command that forbids (vainly) the future enactment of mandatory-minimum penalties. The Code is not a model constitution, and none of its provisions can preclude future legislative action. Even so, the revised Code offers a forceful declaration of policy in the present tense. It states categorically that a sentencing court "is not required to impose a minimum term of imprisonment for any offense under this Code." In jurisdictions that have enacted mandatory penalties, subsection (3) makes clear that the intent of the legislature is to supersede all such preexisting laws. As with all of the Code's recommendations, the desirability of subsection (3) is meant to project forward in time; it embodies a policy that is meant to be of lasting persuasive value.

The Institute recognizes that no criminal code in any U.S. jurisdiction is in conformity with the categorical prescription of subsection (8). Even in the best of scenarios, it could be many years before mandatory penalties are eradicated from the nation's criminal laws. To address this reality, the Code includes an array of new provisions, dispersed throughout the sentencing articles, that are intended to mute or bypass the effects of mandatory-minimum sentences in designated settings. These include § 6.02B(3) (Tentative Draft No. 3, 2014); § 6.11A(f) (Tentative Draft No. 2, 2011); § 6.14(3)(b) (Council Draft No. 5, 2015); § 6B.03(6) (Tentative Draft No. 1, 2007); § 6B.09(3) (Tentative Draft No. 2, 2011); § 7.XX(3)(c) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5, 2015); § 7.08(2) (Council Draft No. 5, 2015); § 7.09(5)(b) (Council Draft No. 5, 2015); § 305.1(3) (Tentative Draft No. 2, 2011); § 305.6(5) (Tentative Draft No. 2, 2011); § 305.7(8) (Tentative Draft No. 2, 2011); and§ 305.8(1.3) (Council Draft No. 5, 2015) (all of these provisions are more fully described in Comment *m* below). For legislatures that choose not to repeal their mandatory-penalty laws en masse, these targeted provisions offer significant incremental improvements.

b. Terminology. This provision addresses sentences of "incarceration" rather than "imprisonment." This is a change in usage from the original Code, but not a change in meaning. The new terminology clarifies that § 6.06 is intended to cover sentences of confinement whether served in prisons or jails. The new wording avoids possible confusion: American criminal-justice professionals frequently understand the term "imprisonment" to refer only to state prison sentences. Postconviction confinement in a local jail is usually not called a "prison term."

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1 *c. Purposes of incarceration*. Subsection (2) speaks to the justified purposes of incarceration
2 that should govern judicial decisionmaking in individual cases. The subsection is addressed only
3 to the courts and applies only to the question of whether the sanction of incarceration should be
4 used. Elsewhere, the Code outlines operative purposes for other sanction types.[36] Subsection
5 6.06(2) and its parallel provisions throughout the Code are "nested" within the comprehensive
6 statement of system purposes in § 1.02(2) (Tentative Draft No. 1, 2007; amended in Council
7 Draft No. 5).

8 The nesting structure is not an invention of the revised Code. The original Model Penal
9 Code contained both a provision on the general purposes of sentencing and a more specific
10 provision on the subset among those general purposes that could justify sentences of
11 imprisonment in individual cases. See Model Penal Code and Commentaries, Part I, §§ 1.01 to
12 2.13, § 1.02 (1985); Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01 (1985).

13 Likewise, the revised Code defines general purposes at the beginning of the sentencing
14 articles, in § 1.02(2), but envisions that those goals will be applied selectively in different
15 contexts, and with varying prioritization. It is a truism, but a useful one, that all objectives of the
16 system cannot be pursued all of the time. Thus, depending on factors concerning the offense, the
17 offender, the interests of crime victims, the type of sanction at issue, and the competencies of
18 different official actors in the system, the principles governing sentencing decisions may be
19 arranged in particularized ways.

[36] See Tentative Draft No. 3, § 6.02A(2) ("The purpose of deferred prosecution is to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction."); id., § 6.02B(2) ("The purposes of deferred adjudication are to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction."); id., § 6.03(2) ("The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses."); Preliminary Draft No. 11, § 6.04A(2) ("The purposes of victim restitution are to compensate victims for injuries suffered as a direct result of criminal conduct and promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims."); Tentative Draft No. 3, § 6.04B(2) ("The purposes of fines are to exact proportionate punishments and further the goals of general deterrence and offender rehabilitation without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community."); id., § 6.04C(2) ("The purposes of asset forfeitures are to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies."); id., Alternative § 6.04D(2) ("The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correctional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.").

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d. Confinement of dangerous offenders. Subsection (2)(a) prioritizes the removal of dangerous offenders from society as the defining utilitarian goal of incarceration. The original Code contained similar injunctions, see, for example, Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01(1)(a) (1985) ("A sentence of incarceration is appropriate when . . . [t]here is undue risk that during a period of probation the defendant will commit another crime."). Incapacitation as a means of crime prevention is recognized as one of the primary utilitarian goals of the sentencing system in § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5) (stating that one general purpose is the "incapacitation of dangerous offenders").

The pursuit of incapacitation policy is not intended to be unbounded, however. Subsection (2)(a) expressly acknowledges that, under the Code's foundational principles, no utilitarian objective may ever justify a punishment that is disproportionate in severity. See § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007; amended in Tentative Draft No. 4, 2016) (sentences in all cases must be "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). The statutory constraint of proportionality in the revised Code is intended to impact far more cases than current Eighth Amendment jurisprudence. See § 7.09(5)(b) (this draft) ("The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.").

Any incapacitation policy under the Code is also constrained by the limits of empirical and predictive sciences. Reliance on risk assessment technologies that have not been demonstrated to achieve reasonable predictive accuracy is not permitted. These utilitarian constraints are discussed more fully in Tentative Draft No. 2 (2011), § 6B.09 (Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending). See also § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (utilitarian goals to be pursued only "when reasonably feasible"); and id., Comment *e* ("One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through the administration of a criminal sanction.").

One consistent objective throughout the revised Code is to render incapacitation policy transparent and subject to inspection, empirical evaluation, procedural protections, and normative and constitutional challenge in individual cases. See generally Tentative Draft No. 2, § 6B.09 (2011). If one broadly accepted purpose of imprisonment is to separate the free community from those we are "afraid of," effectuation of that policy should be in the light of day.

Assuming a system without parole-release discretion, the Code's incapacitation policy can be implemented only by courts at the individual-case level, with the assistance of sentencing guidelines, actuarial risk-assessment instruments, tools to measure offenders' progress toward a

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lower risk of recidivism, and "needs-assessment" tools to structure programming and supervision plans best tailored to facilitate a particular inmate's successful reentry into society. Thus, individualized determinations of dangerousness, when this can be done with reasonable accuracy, should be a core responsibility of sentencing courts.

Among the most difficult decisions each jurisdiction must confront are the definitions and the statistical thresholds of "dangerousness" it will establish in its prison policy. Risk thresholds should almost certainly vary by offense.

There will be many difficult cases in the administration of risk-assessment strategies. It is the position of the Institute that open debate of grey-area scenarios in risk prediction, played out in the transparency of the courtroom, with effective adversarial testing, will be a healthy improvement over the current law and practices in most states.

The Code makes no room for "general" incapacitation policy, under which large classes of convicted offenders are incarcerated indiscriminately for longer periods than are otherwise justified—on the theory that bulk confinement will prevent the offenses that some portion of the larger group would have committed. It is the firm position of the Institute that public safety can be safeguarded more efficiently, and at far less human cost, through evidence-based policies that are wielded carefully and are continuously tested and improved.

e. Incarceration based on seriousness of the offense. Subsection (2)(b) moves beyond pure instrumentalism to posit that some offenses are so serious in their own right that their perpetrators are deserving of incarceration even if they present no special risk of recidivism. The first clause of subsection (2)(b) borrows from the original Code, Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01(c) (1985) (sentencing court may impose prison when "a lesser sentence would depreciate the seriousness of the crime"). The second clause of subsection (2)(b) adds language inspired by the American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.12(c)(iii) (use of incarceration "may be proper . . . if necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law"). Finally, subsection (2)(b) directs sentencing judges, in appropriate cases, to consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims. The first clause recognizes that risk creation can be highly blameworthy and deserving of stern punishment. For example, an attempted murder is a "serious" crime even when the intended victim is not injured. The second clause recognizes that some offenses, such as environmental and financial crimes, may have diffuse effects on a large population of crime victims. Some victims may not even be aware of their injuries. Nonetheless, such broadly dispersed harms may be aggregated when sentencing courts weigh the seriousness of an offense under subsection (2)(b).

Subsection (2)(b) injects considerations of proportionality into incarceration policy. Some crimes are sufficiently serious that a society's collective views of deserved punishment demand the response of incarceration—and in some instances this rationale can justify a lengthy prison

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term. Put simply, considerations of proportionality can set lower boundaries on appropriate punishment severity, just as they set ceilings. See § 1.02(2)(a)(i) and Comment *b* (Tentative Draft No. 1, 2007; Council Draft No. 5, 2015).

Subsection (2)(b) also recognizes that proportionality in sentencing can serve a communicative function to the broader society. Disproportionate sentences of any kind can undermine the perceived legitimacy of the justice system and inspire disrespect for the law in the community. See § 1.02(2)(b)(vii) (Tentative Draft No. 1, 2007; Council Draft No. 5, 2015). Subsection (2)(b) therefore continues prior Institute policy that imprisonment is justified when "a lesser sentence would depreciate the seriousness of the crime." Commentary to the original Code explained that this wording was intended to focus attention on the question of whether a nonprison sanction would have a "negative effect" on "public respect for the law."

The courts play an essential role under subsection (2)(b). Judgments of offense seriousness cannot be made solely at the systemic level by legislatures and sentencing commissions. A well-functioning system requires that judges hold power to individualize sentences in relation to an offender's blameworthiness in a particular case, and to the harms done or risked by the offender's conduct. In the revised Code's scheme, for example, members of the sentencing commission are called upon to use their best collective judgment to develop presumptive sentencing recommendations that are proportionate to "ordinary" or "typical" offenses and offenders within each guidelines classification. See Tentative Draft No. 1 (2007), § 6B.03(2) ("The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence."). The commission's judgments of proportionality in punishment are not meant to be relitigated from scratch in every case. Indeed, a judge who departs from the guidelines on proportionality grounds is in principle *acknowledging* that the commission created a proportionate guideline for an ordinary case, but the judge is also finding that, on the facts, the instant case is more serious than an "ordinary" or "typical" case. See § 7.XX(2)(a) ("A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.").[37]

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[37] See also Tentative Draft No. 1 (2007), § 1.02(2), Comment *b*:

> [T]he ranges of penalties expressed in sentencing guidelines must not be viewed as fixed statements of the boundaries of proportionality for all cases. No matter how sagacious a commission may be, it does its work in the abstract, without exposure to the textured facts and circumstances of individual cases. At the end of the day, the trial and appellate courts must hold dispositive authority in particular cases to accept the judgments of proportionality reflected in sentencing guidelines, or to rule that the considerations in subsection (2)(a)(i) move an individual case above or below the range of penalties specified in guidelines, see Comment *d* below. In short, the sentencing

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f. Omission of general deterrence as a basis for judicially imposed prison sentences; propriety of incarceration when other sanctions would depreciate the seriousness of the offense. Judgments about general deterrence are best made at the systemwide policymaking level, in light of credible empirical evidence, and are least likely to be administered effectively or uniformly by sentencing judges, one case at a time. On this score, the revised Code echoes the policy conclusion of the original Code:

> As a practical matter it is impossible to measure the amount of deterrence that will be engendered by a particular sentence. The positive effect of a given disposition on the community in terms of preventing or discouraging future offenses of the type involved is, in effect, a rationale that could easily be used to justify any result at any time. (Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 3(c) (1985), at p. 234.)

Section 6.06(2) does not foreclose legislatures and sentencing commissions from pursuing prison policies founded on theories of general deterrence, through the definition and grading of offenses, measures to increase the certainty and swiftness of apprehension and punishment, and the promulgation of sentencing guidelines. Legislatures and commissions are best situated to apply general deterrence policy to specific categories of offenses, such as white-collar crime. This is approved in the Code, so long as reasonable evidence supports the policy decisions that are made. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (utilitarian goals to be pursued only "when reasonably feasible"); and id., Comment *e* ("One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through the administration of a criminal sanction."). Subsection (2) addresses only what is within the competency of sentencing courts to adjudicate in a particular case.

g. Purposes and the length of incarceration. Subsection (3) provides that the duration of incarceration terms "shall be no longer than needed" to serve their authorized purposes. This effects a fundamental tenet of the revised Code; see Tentative Draft No. 1, § 1.02(2)(a)(iii) (one general purpose of sentencing is "to render sentences no more severe than necessary to achieve the applicable purposes in subsections [1.02(2)(a)(i) and (a)(ii)").

h. Rehabilitation and incarceration. A prison term may not be imposed for the purpose of rehabilitation under § 6.06, but this is not the same as saying that rehabilitation plays no role in incarceration policy. Subsection (4) provides that government has a duty to provide reasonable opportunities for rehabilitation for those it imprisons, and must make reasonable efforts to prepare them for reintegration into the law-abiding community. Simply stated, the Code treats rehabilitation as a purpose "of" incarceration but not a reason "for" incarceration.

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guidelines should be viewed as "first drafts" of proportionate sentences for ordinary cases, not as final pronouncements for all cases.

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The new Code's decision to rule out rehabilitation as a reason "for" incarceration is contrary to that of the original Code. See Model Penal Code (1962), § 7.01(1)(b) (approving of the use of imprisonment when "the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution").

i. Conditions of confinement. This provision is new to the Code. The first edition of the Code predated the wave of prison-conditions litigation in the 1970s. It was written at a time when incarcerated populations were roughly one-sixth of their current totals, and before the increased use of private prisons and the advent of "supermax" prisons. A sentencing code for the 21st century cannot overlook these subject matters, with U.S. incarcerated populations now standing at more than two million individuals, even though the Code revision project has not embraced issues of prison administration or conditions of incarceration. (A separate project on these topics has been suggested by some ALI members, Advisers, and Council members.) For present purposes, subsection (4) states the most important aspirations for the field. These include absolute guarantees of the personal safety and subsistence of prisoners. Further, subsection (4) states that prisoners must be afforded reasonable medical care, mental-health care, and opportunities to rehabilitate themselves and prepare for reintegration into the law-abiding community.

Subsection (4) is the Code's cornerstone statement of how the societal goals of offender rehabilitation and reintegration are applied in the setting of prison and jail sentences. Neither goal, standing alone, can justify the use of incarceration in an individual case in the Code's scheme. However, when incarceration is imposed for other sufficient reasons, subsection (4) asserts that governments should take responsibility to give inmates reasonable opportunities to pursue their own rehabilitation and prepare for successful reentry upon release.

The revised Code also takes the view that most people convicted of crimes, even those who present a current high risk of serious reoffending, will not remain crime-prone forever. In many cases, the aging process alone takes ex-offenders beyond the period of their active criminal careers. In other instances, the pain of incarceration, the benefits of rehabilitative programming, or the mysterious process of personal growth can be expected to change a prisoner for the better. Thus, in some but not all cases, the classic goals of rehabilitation and incapacitation are intertwined. When deciding to imprison a defendant on grounds of incapacitation, the court must pass judgment on how long an incapacitative penalty will be needed, and this task sometimes translates into a calculation of the amount of time that the rehabilitative process will take. For many first-time prisoners, for example, who statistically present a much lower risk of recidivism than persons who have served multiple terms, a reasonable evidence-based judgment might be that a short period of confinement will be enough to put the defendant on the right course. Or, for a seriously drug-involved offender, the length of a judge's incapacitative sentence might turn on evidence that effective in-prison drug-treatment programs often take a year or two to yield results.

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j. Sentencing guidelines. New subsection (4) reproduces language also found in the Sections of the Code devoted to probation, postrelease supervision, and economic sanctions, requiring that the courts "apply" sentencing guidelines promulgated by the sentencing commission when ordering such sanctions. This language does not render the guidelines mandatory. As explained elsewhere in the Code, proper application of the guidelines includes generous authority on the part of sentencing courts to depart from guidelines prescriptions when "substantial reasons" exist to impose a non-guidelines sentence in an individual case. See Tentative Draft No. 1 (2007), § 6B.04(1) ("The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX"); id., § 7.XX(2) ("In sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a)."). Within the Code's framework of structured judicial discretion, departures from presumptive sentencing guidelines are encouraged when they are well-founded in the operative purposes of the sentencing system.

k. Maximum authorized terms for felony offenses. The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. In part this is because the Code is agnostic as to the number of felony grades that should exist in a criminal code; see § 6.01(1) and Comments *a* through *c* (Tentative Draft No. 2, 2011). Maximum penalties necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for instance, rather than five.

Further, the revised Code for the most part draws short of recommendations concerning the severity of sanctions that ought to attend particular crimes. These are fundamental policy questions that must be confronted by responsible officials within each state. They are also questions with answers that change over time. The development of new rehabilitative treatment programs for an identifiable group of offenders, for example, may change the sentencing outcomes thought most appropriate for that group. Community values about discrete forms of criminality are also constantly evolving. Acquaintance rape and marital rape, as one illustration, are offenses regarded as much more serious today than 40 years ago. Some behaviors commonly criminalized in American codes in the mid-20th century, even at the felony level (and even in the original Model Penal Code), are no longer criminal offenses at all. The revised Code would impeach its own credibility were it to pretend Olympian knowledge of condign punishments.

Instead, the Code confronts problems of prison-sentence severity through numerous other means, including the adoption of a sound institutional structure for the creation and application of rational sentencing policies, with a judiciary statutorily empowered at both the trial and appellate levels to combat disproportionality in punishment. On this subject, much weight is borne by other Sections of the Code. In the 1962 Code, the statutory ceilings in § 6.06 were the

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sole enforceable limitations upon sentence severity for the majority of prison cases. Under the revised Code's sentencing system, severity is regulated primarily through sentencing guidelines, the courts' departure power under guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms (beyond the historically weak constitutional protections under the Eighth Amendment) for subconstitutional proportionality review of excessively harsh penalties.

(1) *Most severe available penalty*. Even given § 6.06's open-textured approach, it is possible to bring sharp focus to questions of statutory maximum penalties in three locations of the grading scheme: for the most serious of all offenses, for the grade of felonies immediately below the most serious class, and for the least serious felony classification. All jurisdictions face comparable questions of law and policy in establishing these benchmarks.

The most severe authorized penalty in a criminal-punishment scheme (the "absolute maximum") does much to define the scaling of penalties beneath it. It is an anchor point that marks the sentence to be meted out for the most serious of offenses, committed under the least mitigated circumstances. For somewhat less serious crimes, the law's "penultimate" maximum sentence is chosen with the absolute maximum penalty as one reference point. Arguably, the entire scale of authorized sanctions has some tendency to be stretched upward, or compressed downward, depending on where the absolute maximum is located.

The question of the absolute maximum sentence is especially pressing in this country, and was the subject of extensive debate during preparation of the revised Code. Compared with other Western democracies, the United States employs harsher penalties at the upper tier of the punishment scale, and dispenses sanctions from the upper tier more often. In most U.S. jurisdictions, the absolute maximum sentence remains the death penalty, which has been abolished throughout Western Europe and all British Commonwealth nations. In our country, fierce controversy has long surrounded the issue, has distracted attention from the formulation of a coherent prison policy, and has contributed to the over-severity of prison sentences.

The Model Penal Code itself has had a complex relationship to the death penalty—both in its 1962 and present-day iterations. The original Code took no position on the abolition or retention of capital punishment, but included detailed statutory recommendations addressed to states that chose to retain the penalty; see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.6 (1980). This provision was influential in state legislatures, and helped some states devise capital-punishment laws that survived the constitutional challenges of the 1970s. In part because of this history, the Institute undertook a reexamination of its policy in the 2000s. The results of that process are easily summarized: The new Code will contain no death penalty, and the capital-punishment provision in the 1962 Code has been formally withdrawn by the Institute. See Message from ALI Director Lance Liebman (October 23, 2009) (reporting adoption of resolution that "the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally

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adequate system for administering capital punishment."); see also Report to the ALI Concerning Capital Punishment: Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law) (2008), reprinted in Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (2009).

In light of these developments, it might appear that the revised § 6.06 speaks only to death-penalty-abolition states. That is not the case. The provision is addressed to all American jurisdictions on the premise that the policy questions surrounding maximum prison sentences are largely similar in death-penalty and non-death-penalty states. Put differently, death-penalty states should resist the pressure to distend their full-punishment scale toward greater severity because of the presence of a capital-sentencing provision, while non-death-penalty states cannot wholly ignore the existence of capital punishment when defining their subcapital-penalty scales. The Institute recognizes that its decision to excise the death penalty from the Model Penal Code does not remove it from policy debate.

The equivalencies between capital and noncapital systems run in two directions. In a majority of death-penalty jurisdictions, the penalty is rarely or never used. In all but a handful of American states, nearly 100 percent of convicted offenders receive sentences from the continuum of subcapital-sentencing options. Without denying the great symbolic and ethical significance of capital punishment, the actual operation of American criminal-justice systems, with only a few exceptions, is effectively the same across the death-penalty divide: Long prison sentences are the most severe sanctions actually used. There is a further and more subtle similarity: Non-death-penalty states make criminal-justice policy in the shadow of the constitutional availability of capital punishment, and the prospect of its future enactment. Legislative sentencing discretion extends to the death penalty even if the state's current statutory law does not—and this sometimes influences debate over the subcapital-sentencing scale. Section 6.06 has been framed to take account of the death penalty's continuing presence in American law, and its direct and indirect effects on prison policy.

(2) *Life sentences.* With one narrow exception, the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner's natural death. In a departure from the Institute's previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release—the equivalent of "life without parole" in some systems—but only when this sanction is the sole alternative to a death sentence. It is thus fair to say that the absolute maximum penalty under the Code, for the overwhelming majority of cases, even at the highest reaches of offense seriousness, is an "ordinary" life prison term—one with the prospect of release—yet this ceiling may occasionally be raised to respond to the unique realities of capital punishment in American law.

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Subsection (6)(a) states that, "in the case of a felony of the first degree, the prison term shall not exceed life imprisonment." In the normal course, all life sentences imposed under this Section will be reconsidered at a much later date. Subsection (9) allows for reduction of this maximum term under either § 305.6 or § 305.7 (both in Tentative Draft No. 2, 2011). Section 305.6 creates a sentence-modification power, to be exercised by a judicial panel or other judicial decisionmaker, for prison sentences that result in time served of more than 15 years, including life sentences under subsection (6)(a). Section 305.7 responds to exceptional circumstances, including the prisoner's advanced age or physical or mental infirmity, exigent family circumstances, or other compelling reasons that justify a modified penalty in light of the purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007). These are meaningful, but not remarkably generous, release provisions. Taking both sentence-modification mechanisms into account, the prospects of freedom for prisoners serving life sentences under subsection (6) are significantly reduced from those under the original Model Penal Code.

For jurisdictions with no death penalty, the absolute maximum sentence in the 1962 Code was an indeterminate life sentence, with the actual length of term left largely to the discretion of the parole board. Under original § 6.06(1), Alternative § 6.06(1), and § 6.07(1), an offender sentenced to a maximum of life imprisonment would become parole eligible after serving a minimum term never longer than 10 years—and as short as 1 year. Moreover, the original Code included a presumption in favor of release at first eligibility. See 1962 Code § 305.9(1) ("Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release," unless the Board "is of the opinion" that one of four enumerated factors is present and justifies deferral of the prisoner's release). There were no exceptions to this highly indeterminate approach. Even in capital cases, the 1962 Code rejected the "flat life" sentence as an alternative to the death penalty.

The original Code's view that the absolute maximum prison sentence should be an indeterminate life term has not had lasting influence. Short of the death penalty, in nearly every American jurisdiction in the early 21st century, a life term of imprisonment *without the possibility of release* is now the most severe punishment authorized in the criminal code. Varying terminology has been used to denote a "natural life," "true life," or "whole life" sentence. "Life without parole," abbreviated as "LWOP," is the most popular usage in the United States—even in jurisdictions that have discontinued parole release as a regular feature of their criminal-justice systems. Unlike the death penalty, LWOP has come to be frequently employed. Nationwide, the number of prisoners serving natural-life sentences was vanishingly small through the 1960s, but the use of the sanction began to lift in the mid-1970s and has grown dramatically ever since. In 2009 more than 41,000 persons nationwide were serving LWOP sentences. In some states, they currently make up more than five percent of the total prison populations.

The increasing use of whole-life sentences in this country has been driven largely by their role in the death-penalty debate. In many jurisdictions, life without parole serves as the chief

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alternative to capital punishment for the most aggravated homicides. As a matter of statutory law, sentencing juries in most capital-punishment jurisdictions are instructed whenever life without parole is an alternative to a death sentence in the case before them, and such an instruction is often constitutionally required. In states without capital punishment, legislative authorization of natural-life sentences is sometimes thought essential to public acceptance of a system with no death penalty. In opinion surveys over the past 15 years, public support for capital punishment has been shown to drop markedly when survey respondents are told that life without parole may be substituted for execution. Thus, the political momentum of proposed death-penalty legislation may be offset if the credible alternative of a whole-life tariff is brought forward.

The Institute's new position has been forged with reluctance. Viewed as an independent policy question, that is, if capital punishment were not part of the nation's legal landscape, the Institute would not endorse penalties of life imprisonment with no chance of release. Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time—even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable. See § 305.6 and Comment *b* (Tentative Draft No. 2, 2011) (creating a process for reassessment and possible modification of exceptionally long prison sentences after a period of 15 years).

Despite these concerns, the Institute recognizes the advisability of the penalty of life imprisonment with no chance of release when it is the only alternative to the death penalty. In this circumstance, it is defensible for a legislature to authorize a life prison term that is not subject to later sentence modification under § 305.6. The Institute's position on this score should be understood as a concession to the broader landscape that includes capital sentences, not as a freestanding endorsement of natural-life prison sentences. Because of the death penalty's unmatched severity, it exerts a gravitational pull on other sanctions, both in specific cases and in the legislative process.

In states that make use of the death penalty, it is sound policy to give capital-sentencing juries the option of natural-life sentences in lieu of a death sentence, or to inform juries that the trial court will impose a penalty of life without possibility of release if they do not vote in favor of execution. Such an instruction is often constitutionally required, but is good policy apart from any constitutional mandate. In order to make the jury charge possible, a natural-life sentence must be among the authorized penalties for death-eligible offenses. The revised Code contemplates that this be done, but in the most circumscribed manner. Life without parole is not included in the general framework of statutory maximum penalties in § 6.06, and would not exist under the strictures of subsections (6) and (9). When appropriate under the principles discussed in this Comment, the sanction should be attached to specific crimes, or especially aggravated

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instances of those crimes, that are defined elsewhere in the Code. The present Code revision countenances but does not attempt that task.

In states without capital punishment, the death penalty's gravitational pull stems from the prospect that it *could be* enacted into law. So long as the death penalty is constitutionally permissible, and within reach of majoritarian support, legislators may at times be faced with only two politically viable options: enactment of a new death-penalty provision or the substitution of life without parole. In such instances, the Institute views the natural-life sentence as a justified policy choice. Once again, however, the LWOP penalty should be adopted only for discrete offenses, or subdivisions of those offenses, and should not be normalized as a part of the general felony-punishment scale.

It is important to emphasize that the Institute does not approve of the "creep" of life sentences without parole to offenses beyond those that would otherwise be eligible for the death penalty. Whole-life sentences are justified only for offenses of sufficient gravity that the federal and state constitutions would allow the imposition of capital punishment, and only for offenders who could, consistent with constitutional law, be recipients of death sentences. Application of this principle requires reference to the evolving jurisprudence of the Eighth Amendment, the Due Process Clause, and other relevant provisions under the U.S. and state constitutions. Federal constitutional law, for example, has never upheld the use of the death penalty for crimes other than murder, has struck down its use for offenses as serious as the rape of a child, and holds that capital sentences may not be imposed when the defendant is mentally retarded or was under 18 at the time of the offense. Over time, these constitutional rules of exclusion have changed, and have generally broadened in scope.

In addition to limitations by substantive offense and the personal characteristics of the offender, the death penalty is constitutionally allowable only after adequate procedures have been followed in the individual case to insure that the sentencing jury's discretion has been guided, yet not unduly restricted, on the question of ultimate punishment. For example, the Eighth Amendment forbids the imposition of capital punishment for all first-degree murders, and requires that procedures exist to allow sentencing juries to select especially aggravated cases in which to dispense a death sentence. The U.S. Supreme Court has upheld only death-penalty schemes that bifurcate trial proceedings into guilt and penalty phases, with aggravating facts at the penalty phase to be proven beyond a reasonable doubt. While these rulings have not been extended to subcapital cases, state legislatures should consider the adoption of comparable procedural protections before LWOP penalties may be imposed.

Outside the small category of death-penalty-eligible crimes, the absolute maximum penalty prescribed in the new Code is a life sentence *with* the possibility of release, or an "ordinary" life term. The most important release mechanism for offenders serving such penalties is the sentence-modification process created in § 305.6. This is the only release provision of general application to all prisoners who have served a substantial portion of long prison terms. In

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1 some instances the “compassionate release” criteria in § 305.7 may also warrant a sentence
2 reduction for life prisoners.

3 It is important to recognize that the ordinary life sentence in the Code’s scheme is a
4 punishment of tremendous magnitude, and is not dramatically more lenient than an LWOP
5 sentence. In assessing the sanction’s proportionality as a response to serious victimizations, in
6 both the policymaking or adjudicative settings, its true gravity should not be undervalued. It is a
7 punishment to be used with solemnity and restraint, and crime victims should not devalue its
8 retributive force. Objectively, it is a more severe form of the ordinary life sentence than exists in
9 many systems. Compared with the 1962 Code, for example, the revised Code cuts far back on
10 the realistic chances that a prisoner serving a simple life term will ever be released. Instead of
11 first-release eligibility after 1 to 10 years, with reconsideration in each successive year for those
12 denied, the Code now institutes a minimum term of 15 years, with recurring eligibility at
13 intervals as long as 10 years. Further, the revised Code installs no statutory presumption of
14 release at first eligibility, or at any point in a long prison term, and instead reposes sentence-
15 modification discretion in a judicial authority, aided by sentencing guidelines. See § 305.6
16 (Tentative Draft No. 2, 2011). In short, the extant vehicles for sentence reduction in the new
17 Code do not approach the free-ranging release discretion granted to paroling agencies in
18 indeterminate-sentencing systems. Many offenders who receive simple life prison terms under
19 the Code will never regain their freedom.

20 The Institute considered a proposal to soften the force of ordinary life sentences under
21 subsections (6)(a) and (4) through the injection of a presumption in favor of release at a very
22 distant remove such as 25 or 35 years. The main argument in support of the suggestion was that
23 the release provisions of §§ 305.6 and 305.7 are too limited and are unproven in application, so
24 there is a significant danger that many or most ordinary life terms under the revised Code will be
25 the functional equivalent of LWOP sentences. Indeed, an illusory prospect of later sentence
26 modification might make it all too easy to impose ordinary life terms at the front end of the
27 sentencing process, in reliance upon back-end release practices that will never materialize. This
28 reasoning was not found sufficient to change the broad statutory parameters of § 6.06, however.
29 Acknowledging the full weight of the concerns expressed, they cannot be addressed with the
30 requisite precision, in light of distinctions that arise from the facts of individual cases, in the
31 relatively mechanical statutory provision that creates the basic superstructure for authorized
32 prison sentences. Instead, questions of presumptive release dates for some or all offenders with
33 life sentences—as well as others serving terms of 20 years, 30 years, or more—are reposed with
34 the sentencing commission in the promulgation of sentence-modification guidelines under
35 §§ 305.6(9) and 305.7(10), and in the judicial branch, which is entrusted to develop a common
36 law of sentence modification under §§ 305.6(8) and 305.7(6)(e).

37 (3) *Penultimate maximum penalties.* All States with comprehensive grading schemes
38 must fix maximum sentence severity at the “penultimate” level of felonies, one tier below those
39 offenses justifying a life prison sentence. This problem is taken up in subsection (6)(b). Although

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the revised Code is intended to be adaptable to many state criminal codes, and assumes that there will be many variations in crime definitions across jurisdictions, the offenses involved will probably include the most serious forms of manslaughter, some lower degrees of murder where they exist, many classes of aggravated assaults, sexual assaults, and robberies, and the most serious of economic crimes. The question posed is what penalty should be available for the worst cases, on their individual facts, in this group. The original Code, with only three degrees of felonies, placed the penultimate maximum at 20 years under § 6.07(2), which set out the longest "extended term" prison sentence available for second-degree felonies. This same statutory ceiling is carried forward in the revised § 6.06(6)(b), albeit in bracketed language. It also reflects the legislative judgments reflected in many contemporary criminal codes, albeit in the low range of current practice. Prison terms for single offenses in excess of 20 years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes, see § 1.02(2)(a) (Tentative Draft No. 1, 2007).

The maximum term in subsection (6)(b) is intended for use in the most extreme cases at the penultimate tier of crime seriousness. Great care should be taken by the sentencing commission when recommending punishments at this level, and by sentencing courts when considering their use in individual cases. It should be kept in mind that a 20-year sentence, when imposed in the new Code's determinate sentencing scheme, will often be a more severe penalty than the identical pronounced sentence in an indeterminate system. Under the original Code, offenders sentenced to a 20-year maximum term would be eligible for presumptive release by the parole board after no more than four years, assuming the usual award of good-time credits, see original§§ 6.07(2), 305.1, 305.9. In the revised Code, a 20-year sentence yields a presumptive release date after 14 years, assuming the prisoner earns all available good-time credits; see § 305.1 (Tentative Draft No. 2, 2011). The very worst among offenders may serve the full 20-year maximum in either system. Still, under a determinate scheme with sentencing guidelines, and meaningful appellate sentence review, pronounced sentences with a 20-year maximum should be imposed less frequently under the approach of the revised Code than under the 1962 Code. In the Code's new sentencing structure, judgments about which offenders are deserving of this degree of punishment are concentrated at the "front end" of the system rather than the "back end."

(4) *Least serious felonies.* There are some crimes that are seen by legislatures as deserving of the opprobrium of classification as "felonies," yet do not justify imposition of substantial incarceration terms. Sometimes new felony legislation is enacted in part for symbolic purposes, even though the conduct involved is not meaningfully distinguishable from the most serious misdemeanors. Accordingly, most American jurisdictions with comprehensive grading schemes have felt the need for at least one gradation of felony offenses subject to a maximum sentence of no more than several years. Subsection 6.06(6)(e) recommends, in brackets, a ceiling of three years for the lowest felony classification, no matter how many other gradations of felony a jurisdiction has chosen to create. The ceiling in subsection (6)(e) also serves as the default

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maximum sentence for unclassified felonies; see § 6.01(3) (Tentative Draft No. 2, 2011). Although the Institute is confident that the bracketed three-year ceiling is at or near its correct position, a somewhat lower maximum term would be consistent with the underlying policy of the provision.

l. Maximum authorized terms for misdemeanor offenses. While subsection (7) follows the original Code's subdivision of misdemeanor offenses into two classes, the maximum available penalties for misdemeanors and petty misdemeanors are considerably lower than those recommended in the 1962 Code. Under original § 6.09(1)(a), the maximum available penalty for a misdemeanor was three years. For a petty misdemeanor, under original § 6.09(1)(b), the maximum was two years. The maximums stated in proposed subsection (2), albeit in brackets, follow the overwhelming practice of contemporary American jurisdictions. Only a handful of states currently authorize penalties in excess of one year of incarceration for the most serious of misdemeanor offenses.

m. Disapproval of mandatory-minimum prison sentences. The revised Code continues the "firm position of the Institute that legislatively mandated minimum sentences are unsound," as stated in the 1962 Code in an Official Comment. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-125. Subsection (8) now elevates the Institute's policy to black-letter statutory language, and states that a sentencing court "is not required to impose a minimum term of imprisonment for any offense under this Code." The subsection will have the substantive effect, in adopting jurisdictions with preexisting mandatory penalties in their criminal codes, of repealing all such provisions. Subsection (8) declares unequivocally that it "supersedes any contrary provision in the Code."

The Institute's longstanding disapproval of mandatory-minimum penalties is based on deep historical experience and an ever-enlarging research base. The drafters of the 1962 Code concluded that such provisions failed to advance their purported goals, worked injustices as applied in individual cases, and distorted the operation of the criminal-justice system. These conclusions are even more strongly supported today than they were 50 years ago.

Statutorily mandated prison terms ostensibly shift sentencing discretion from the courts to the legislature, on the theory that sentencing outcomes can be determined by legislative command without the variability of case-level decisionmaking. Even if such legislatively directed uniformity were possible, it would be an undesirable policy goal. Throughout the revised Code, judicial discretion is viewed as the indispensable centerpiece of the criminal sentencing process. See § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007) (a fundamental purpose of the sentencing system is to "preserve judicial discretion to individualize sentences within a framework of law"). No legislature can envision ahead of time the particularized facts of all cases that will come before the courts. It is inherently unsound to assume that all offenses within a given category must necessarily be aggravated to the same high level of seriousness, or will be uniformly devoid of mitigating circumstances. It is equally infirm to suppose that all offenders

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will present identical profiles of blameworthiness, or that the harms done or risked to crime victims will in every case be equivalent. The interests of victims, and the community at large, in seeing proportionate penalties visited on criminal offenders, are frustrated by a one-size-fits-all punishment scheme.

Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.

The scope of prosecutorial sentencing power is a serious problem in American justice systems. An indispensable premise of the adversarial process is that a neutral decisionmaker will pass ultimate judgment in criminal cases, rather than one of the parties of interest. This procedural value is nowhere more basic than in the realm of sentencing. It is not necessary to romanticize the capabilities of all trial judges, or to pretend that perfect objectivity is possible for any human decisionmaker, to recognize that clear institutional and professional differences exist between the roles of judges and prosecutors. The norms and incentives of the judicial branch strive toward objectivity and the unbiased application of law. While processes for judicial selection vary widely across the nation, there is broad consensus that the qualifications for judgeship include seasoned experience and a temperament that precludes favoritism or the prejudgment of cases. Prosecutors, in contrast, are often young attorneys not long out of law school. While they have an ethical responsibility to pursue just results in individual cases, they are also combatants within an adversarial system. The incentives that prosecutors experience in daily life often push toward the obtaining of convictions and substantial punishments. Likewise, the procedural contexts for judicial and prosecutorial decisionmaking are vastly different. Whereas judicial sentencing authority is exercised in open court, structured by enforceable law, and subject to the check of appellate review, prosecutorial sentencing power is opaque, unregulated, and unreviewable.

In the preparation of the revised Code, one clear imperative has been to address, where possible, the perceived expansion in prosecutorial sentencing power that has occurred over the past several decades, and to prevent the undue enlargement of such power. See, for example, § 6A.05(3)(b) and Comment *c* (Tentative Draft No. 1, 2007);§ 6B.06(6) and Comment *h* (id.); § 6B.07(4) and Reporter's Note to Comment *f* (id.); § 6B.08(1)(f) and Comment *e* (id.) (this provision submitted for informational purposes only, and not for approval); § 7.07B(6) and (7) and Comments *i* and *j* (id.). One of the most effective ways to strike a proper balance between

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judicial and prosecutorial power is to ensure that judges retain final discretion to set penalties in individual cases, so that judges' hands cannot be tied by the government's prior charging and bargaining decisions. See §§ 1.02(2)(b)(i) (id.); 6B.03(4) (id.); 6B.04(1) (id.); 7.XX(2) (id.). In this respect, there is no current mechanism in American law more misconceived than mandatory penalty laws. Once conviction is entered for an offense carrying a mandatory sentence, the judge has no formal authority to deviate from the minimum term—and no appellate court has freedom to hold otherwise. In many instances, other later-in-time decisionmakers in the sentencing system are likewise stripped of their customary decisional powers, such as when mandatory-penalty laws provide that offenders shall not be parolable or eligible for good-time credits. To the extent that mandatory sentencing provisions are defended for their ability to even out punishment disparities borne of the vagaries of case-specific sentencing discretion, this is a hollow claim. Case-specific discretion is not eliminated or even reduced in its magnitude; it is merely relocated and concentrated in the office of the prosecutor.

It should be noted that steep mandatory penalties are occasionally defended as an "aid" to plea bargaining. This rationale is not always articulated openly. Whether it is the stated or covert objective of mandatory sentencing laws, however, the Institute can endorse neither the means nor the ends in question. Coercion of guilty pleas is a substantial worry in every American criminal-justice system. An intentional machinery to threaten crushing penalties in order to win jury-trial waivers is an unacceptable use of the criminal law.

When measured against the substantive purposes of the sentencing system, mandatory-minimum-penalty provisions offer few or no benefits, and manifest harms. Section 1.02(2)(a) (Tentative Draft No. 1, 2007) of the revised Code institutes a policy framework of utilitarian purposes to be effected within statutory limits of proportionality in punishment. High importance is given to the utilitarian goals of "offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community," but these objectives are never deemed sufficient to justify penalties of disproportionate severity. The determination of proportionate sentences under Code is a deontological process, not conceived as an exact science, but as an effort to identify a "range of severity" of punishments that should be allowable in particular cases without the infliction of injustice. The reference points for judgments of proportionality are set forth in the Code as: "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." See § 1.02(2)(a)(i) and (ii) (id.). Ultimately, the process is one of moral valuation, and is entrusted to multiple actors within the system, including the legislature, sentencing commission, trial courts, and appellate courts. In the revised Code's institutional structure, the judicial branch is given the statutory power to make final determinations of sentence proportionality in individual cases, and may override all other decisionmakers in the system. The statutory power of proportionality review under the Code is meant to be significantly greater than the courts' authority to declare sentences "grossly disproportionate" on constitutional grounds.

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See §§ 7.XX(2), (3) (Tentative Draft No. 1, 2007); 7.09(5)(b) (id.) (the latter provision not yet presented for approval).

Mandatory-minimum-penalty laws are at war with the Code's tenets of proportionality in punishment. Among the cases prosecuted under an offense carrying a mandatory sentence, there will be many variations, great and small, in facts going to the anchor points of § 1.02(2)(a) (Tentative Draft No. 1, 2007), including offense gravity, the harms done or risked to victims, and the blameworthiness of the defendant. Yet—other than the prosecutor—no official in the sentencing system is permitted to respond to morally salient distinctions. The indiscriminate treatment of all cases as alike simply because they fall within the same crime definition is a false uniformity. The result is the injustice of intra-offense disproportionality in punishment.

Mandatory penalties can also produce disproportionate—and even nonsensical—sentencing outcomes across offense types. For example, in the present federal system, the minimum prison terms mandated by Congress for some drug offenses, or offenses involving weapons possession without victim injury, can far outstrip the sentences typically imposed for more serious crimes. The problem of inter-offense disproportionality is vividly illustrated by the 2007 testimony of one U.S. District Court judge:

> [R]ecently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison—the maximum suggested by the [U.S.] Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

The case for mandatory penalties is especially weak in a well-designed sentencing-guidelines scheme. Experience shows that greater sentence uniformity may be achieved with guidelines than with mandatory-penalty provisions, while not stripping sentencing courts of their authority to individualize sanctions in appropriate cases. The revised Code's guidelines system is carefully designed to avoid both intra- and inter-offense disproportionalities in sanctions imposed, and assumes that meaningful judicial sentencing discretion is required to realize these aspirations. The Code trusts sentencing judges both to respect guidelines presumptions in run-of-the-mill cases, and to depart from the guidelines when the circumstances of particular cases demand non-guidelines sentences. Conceived properly, judicial sentencing discretion is indispensable to the pursuit of true proportionality in punishment, measured by the diverse complexities of criminal cases in the real world, and to avoid the false uniformity of simplistically invariant punishments. Statutory mandatory penalties are not needed in a

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1 guidelines system in part because the guidelines can do a better job or, more pointedly, can
2 succeed where mandatory sentencing provisions fail. Worse still, mandatory-minimum sentences
3 subvert the guidelines system's goals by functioning as rigid statutory "trumps" that override the
4 graduated policy judgments built into the guidelines structure as a whole.

5 A survey of the utilitarian objectives of sentencing law, see § 1.02(2)(a)(ii) (Tentative Draft
6 No. 1), further weakens the case for mandatory-penalty laws. No one maintains that mandatory
7 sentences are directed toward the rehabilitation of offenders, their reintegration into the law-
8 abiding community, or the restitution of crime victims. And, as the drafters of the original Code
9 concluded, the use of mandatory penalties does little or nothing to further goals of general
10 deterrence or the incapacitation of dangerous criminals.

11 The overwhelming weight of criminological research suggests that the law's deterrent
12 effects can rarely be enhanced through marginal increases in the punishment severity. The theory
13 of marginal deterrence supposes that prospective offenders engage in a rational analysis of the
14 possible costs and benefits of their actions, are familiar with the penalties attached to different
15 crimes, and would be deterred by the prospect of a mandatory sentence even though they would
16 be undeterred by the felony sanctions otherwise in force. These compound assumptions do not
17 match well with the realities of most criminal behavior. Indeed, for those hypothetical offenders
18 who are fully acquainted with the criminal law and rationally process its consequences, the
19 assignment of mandatory punishments to particular offenses could have the perverse effect of
20 encouraging the commission of even more serious crimes. For example, an offender who
21 understands that his past criminal acts already subject him to a long mandatory prison term may
22 face strong temptation to intimidate or kill the witnesses against him, forcibly resist arrest, or
23 take other extreme steps to avoid the heavy penalty.

24 Nor do mandatory-minimum sentences find justification on incapacitation grounds. While it
25 is true that incarcerated persons cannot commit offenses in the free community—and so, in a
26 sense, every prison sentence is 100 percent incapacitative—a successful incapacitation policy
27 requires that prisoners confined for extended terms must be persons who would have in fact
28 committed serious offenses had they been free. Sustained detention of harmless individuals, apart
29 from its heavy moral costs, is therefore a gross failure of incapacitation strategy. The drafters of
30 the original Code recognized that mandatory-penalty laws were much too blunt an instrument to
31 make individualized judgments about recidivism risk, and that other, superior means could be
32 deployed to effect such a policy. Today, the argument is even stronger. While mandatory
33 sentencing provisions remain a blunderbuss approach for selecting the most dangerous offenders,
34 actuarial risk-assessment technology has significantly improved in the last 30 years. In order to
35 approach ethical and empirical plausibility, an incapacitation program must make use of credible
36 risk-assessment tools in support of judgments about who is dangerous and who is not. Even then
37 many mistakes are inevitable. Considerations of humility and restraint, along with careful
38 procedural safeguards, ought to be in play. See § 6B.09 and Comment *e* (Tentative Draft No. 2,
39 2011). What is never defensible is the pursuit of a selective incapacitation policy through the

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crude means of offense definition alone, with no consideration of the relevant histories and propensities of individual defendants.

Finally, the case against mandatory-penalty laws includes their distorting effects upon the legal system. Studies have found that such laws often result in increased trial rates and case-processing times. Because they are often viewed as too harsh by actors within the system, there are well-documented histories of the "nullification" of mandatory penalties by prosecutors, judges, and juries. The drafters of the original Code found these concerns to be substantial—and their magnitude has only grown with time. Contemporary studies of mandatory-penalty schemes in operation show widespread patterns of spotty enforcement and circumvention by courtroom actors. Judges and other observers have noted a trend of more frequent jury nullifications, especially in drug prosecutions—and there have been proposals that juries should be informed of the sentencing consequences of mandatory penalties in order to allow them to exercise their nullification power in a more knowledgeable way. These are all signals of a vastly misinformed policy.

The revised Code's approach to the subject of mandatory-minimum sentencing provisions is more forceful and comprehensive than the original Code's in two ways. First, as discussed earlier, the Institute's blanket disapproval of mandatory penalties is now given effect in express statutory language. Second, the revised Code now includes a host of targeted provisions designed to weaken the impact of mandatory penalties where they continue to exist in American criminal codes. Concededly, these are "second-best" solutions to the problem. They are recommended to state legislatures in concession to the reality that many jurisdictions will not repeal their mandatory sentencing laws in the immediate future. It may also be admitted that the targeted provisions are inconsistent, as a matter of pristine theory, with the declaration in subsection (8) that such penalties simply should not exist. If the revised Code were adopted whole cloth by a state legislature, including subsection (8), the targeted provisions would be surplusage. The adoption history of the original Code, however, teaches that state legislatures will often pick and choose among the Code's prescriptions. Taking the world of American criminal justice as it is, and as it is likely to remain for some time, the Institute concluded that it would be irresponsible to rest upon a categorical policy of condemnation of mandatory sentences, without also offering second-order recommendations for significant incremental change.

The following is a full list of the new Code's targeted provisions that operate to mute the effects of mandatory penalties, while not requiring their outright repeal:

(1) Under § 6.02B(3) (Tentative Draft No. 3, 2014), trial courts may order a deferred adjudication in a criminal case even when the offense charged is one that carries a mandatory prison penalty. The relevant language is:

The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that

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the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(2) Under a new provision for the sentencing of offenders under the age of 18 at the time of their offenses, judges are not bound by otherwise-applicable mandatory sentences. See § 6.11A(f) (Tentative Draft No. 2, 2011) ("The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.").

(3) In § 6.14(3)(b) (Council Draft No. 5, 2015), sentencing judges are given authority to approve negotiated "restorative justice" dispositions of criminal cases even when those dispositions differ from any mandatory prison sentence for the charge of conviction. The relevant language is:

> **The court may approve the recommended [restorative justice] disposition only if it is satisfied that the participants have consented to the recommendation and the requirements it imposes on the defendant are not disproportionate to the crime. If the court approves the recommended disposition, it may supplant any or all other authorized dispositions under this Article, and may supersede any mandatory-minimum term of imprisonment under state law.**

(4) The Code prohibits the sentencing commission from formulating guidelines that are based on the severity levels of mandatory-punishment statutes, and instead requires commissioners to use their own best judgment as to sentence proportionality in the guidelines. The relevant language is contained in § 6B.03(6) (Tentative Draft No. 1, 2007):

> **The guidelines shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission consistent with this Section.**

(5) The Code authorizes judges to deviate from a mandatory-minimum sentence in § 6B.09(3) (Tentative Draft No. 2, 2011), when an offender otherwise subject to the mandatory penalty is identified through actuarial risk assessment to pose an unusually low risk of recidivism. This subsection provides:

> **The [sentencing] commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction**

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rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

(6) The Code grants sentencing judges an "extraordinary-departure power" to deviate from the terms of mandatory-penalty provisions. See § 7.XX(3)(c) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5, 2015). This resembles the courts' authority to depart from sentencing guidelines, although the legal standard for departure from a mandatory penalty is more demanding than the "substantial reasons" standard for guidelines departures. The relevant language is:

> **Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).**

(7) Under the sentence-modification power created in § 7.08(2) (Council Draft No. 5, 2015), following a motion by the government, the trial court may reduce a sentence below the requirements of any mandatory prison penalty when the defendant has provided substantial assistance in the investigation or prosecution of another person. The relevant language is:

> **Upon the government's motion made prior to the termination of sentence, the court may reduce a sentence if the defendant provided substantial assistance in investigating or prosecuting another person's crime or criminal case when the assistance, or its full value, was not known to the court at the time of sentencing. A sentence reduction under this subsection may reduce the sentence to a level below any otherwise-applicable mandatory-minimum term of imprisonment under state law.**

(8) The revised Code's provision on appellate review of sentences creates a new statutory power in the appeals courts to reverse, remand, or modify any sentence, including sentences imposed in conformity with a mandatory prison penalty, on the ground that the sentence would be disproportionately severe. See § 7.09(4)(b) (Council Draft No. 5, 2015). The relevant language is:

> **The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.**

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(9) Good-time credits are always to be subtracted from the minimum term of a mandated prison sentence. See § 305.1(3) (Tentative Draft No. 2, 2011) ("Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.").

(10) The new sentence-modification powers under § 305.6 (Tentative Draft No. 2, 2011) (the so-called "second-look provision," which engages after a prisoner has served 15 years) and § 305.7 (Tentative Draft No. 2, 2011) (the "compassionate release" provision for aged and infirm inmates, or for extraordinary and compelling circumstances) expressly supersede any mandatory-minimum penalty that may have been imposed at the original sentencing, see § 305.6(5) ("The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law"), § 305.7(8) ("The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law").

(11) New § 305.8(1.3) ("Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation") (Council Draft No. 5, 2015), gives emergency powers to corrections officials (sometimes requiring court approval) to release prisoners in conditions of prison overcrowding, and these powers supersede any mandatory-minimum terms of incarceration imposed on prisoners otherwise eligible for "control release." The relevant language is:

> **The control-release authority under this provision shall not be limited by any mandatory-minimum term of incarceration or supervision under state law.**

n. Elimination of parole-release authority. The most far-reaching policy choice in this Tentative Draft, expressed in subsections (9) and (10), is the recommendation that all American sentencing systems should institute "determinate" sentencing systems—defined as systems in which no parole agency holds authority to set the actual lengths of prison stays. Subsection (5) is stated in brackets because it has application only in jurisdictions that have not already eliminated the prison-release discretion of the parole board.

The recommendation in favor of a determinate sentencing structure is a major departure from the policy of the original Code, which never questioned the desirability of an indeterminate framework. In 1962, when the first Code was approved, no determinate-sentencing system existed anywhere in the United States. Nationwide experimentation with these systemic reforms did not begin until the mid-1970s, and the first determinate-sentencing-guidelines systems were not created until the early 1980s. In the last 30 to 35 years, an information base has built up that was wholly missing when the Institute first spoke to the question of sentencing system design.

Subsections (9) and (10) contain relatively few words, yet affect the institutional structure of the sentencing system as a whole. Their prescriptions will have profound effects on many cases,

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and the policymaking process itself. At the elemental level, the choice in favor of a determinate framework reflects the underlying institutional philosophy of the Code that judges should be the decisionmakers with the greatest share of power to determine criminal sentences, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007). The most important systemic consequence of subsections (9) and (10) is the reallocation of sentencing authority otherwise held by parole boards in prison cases, which is now vested in sentencing courts.

Sixteen states and the federal system have abolished the parole board's release authority, including a majority of sentencing-guidelines jurisdictions. In 1994, the American Bar Association endorsed the trend, recommending that time served in prison should be determined by sentencing judges subject to good-time reductions (all within a framework of sentencing guidelines). There is broad agreement within the Institute that American parole boards, as they now function, and as they have performed in the past, should not retain the prison-release discretion that they have historically possessed in indeterminate sentencing jurisdictions. After more than a century of demonstrated failure, it is doubtful the parole board itself can be reformed. No example has been brought to the Institute's attention of a "successful" parole-release agency—that is, one that has performed its intended functions reasonably well—that might be used as a starting point to craft model legislation. One influential consideration behind the Institute's policy is that traditional indeterminate-sentencing systems have experienced more prison growth over the last 30 years than other system types, so that the states with the highest standing incarceration rates in the early 21st century are nearly all indeterminate-sentencing jurisdictions.

In contrast, a number of the existing determinate-sentencing systems—those that have conjoined the adoption of sentencing guidelines with the abrogation of parole release—have amassed track records of success in the implementation of desired sentencing policies, promotion of consistency in sentencing in individual cases, modest reductions in racial disparities in sentencing, inculcation of a meaningful process of appellate review, design of new information systems for monitoring actual sentencing practices, and successful development of "resource management" tools to control the growth of prison populations and other correctional populations. See Model Penal Code: Sentencing, Report (2003), at 63-125.

The considerations most important to the Institute's position in favor of a determinate-sentencing system are set forth at length in Appendix B (Tentative Draft No. 2, 2011), Reporter's Study: The Question of Parole-Release Authority.

o. States choosing an advisory-guidelines system. In states that choose to adopt advisory rather than presumptive guidelines, the statutory guidance in § 6.06 assumes heightened importance. When the guidelines themselves are unenforceable, § 6.06 supplies a coherent template for development of a common law of sentencing through decisions of trial and appellate courts. Finally, in states that have adopted no guidelines at all, § 6.06 gives important guidance

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1 to courts when exercising broad sentencing discretion, together with a handful of enforceable
2 legal constraints.

REPORTERS' NOTE [38]

4 *a. Scope.* For background on the Institute's decision to recommend a determinate-sentencing structure to every
5 jurisdiction, see Model Penal Code: Sentencing, Report (2003), at 21-27; Tentative Draft No. 2 (2007), Appendix B.

6 *c. Purposes of incarceration.* The subject matter of subsection (2) is of profound importance in a nation that
7 currently leads the world in per capita incarceration, with average incarceration rates that are seven times those in
8 Western Europe. America's prison and jail populations have fallen into modest decline since 2009—the first period
9 of reductions in nearly four decades, see E. Ann Carson, Prisoners in 2014 (Bureau of Justice Statistics 2015). Even
10 so, the U.S. has maintained its position of world "leadership" in incarceration rates. See Jeremy Travis, Bruce
11 Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and
12 Consequences (The National Academies Press 2014); World Prison Brief, Highest to Lowest—Prison Population
13 Rate (Institute for Criminal Policy Research 2016), available at: http://www.prisonstudies.org/world-prison-brief;
14 Tapio Lappi-Seppälä, American Exceptionalism in Comparative Perspective: Explaining Trends and Variation in the
15 Use of Incarceration, in Kevin R. Reitz, ed., American Exceptionalism in Crime and Punishment (Oxford University
16 Press 2017).

17 On the American "crime drop" since the early 1990s, see Alfred Blumstein and Joel Wallman, The Crime Drop
18 in America Cambridge University Press 2000); Franklin E. Zimring, The Great American Crime Decline (Oxford
19 University Press 2007); Richard Rosenfeld, Trends in Street Crime and the Crime Drop (Wiley & Sons 2015);
20 Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, What Caused the Crime Decline? (Brennan Center for
21 Justice 2015).

22 *d. Confinement of dangerous offenders.* On the incapacitation of dangerous offenders as a primary utilitarian
23 goal of incarceration, see Franklin E. Zimring and Gordon Hawkins, Incapacitation: Penal Confinement and the
24 Restraint of Crime (Oxford University Press 1995); Martin F. Horn, Rethinking Sentencing, 5 Corrections
25 Management Quarterly 34 (2001); Alfred Blumstein, From Incapacitation to Criminal Careers, 53 Journal of
26 Research in Crime and Delinquency 291 (2016). Reasonable empirical estimates of the crime-reductive benefits of
27 incapacitation policy vary significantly; see John J. Donohue III, Assessing the Relative Benefits of Incarceration:
28 Overall Changes and the Benefits on the Margin, in Steven Raphael and Michael A. Stoll, eds., Do Prisons Make Us
29 Safer?: The Benefits and Costs of the Prison Boom (Russell Sage Foundation 2009); Jeremy Travis, Bruce Western,
30 and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences
31 (The National Academies Press 2014), at 140. For strong critiques of incapacitation-based prison policy, see Todd
32 R. Clear, "A Thug in Prison Can't Shoot Your Sister," 15 Criminology & Public Policy 343 (2016); Bernard E.
33 Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age (University of Chicago Press
34 2008). Most scholars agree that incarceration growth yields diminishing crime-avoidance returns as per capita

[38] The bulk of this Reporters' Note has not been revised since § 6.06's approval in 2011. The Note has been revised only to reflect the proposed amendments to the provision put forth in this draft. All Reporters' Notes will be updated for the Code's hardbound volumes.

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imprisonment increases, and may reach a tipping point beyond which incarceration growth produces more crime than it prevents. See Zimring and Hawkins, supra; Bert Useem and Anne Morrison Piehl, Prison State: The Challenge of Mass Incarceration (Cambridge University Press 2008).

There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders. Any sentencing policy based on predictions of future misconduct will yield a significant number of "false positives"—that is, individuals who have been classified as dangerous when, in fact, they would not reoffend if released or would commit only minor crimes. Actuarial prediction models have improved in the past several decades, and have outperformed clinical judgments of future recidivism for at least half a century, see Paul E. Meehl, Clinical vs. Statistical Prediction (1954); Michael Gottfredson and Donald Gottfredson, The Accuracy of Prediction, in Alfred Blumstein ed., Criminal Careers and Career Criminals (1986) ("in virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment"); W.M. Grove and Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction, 2 Psychology, Public Policy and Law 293 (1996); Grant T. Harris, Marnie E. Rice, and Catherine A. Cormier, Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 Law & Human Behavior 377 (2002) (finding that "composite clinical judgment scores were significantly correlated with violent recidivism, but significantly less than the actuarial scores"). In recent decades, the science of actuarial prediction has advanced substantially, while the success of clinical predictions has not. John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 Va. L. Rev. 391, 406 (2006).

Even with the best available risk-sensitive technology, however, errors in prediction can never be eliminated—and the greatest number of mistakes occur when trying to predict the most serious acts of reoffending. See Richard Berk and Justin Bleich, Statistical Procedures for Forecasting Criminal Behavior: A Comparative Assessment, 12 J. of Criminology and Pub. Pol'y 515 (2013). The Institute, recognizing that the question is difficult, has concluded that the interests of future crime victims (whose actuarially certain victimizations can be avoided through use of selective incapacitation policy) must be weighed against the interests of convicted offenders whose sentences are determined in part by imperfect risk assessment protocols. Indeed, either choice—to use or not use risk assessment scales—is intolerable, see § 6B.09 and Comments and Reporters' Notes *a*, *d*, and *e*; Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003).

Incapacitation policy can be used to rule out low-risk offenders from prison and jail sentences, as recommended in § 6B.09(3). See generally Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). Because actuarial prediction technologies are more successful at identifying low-risk individuals than persons who pose especially high risks, incapacitation policy can be deployed with relative confidence in support of prison-diversion initiatives. See Kathleen Auerhahn, Selective Incapacitation and the Problem of Prediction, 37 Criminology 703 (1999); Hennessey D. Hayes and Michael R. Geerken, The Idea of Selective Release, 14 Just. Quarterly 353, 368-369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders"; proposing policy of "selective release" as opposed to selective incapacitation); Stephen D. Gottfredson and Michael Gottfredson, Selective Incapacitation?, 478 Annals of the American Academy of Political and Social Science 135

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(1985) ("Predictive accuracy, while much in need of improvement, is sufficient for [the policy of selective deinstitutionalization], but insufficient for [the policy of selective incapacitation]").

Incapacitation or the prediction of dangerousness has been a fundament of American prison policy for much of the nation's history. Two-thirds of the states regularly base the lengths of prison terms on the perceived dangerousness of imprisoned offenders—a policy that has been largely uncontroversial for over a century when administered by parole-releasing agencies. See Joan Petersilia, Edward E. Rhine, and Kevin R. Reitz, The Future of Parole Release: A Ten-Point Reform Plan, in Michael Tonry ed., Crime and Justice: A Review of Research (2017); Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., Crime and Justice: A Review of Research, vol. 12 (University of Chicago Press 1990); Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbook of Sentencing and Corrections (Oxford University Press 2012); Kevin R. Reitz, The "Traditional" Indeterminate Sentencing Model, in Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbook of Sentencing and Corrections (Oxford University Press 2012); Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey, and Kelly Lyn Mitchell, The Continuing Leverage of Parole Releasing Authorities: Findings from a National Survey (Robina Institute of Criminal Law and Criminal Justice 2016). Judges regularly pass sentences based partly on their best judgment, or the best information available to them, concerning the future dangerousness of defendants, see Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985). A binding injunction, statutory or otherwise, that these modes of decisionmaking should be outlawed is nearly impossible to imagine in this country. However, implementation of an attitude of utilitarian skepticism would work vast improvement in the nation's justice systems.

e. Incarceration based on seriousness of the offense. On retribution as a justification for prison sentences, see Michael S. Moore, Justifying Retributivism, 27 Israel L. R. 15 (1993); Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (Oxford University Press 2005); Paul H. Robinson, Intuitions of Justice and the Utility of Desert (Oxford University press 2013).

f. Omission of general deterrence as a basis for judicially imposed prison sentences; propriety of incarceration when other sanctions would depreciate the seriousness of the offense. No recommendation of the revised Code was more controversial in the drafting process than the position that general deterrence should not be included as one of the legitimate purposes of incarceration within the purview of sentencing courts. One source of concern within the Institute was that the omission is out of sync with existing law. In the majority of American jurisdictions, statutory law on the general purposes of criminal sentences or, where they exist, specialized provisions on the purposes of prison sentences, include general deterrence among the goals to be considered by courts when meting out sentences. See § 1.02(2), Reporters' Note *b*. The Code's approach is not wholly unprecedented, however. Roughly one-fifth of all states omit general deterrence from the express statutory aims to be pursued by sentencing courts. The strength of these authorities should not be overstated, however. For the most part, statutory provisions on the purposes of sentencing and imprisonment are not enforceable in individual cases. Actual judicial practice may vary significantly from statutory declarations of sentencing purposes. Indeed, one cornerstone innovation of the revised Model Penal Court is to give such statutory purposes the force of law throughout the sentencing system. See § 1.02(2), Reporter's

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Note *a* ("[n]ew § 1.02(2) . . . is made a required basis for decisionmaking and explanation by identified officials throughout the sentencing system").

In the Institute's view, a reordering of past practices of prison sentencing is among the first national priorities for the 21st century. The decision not to include general deterrence among the purposes in subsection (2) should be understood as consciously intended—following extended debate and deliberation—to work an important change in the thought processes of sentencing judges across the country.

Because of the ambitious nature of the Code's recommendation on this score, it is helpful to rehearse the main subjects of discussion that preceded it. These may be arranged under several headings:

(1) The Code rejects practices of *individualized* variations in sentence severity, on a case-by-case basis, in furtherance of goals of general deterrence. General deterrence is aimed toward the public at large and has only a remote relationship to the facts or resolutions of individual cases. Judges have no case-specific information that indicates the general-deterrence efficacy of one sanction versus another. Instead, general deterrence policy is better considered at the systemic level, when penalties are assigned to particular offenses by the legislature or sentencing commission.

(2) The weight of criminological knowledge teaches that marginal increases in the severity of criminal sanctions rarely bring about marginal improvements in general deterrence in the community. Criminologists over many decades have failed to find robust empirical evidence in support of the deterrence-through-severity hypothesis. (The intellectual history of "the null hypothesis" includes groundbreaking research conducted by Thorsten Sellin, during the original Model Penal Code project, on the deterrent effect of the death penalty.) The empirical evidence does support the view that marginal general deterrence can be effected by the increased probability of apprehension for criminal conduct, and accelerated swiftness in the delivery of penalties—sometimes called the "certainty" and "celerity" principles. These mechanisms of general deterrence, however, operate independently of the quantum of punishment dispensed in particular cases.

On the weakness of empirical evidence that increasing the severity of criminal punishments has a deterrent effect on crime, see Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (University of Cambridge Institute of Criminology 1999); Aaron Chalfin and Justin McCrary, Criminal Deterrence: A Review of the Literature, J. Economic Literature (forthcoming) ("While there is considerable evidence that crime is responsive to police and to the existence of attractive legitimate labor market opportunities, there is far less evidence that crime responds to the severity of criminal sanctions."); Anthony N. Doob and Cheryl Marie Webster, Sentencing Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003) ("A reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society."), at 143; Daniel S. Nagin, Deterrence in the Twenty-First Century, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 42 (2013), at 199 ("certainty of apprehension, not the severity of the ensuing legal consequence, is the more effective deterrent"); Jeremy Travis, Bruce Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press 2014), at 139 ("the deterrent return to increasing already long sentences is modest at best.").

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There is a consensus among researchers that an increase in the *probability* that sanctions will be imposed carries greater deterrent effect than an increase in punitive severity, see Daniel Nagin and Greg Pogarsky, Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence, 39 Criminology 865, 865 (2001) ("Deterrence studies focusing on the certainty and severity of sanctions have been a staple of criminological research for more than 30 years. . . . [A prominent finding is] that punishment certainty is far more consistently found to deter crime than is punishment severity"). This conclusion has been echoed in the domain of white-collar offending. See A. Mitchell Polinsky and Steven Shavell, On the Disutility and Discounting of Imprisonment and the Theory of Deterrence, 28 J. Legal Studies 1, 12 (1999) ("for individuals who commit white-collar crimes, the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment . . . which suggests that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal."); Carlton Gunn & Myra Sun, Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet, 38 Human Rights 9, 12 (2011) ("A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught."). Cf. Daniel Richman, Federal White Collar Sentencing in the United States: A Work in Progress, 76 Law & Contemp. Problems 53, 63 (2013) (concluding there is "a cogent argument for a regime of frequent enforcement with relatively short prison sentences," but doubting that adequate resources will be devoted to increasing probabilities of detection).

Some believe that deterrence through severity can be an effective strategy for the prevention of corporate and other white-collar crime, on the premise that white-collar offenders are more likely than others to weigh the costs and benefits of criminal behavior before acting. The question remains an empirical one, however, not resolvable by common-sense judgments of human behavior. (Otherwise, for example, common-sense belief in the deterrent effect of the death penalty would still control.)

For research on the deterrability of corporate and other white-collar crimes through increased severity of punishment, see Elizabeth Szockyj, Imprisoning White-Collar Criminals?, 23 Southern Illinois University L.J. 485, 493 (1999) ("Empirical support regarding deterrence of conventional street crimes is inconclusive . . . . Although the subject has been researched less extensively, the results of white-collar crime deterrence studies show a similar inconsistent pattern. There is lukewarm support for the position that criminal penalties effectively deter corporate crime."); Daniel V. Dooley, Sr. and Mark Radke, Does Severe Punishment Deter Financial Crimes?, 4 Charleston L. Rev. 619, 657 (2010) ("A study of empirical evidence, relevant statistics, the nature of financial criminals, and other factors influencing punishment of white-collar criminals suggests that deterrence is not working."). Dooley and Radke advocate increased regulatory presence over harsher criminal sentences, stating that "the SEC and CFTC could achieve more meaningful deterrence by focusing on white-collar crime prevention through more effective and focused regulation," id. at 659. See also Ken Devos, The Role of Sanctions and Other Factors in Tackling International Tax Fraud, 42 Common Law World Rev. 1, 21 (2013) (studies have found that "the introduction and increase in penalties and sanctions per se had a limited impact upon tax non-compliance in the Australian, New Zealand, UK and US jurisdictions"); Peter J. Henning, Is Deterrence Relevant in Sentencing White-Collar Criminals?, 61 Wayne L. Rev. 27, 46 (2015) ("Research shows . . . that the deterrent effect of punishment is minimal for both street crimes and white-collar offenses"). The most recent and thorough meta-analysis of

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corporate-crime deterrence strategies—both civil and criminal—concluded that "we do not have enough evidence to conclude that punitive sanctions have a deterrent effect on individual- or company-level offending." See Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie, and Mariel Alper, What Works? A Systematic Review of Corporate Crime Deterrence, 15 Criminology & Public Policy 387, 397 (2016). Schell-Busey et al. concluded that measurable deterrent effects can be achieved in the corporate setting through regulatory strategies (that is, strategies that increase the certainty and celerity of adverse consequences), especially when multiple regulatory mechanisms are employed, but the study authors could find no persuasive evidence that changes in the severity of criminal punishments bring about meaningful deterrent effects.

Whatever the state of the evidence on marginal general deterrence through changes in sentencing severity, and however this evidence breaks down across crime categories, the revised Code takes the view that the evidence is best weighed by lawmakers and policymakers on the systemic level, and that deterrence policy cannot sensibly be applied by sentencing courts through variation in the severity of individual penalties.

(3) The Code's approach of proportionate prison sentences, to be imposed when lesser sanctions would depreciate the seriousness of the offense, effects some of the intuitions that underlie general deterrence reasoning. As recognized long ago by Jeremy Bentham, a criminal-justice system that metes out proportionate sanctions necessarily incorporates some principles of general deterrence. Leading contemporary desert theorists assert that deterrence is a side benefit of a commitment to proportionality in sentencing. See, e.g., Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (Oxford University Press 2005), at 24-26. In Bentham's utilitarian view, deterrence dictates that a society should impose punishments that correspond with crime severity. This is in part because the most serious crimes are those the law should discourage most vigorously, even at high cost to the offender and community. In addition, Bentham reasoned that the sentencing scheme should encourage offenders to limit the gravity of their criminal activity to the lowest possible grade of offense—and he believed that a disproportionate penalty framework would disrupt this incentive structure. See Jeremy Bentham, Principles of Penal Law, Pt. II, bk. 1, ch. 3, in J. Bentham's Works (J. Bowring ed., 1843). For example, if armed robbery and homicide were both punished with life imprisonment, some robbers would be encouraged to kill their victims. The removal of a key witness may appear to be a benefit with no additional cost. Or, if shoplifting is punished equally with grand larceny, we are telling rational shoplifters to "think big."

The Code's "depreciation of seriousness" formula posits that there is a meaningful difference between prison policy driven by offense seriousness and prison policy premised on utilitarian calculations without reasonable foundation. In the Institute's view, the "depreciation of seriousness" formulation frames a question that sentencing courts are equipped to answer, and appellate courts are competent to review.

The original Code is in agreement with the revised Code on this point. The 1962 Code's commentary stated that the "depreciation of seriousness" analysis was meant to displace more traditional but "unrealistic" utilitarian attempts to calculate the general deterrent effects of individual sentences:

> As a practical matter it is impossible to measure the amount of deterrence that will be engendered by a particular sentence. The positive effect of a given disposition on the community in terms of preventing or discouraging future offenses of the type involved is, in effect, a rationale that could easily be used to justify any result at any time.

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> For this reason, the wording of Subsection (I)(c) is designed to suggest a different set of inquiries. Rather than ask what positive deterrent effect a sentence will have, or whether many future offenses are likely to be deterred by a given sentence, the suggested criterion poses the question of what the negative effect of another sentence might be in terms of its impact on attitudes about the seriousness with which the offense is perceived. To take an obvious case, it would be unthinkable to impose a sentence of probation on a President's assassin. One might defend such a conclusion simply on retributive grounds, but this is not the intention here. The judgment is that such a disposition would so affect public respect for the law, and in particular for the level of seriousness with which the particular offense is taken, as to warrant a sentence of imprisonment on this ground alone. Viewed another way, the failure to impose the sanction of imprisonment would risk being taken as a license to commit certain types of offenses and should be avoided when serious risk of creating that image will arise. (Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 3(c) (1985), at pp. 233-234.)

(4) Finally, some argued that it is necessary to retain general deterrence as part of the sentencing of individual offenders, because otherwise judges will be disproportionately lenient when sentencing white-collar offenders with personal characteristics of race, ethnicity, background, and social-class status similar to most judges. The Code rejects this "misdirection" line of reasoning. As a matter of principle, it would be improper for the Institute to intentionally misstate the meaning of recommended statutory language, particularly in a provision meant to be the cornerstone of a jurisdiction's prison policy. The practical effects of such a maneuver are worse. It is dangerous to loose the "weapon" of general deterrence into all sentencing proceedings as a mislabeled surrogate for another policy altogether.

h. Rehabilitation and incarceration. Norval Morris famously argued that a term of imprisonment should never be imposed solely for purposes of rehabilitation, but that the incapacitation of dangerous offenders should be permissible with proper safeguards, Norval Morris, The Future of Imprisonment (1974), at 18; Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 6 (1985). See also H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968), at 26; Herbert L. Packer, The Limits of the Criminal Sanction (1968), at 67; United States v. Bergman, 416 F. Supp. 496 (E.D.N.Y. 1976) (Frankel, J.). For an argument that society has a moral duty to try to rehabilitate the offenders it incarcerates, see Edward L. Rubin, The Inevitability of Rehabilitation, 19 Law & Inequality 343 (2001).

i. Conditions of confinement. The Code's position on the inadequacy of rehabilitation as the sole justification for a prison sentence is qualified by its position on other utilitarian objectives. Subsection (2) endorses the use of incarceration "when necessary to incapacitate dangerous offenders." This policy applies, of course, whether or not an individual offender has any realistic prospect of rehabilitation. Indeed, the hypothetical "incorrigible" criminal has historically been considered the paradigm candidate for incapacitation. However, most people convicted of crimes, including those who present a high risk of serious reoffending when sentenced, will not remain crime-prone forever. In many cases, the aging process alone takes ex-offenders beyond the period of their active criminal careers. In other instances, the pain of incarceration, the benefits of rehabilitative programming, or the mysterious process of personal growth can be expected to change a prisoner for the better.

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When deciding to imprison a defendant on grounds of incapacitation, it is a difficult but unavoidable task to pass judgment on how long an incapacitative penalty will be needed. In some cases, this translates into a calculation of the amount of time the rehabilitative (or specific deterrence) process will take. For many first-time prisoners, for example, who statistically present much lower risk of recidivism than persons who have served multiple terms, a reasonable evidence-based judgment might be that a short period of confinement will be enough to put the defendant on the right course. Or, for a seriously drug-involved offender, the length of a judge's incapacitative sentence might turn on evidence that effective in-prison drug-treatment programs often take a year or two to yield results. In some but not all cases, the classic goals of incapacitation and rehabilitation are intertwined.

j. Sentencing guidelines. Although American sentencing guidelines do not address the full menu of criminal sanctions—only a few guidelines systems contain recommendations for probation and economic sanctions, for example—all American guidelines speak to the question of whether a sentence of incarceration should be imposed and, if so, its length of term. See Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (Oxford University Press 2013). Nearly all American sentencing guidelines are either presumptive in legal force (granting trial judges substantial discretion to deviate from guidelines provisions in individual cases) or advisory (unenforceable recommendations to trial courts); see id., Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2006).

k. Maximum authorized terms for felony offenses.

(1) *Most severe available penalty.* On the infrequency of executions in most U.S. jurisdictions that authorize capital punishment, see Franklin E. Zimring, The Contradictions of American Capital Punishment (2003), at 6-7; U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in 2005 (2006), at 9 table 9 (reporting 1004 executions in the United States from 1977 through 2005; of the 38 death-penalty jurisdictions in America during that time, only 12 states executed more than 20 people across the entire period; 23 of 38 death-penalty jurisdictions executed fewer than 5; 10 of 38 executed no one). As of this writing, 34 states and the federal system retain the death penalty. See John Schwartz and Emma B. Fitzsimmons, Illinois Governor Signs Capital Punishment Ban, The New York Times, March 9, 2011.

(2) *Life sentences.* For the 1962 Code's rejection of the "flat life" sentence as an alternative to the death penalty, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.6, Comment 10 (1980), at 152. ("Thus, persons convicted of murder but not sentenced to death are subject to imprisonment for a maximum term of life and a minimum term of not more than ten years. This resolution reflects the judgment that supervised release after a period of confinement is altogether appropriate for some convicted murderers, even though incarceration for the prisoner's lifetime may be required in other instances.").

A sentence of life imprisonment without possibility of early release—usually termed "life without parole"—now exists in every American jurisdiction except Alaska. See Death Penalty Information Center, Life without Parole, at http://www.deathpenaltyinfo.org/life-without-parole (last visited Mar. 8, 2011) (49 states, the federal system, and the District of Columbia authorize sentences of life without parole; New Mexico adopted its LWOP law in 2009). On the infrequent use of such a penalty in the United States until recent decades, see Note, A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1840 and n.17 (2006) ("From the 1910s to the 1970s, life without parole, as we now know it, did not exist. . . .

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While a few states, such as Pennsylvania, did not have parole for life prisoners, there was often an unofficial parole system through gubernatorial commutations"). On the effects of the death-penalty debate on the proliferation of LWOP sentences, see Franklin E. Zimring and David Johnson, The Dark at the Top of the Stairs: Four Destructive Influences of Capital Punishment on American Criminal Justice, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011).

Since the early 1970s, the use of whole-life sentences has increased steadily and dramatically. In 1992, there were 12,453 prisoners in the United States serving sentences of life without parole. This number grew to 33,633 in 2003, and 41,095 in 2008. See U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1992 (1992), at 633 table 6.81; Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 9.

On the average duration of life sentences served in U.S. criminal-justice systems, including sentences subject to parole release, see Marc Mauer, Ryan S. King, and Malcolm C. Young, The Meaning of "Life": Long Prison Sentences in Context (Sentencing Project 2004), at 12 (reporting that prisoners admitted to life sentences in 1991 could expect to serve about 21 years; this had risen to an expected 29 years for 1997 admittees).

Elsewhere in the developed world, natural-life sentences remain rare. No such sanction exists in Canada, where the most severe criminal penalty is a life sentence with parole eligibility at 25 years. See Canada Federal Statutes, Criminal Code § 745. Many European criminal-justice systems authorize yet rarely employ such a penalty. In the United Kingdom—a nation with one-fifth the U.S. population, only 22 prisoners were serving "whole life" sentences in 2005. Per capita, the United States employs life without parole at more than 350 times the frequency as in the United Kingdom. A few nations, such as Germany, France, and Italy, have declared natural-life sentences unconstitutional. See Catherine Appleton and Brent Grover, The Pros and Cons of Life Without Parole, 47 Brit. J. Criminology 597, 603, 610 (2007). The European Court of Human Rights has taken review of the question whether lifelong imprisonment, without possibility of discretionary release, is a violation of human rights, but no decision has been handed down. See BBC, Sunday Life (archives), Lifer's Rights, www.bbc.co.uk/sundaylife/thisweek8.shtml (last visited Mar. 8, 2011) (appeal of David Bieber, convicted of murder of a British policeman); Dirk van Zyl Smit, Outlawing Irreducible Life Sentences: Europe on the Brink?, 23 Fed. Sent. Rptr. 39 (2010). In the International Criminal Court, the most severe penalty available for any crime, including war crimes and genocide, is life imprisonment reviewable by the Court after a period of 25 years. See Rome Statute of the International Criminal Court art. 111(3), July 17, 1998, 2187 U.N.T.S. 90 ("When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced.").

Arguably, a sentence of life without possibility of release is close in severity to a death sentence. See Robert Johnson and Sandra McGunigall-Smith, Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration, 88 The Prison Journal 328, 329 (2008) (arguing that "[o]ffenders sentenced to death by incarceration suffer a 'civil death.'"). Yet few checks have developed on the appropriate use of the whole-life prison term. In the early 1970s, when the constitutionality of the death penalty had been placed in doubt by Furman v. Georgia, 408 U.S. 238 (1972), a sentence of life without parole for murder survived constitutional challenge with only cursory discussion by the Court in Schick v. Reed, 419 U.S. 256, 267 (1974)

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(death sentence commuted to life without parole; Court held that "[t]he no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution.") (footnote omitted). Federal constitutional limits on the use of natural-life sentences based on the seriousness of the offense of conviction have not been robust. In 1991, the Supreme Court upheld a sentence of life without parole for a first-time drug offender in Harmelin v. Michigan, 501 U.S. 957 (state law imposed mandatory life sentence, without possibility of parole, for possession of more than 650 grams of cocaine).

In 2010, however, the Supreme Court upheld an Eighth Amendment challenge against the use of life without parole for juvenile offenders convicted of non-homicide offenses; see Graham v. Florida, 130 S. Ct. 2011 (2010). The Court held that, given the exceptional severity of a natural-life sentence, surpassed only by the death penalty, its use was disproportionate when applied to offenders under the age of 18 convicted of armed burglary (Graham's most serious crime) or any other non-homicide offense. This was the first time the Court had ever categorically struck down the use of a specific penalty other than the death penalty. While the holding in *Graham* does not apply to adult offenders, the decision may represent a new stringency in the Court's constitutional review of extraordinarily severe prison sentences.

The Supreme Court has held that, at capital sentencing proceedings when offender dangerousness is at issue, the defendant has a constitutional right to a jury instruction that life without parole is an available penalty if a death sentence is not imposed. Simmons v. South Carolina, 512 U.S. 154, 161 (1994). The decision supposes that the state does in fact provide for such a penalty. To date, there is no constitutional rule that requires a state to adopt a penalty of life without parole simply to function as an alternative to capital punishment in individual cases. See generally Note, A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1852 (2006); Theodore Eisenberg and Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (1993); J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 344 (1993).

(3) *Penultimate maximum penalties.* A survey of penultimate maximum prison terms in contemporary American jurisdictions reveals that many states follow the original Code's recommendation to place the ceiling at 20 years. A majority of states, however, have enacted higher maximum terms for this level of offense. See Code of Ala. § 13A-5-6(a)(2) (20-year maximum for Class B felonies); Alaska Stat. § 12.55.125(c) (20 years for most aggravated Class A felony; offenses graded above this class include homicide, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping); Ariz. Rev. Stat. § 13-604(K) (35 years for most aggravated second-degree felony); Ark. Code § 5-4-401(a)(2) (30-year maximum for Class A felonies: "Class Y" is most serious felony level); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (6) (48 years for most aggravated second-degree felony); Conn. Gen. Stat. § 53a-35a (25 years for most serious felony other than murder); 11 Del. Code § 4205(b)(2) (maximum of 25 years for Class B felonies); Fla. Stat. § 775.082(3)(b) (30-year maximum for first-degree felonies; "life felonies" and "capital felonies" are eligible for more severe penalties); Haw. Stat. § 706-659 (20-year maximum for class A felonies; 4 classes of homicide are eligible for more severe penalties); Ill. Stat. c. 730 § 5/5-8-1 (30-year maximum for Class X felonies, one grade below first-degree murder); Ind. Code § 35-50-2-4 (50-year maximum for Class A felonies, one grade below murder); Iowa Code § 902.9(2) (25-year maximum for class B felonies); Ky. Rev. Stat. §§ 532.030 (capital felony);

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532.060(2)(b) (20-year maximum for Class B felonies; Class A maximum is life term: Capital offenses eligible for death penalty or life without parole); Me. Rev. Stat. 17-A § 1252(2)(A) (30-year maximum for Class A crimes; only murder graded above this category, with a maximum life sentence); Mo. Rev. Stat. § 558.011(1)(2) (15-year maximum for Class B felonies; maximum for Class A is 30 years or life imprisonment; capital crimes are graded above Class A); Neb. Rev. Stat. § 28-105(1) (50-year maximum for Class IC felonies; Class IB has life maximum; Class IA has life-without-parole maximum; Class I has death penalty); Nev. Rev. Stat. § 193.130(2)(b) (20-year maximum for Class B felonies; maximum penalties for Class A are death or life without parole); N.J. Rev. Stat. § 2C:43-6(a)(1) (20-year maximum for crimes of first degree); N.M. Stat. §§ 31-18-15(A)(3) & 31-18-15.1(C) (24-year maximum for most aggravated first-degree felonies, except for exceptions eligible for life imprisonment or the death penalty); N.Y. Penal Law § 70.00(2)(b) (25-year maximum for Class B felonies); N.D. Code § 12.1-32-01(2) (20-year maximum for Class A felonies; maximum for Class AA felonies is life without parole); Or. Rev. Stat. § 161.605(1) (20-year maximum for Class A felonies; more severe penalties available for murder and aggravated murder); 18 Pa. C.S. § 1103 (20-year maximum for felonies of first degree; three grades of murder are graded above); S.C. Code § 16-1-20(A)(1) (30-year maximum for Class A felonies; punishments for murder separately graded); S.D. Codified Laws § 22-6-1(4) (50-year maximum for Class 1 felonies; Classes A, B, and C, graded above, include death penalty and life prison terms); Tenn. Code Ann. § 40-35-111(b)(1) (60-year maximum for Class A felonies; penalties for murder, including capital punishment and life sentences, separately provided); Tex. Penal Code § 12.33(a) (20-year maximum for felonies of the second degree; felonies of first degree have maximum of life imprisonment; death penalty separately provided); Utah Code Ann. § 76-3-203(2) (15-year maximum for felonies of the second degree; felonies of the first degree have maximum of life imprisonment; death penalty separately provided); Va. Code § 18.2-10(c) (20-year maximum for Class 3 felonies: maximum for Class 2 is life imprisonment; maximum for Class 1 is death); Wash. Rev. Code § 9A.20.021(b) (10-year maximum for Class B felonies; maximum for Class A is life imprisonment); Wis. Stat. § 939.50(3)(b) (60-year maximum for Class B felonies; maximum for Class A is life imprisonment).

(4) *Least serious felonies.* The penalty for the least serious gradation of felony offense varies among the states with comprehensive grading schemes, but nearly all states have assigned maximum incarceration terms of five years or less. See Code of Ala. § 13A-5-6(a)(3) (maximum of 10 years for least serious felony grade); Alaska Stat. § 12.55.125(e) (5 years); Ariz. Rev. Stat. § 13-701(C)(5) (1 year); Ark. Code § 5-4-401(a)(5) (6 years); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (4)(b)(II)(6) (3 years); Conn. Gen. Stat. § 53a-35a (5 years); 11 Del. Code § 4205(b)(7) (2 years); Fla. Stat. § 775.082(3)(d) (5 years); Haw. Stat. § 706-660(2) (5 years); Ill. Stat. c. 730 § 5/5-8-1(7) (3 years); Ind. Code § 35-50-2-7(a) (3 years); Iowa Code § 902.9(5) (5 years); Ky. Rev. Stat. § 532.060(2)(d) (5 years); Me. Rev. Stat. 17-A § 1252(2)(C) (5 years for "Class C" crimes; equivalent of lowest felony grade); Mo. Rev. Stat. § 558.011(1)(4) (4 years); Neb. Rev. Stat. § 28-105(1) (5 years); Nev. Rev. Stat. § 193.130(2)(e) (4 years); N.H. Rev. Stat. § 625:9(III)(a)(2) (7 years); N.J. Rev. Stat. § 2C:43-6(a)(3) (5 years for crimes "of the third degree"; equivalent of lowest felony grade); N.M. Stat. §§ 31-18-15(A)(10) (18 months); N.Y. Penal Law § 70.00(2)(e) (4 years); N.D. Code § 12.1-32-01(4) (5 years); Or. Rev. Stat. § 161.605(3) (5 years); 18 Pa. C.S. § 1103(3) (7 years); S.C. Code § 16-1-20(A)(6) (5 years); S.D. Codified Laws § 22-6-1(9) (2 years); Tenn. Code Ann. § 40-35-111(b)(5) (6 years); Tex. Penal Code § 12.35(a) (2 years); Utah Code Ann. § 76-3-203(3) (5 years); Va. Code § 18.2-10(f) (5 years); Wash. Rev. Code § 9A.20.021(c) (5 years); Wis. Stat. § 939.50(3)(i) (3 years and 6 months).

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l. Maximum authorized terms for misdemeanor offenses. Current criminal codes with general classification schemes for misdemeanors typically place the maximum available incarceration term, for the most serious of misdemeanors, at one year. See Ala. Code § 13A-5-7; Alaska Stat. § 12.55.135; Ark. Code § 5-4-401; Conn. Gen. Stat. § 53a-36; 11 Del. Code § 4206; Fla. Stat. § 775.082; Haw. Stat. § 706-663; Ill. Stat. c. 730 § 5/5-8-3; Ind. Code §§ 35-50-3-2 through 35-50-3-4; Iowa Code § 903.1; Ky. Rev. Stat. § 532.090; Me. Rev. Stat. 17 § 1252; Mo. Rev. Stat. § 558.011; Nev. Rev. Stat. §§ 193.140 & 193.150; N.H. Rev. Stat. § 651:2; N.M. Stat. § 31-19-1; N.Y. Penal Law § 70.15; N.D. Code § 12.1-32-01; Or. Rev. Stat. § 161.615; S.D. Codified Laws § 22-6-2; Tenn. Code Ann. § 40-35-111; Tex. Penal Code §§ 12.21 – 12.23; Utah Code § 76-3-204; Va. Code § 18.2-11; Wash. Rev. Code § 9A.20.021. For the exceptions, see Ariz. Rev. Stat. § 13-707 (maximum misdemeanor penalty of 6 months); Colo. Rev. Stat. § 18-1.3-501 (maximum misdemeanor penalty of 18 months); N.J. Rev. Stat. § 2C:43-6 (no misdemeanor category of offenses; "4th degree crimes" have maximum prison term of 18 months); N.C. Gen. Stat. § 15A-1340.23 (maximum misdemeanor confinement term of 60 days); Ohio Rev. Code § 2929.24 (maximum jail term of 180 days); Pa. Cons. Stat. t. 18, § 1104 (maximum incarceration term of 5 years for first-degree misdemeanors and 2 years for second-degree misdemeanors); S.C. Code § 16-1-20 (maximum incarceration term of 3 years for Class A misdemeanors and 2 years for Class B misdemeanors); Wis. Stat. § 939.51 (maximum confinement for misdemeanors of 9 months).

m. Disapproval of mandatory-minimum prison sentences. For the 1962 Code's position on mandatory-minimum penalties, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-127 (explaining that both alternative versions of § 6.06 in original Code were "intended to represent the firm position of the Institute that legislatively mandated minimum sentences are unsound"). The original Code's recommendation has been echoed by national crime commissions appointed by Presidents Johnson and Nixon, the American Bar Association, the Federal Judicial Conference, the United States Sentencing Commission, and numerous law-reform organizations. See President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society (1967), at 142-143; National Advisory Commission on Criminal Justice Standards and Goals: Corrections (1973), at 541; American Bar Association, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.21(b) (1994) ("[a] legislature should not prescribe a minimum term of total confinement for any offense"); Judicial Conference of the United States, Statement of Judge Paul G. Cassell, United States District Court, District of Utah, Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee of the Judiciary, United States House of Representatives, on "Mandatory Minimum Sentencing Laws—The Issues" (2007), at 34-39 (documenting that "the Judicial Conference has consistently opposed mandatory minimum sentences for more than fifty years"); United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991), at iii-iv (concluding that Congressional sentencing policy is best effected through a system of sentencing guidelines rather than through mandatory minimums); National Council on Crime & Delinquency, Model Sentencing Act (1963), § 9. In a 1993 Gallup Poll survey, 82 percent of state judges and 94 percent of federal judges disapproved of mandatory minimums. See ABA Journal, vol. 79, p. 78, The Verdict Is In: Throw Out Mandatory Sentences: Introduction (1994).

The Comment draws on the above sources, and also the following: Eric Luna and Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1 (2010); Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties:

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Two Centuries of Consistent Findings, in Michael Tonry ed., Crime & Justice: A Review of Research, vol. 38 (2009), at 65-114; Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer, Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." 44 J. of Rsrch. in Crime and Delinq. 427 (2008); Anthony Kennedy, Chairman, American Bar Association Justice Kennedy Commission Report with Recommendations to the ABA House of Delegates (2004); Jack B. Weinstein, Every Day is a Good Day for a Judge to Lay Down his Professional Life for Justice, 32 Fordham Urban L.J. 131 (2004); Symposium, Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?, 18 Notre Dame J.L. Ethics & Pub. Pol'y 303 (2004); Julian V. Roberts, Public Opinion and Mandatory Sentencing: A Review of International Findings, 30 Crim. Justice and Behavior 483 (2003); Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001); David Brown, Mandatory Sentencing: A Criminological Perspective, 7 Australian J. of Human Rights 31 (2001); Nicole Crutcher, Mandatory Minimum Penalties of Imprisonment: An Historical Analysis, 44 Crim. Law Quarterly 279 (2001); Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rptr. 180 (1999); David Boerner, Sentencing Guidelines and Prosecutorial Discretion, 78 Judicature 196 (1995); Barbara S. Vincent and Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings (Federal Judicial Center, 1994); U.S. General Accounting Office, Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999–2001 (2003); Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Cal. L. Rev. 61 (1993); Robert O. Dawson, Sentencing (1969).

On marginal deterrence theory, see Anthony Doob and Cheryl Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999). On the dangers that mandatory penalties can be criminogenic of more serious crimes, see Tomislav Kovandzic, John Sloan, and Lynne Vieraitis, "Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of 'Three Strikes' in U.S. Cities (1980–1999), 1 Criminology and Public Policy 399 (2002); Thomas B. Marvell and Carlisle E. Moody, The Lethal Effects of Three Strikes Laws, 30 J. of Legal Studies 89 (2001). On the evolution of actuarial risk-assessment tools for the prediction of offender recidivism, see Tentative Draft No. 2 (2011), § 6B.09, Reporter's Note to Comment *a*.

n. Elimination of parole-release authority. Relevant sources are collected in Appendix B (this draft), Reporter's Study: The Question of Parole-Release Authority. For a state-by-state survey of determinate and indeterminate jurisdictions, see Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 66-67 table 3.1. For the ABA's policy recommendation in favor of a determinate sentencing structure, see American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standards 18-2.5, 18-3.21(g), and 18-4.4(c).

Existing provisions establishing determinate sentencing systems include Ariz. Rev. Stat. § 13-701(A) ("A sentence of imprisonment for a felony shall be a definite term of years . . ."); id. § 41-1406.09(I) (maintaining a system of parole "only [for] persons who commit felony offenses before January 1, 1994"); Cal. Penal Code § 2933(a) ("It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170 serve the entire sentence imposed by the court, except for a reduction in the time served in the

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custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections"); Del. Code Ann. tit. 11, § 4205(a) ("A sentence of incarceration for a felony shall be a definite sentence."); id. § 4354 ("No sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989 shall be subject to parole"); 730 Ill. Comp. Stat. § 5/3-3-3(b) ("No person sentenced under this [Act] shall be eligible for parole."); id. § 5/3-3-3(c) ("Except for those sentenced to a term of natural life imprisonment, every person sentenced to imprisonment . . . shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the mandatory supervised release provisions of paragraph (d) of Section 5-8-1 of this Code."); id. § 5/5-8-1(a) (providing that "a sentence of imprisonment for a felony shall be a determinate sentence set by the court"); Ind. Code § 35-50-6-1(a)(1) (providing for release "when a person imprisoned for a felony completes the person's fixed term of imprisonment, less the credit time the person has earned with respect to that term"); Kan. Stat. § 21-4704(e)(2) ("In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing"); id. § 21-4705(c)(2) (same); Me. Rev. Stat. § 1254 ("An imprisoned person shall be unconditionally released and discharged upon the expiration of his sentence, minus the deductions authorized under section 1253 [providing for good-time credits and credits for time served]"); Minn. Stat. § 609.11, subd. 6 ("Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law"); Miss. Code § 47-7-3(1)(g) ("No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995"; providing an exception to general parole ineligibility for "first offender[s] convicted of a nonviolent crime after January 1, 2000," who are sentenced for a year or more, have "observed the rules of the department," and have served at least one-quarter of their sentences); N.C. Gen. Stat. § 15A-1368.2(a) ("A prisoner . . . shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded"); id. § 143B-266(a) (providing that persons sentenced under the structured sentencing system . . . are not eligible for parole"); Ohio Rev. Code § 2967.021(B) (establishing that Ohio's parole, pardon, and probation provisions, revised as of July 1, 1996, "appl[y] to a person upon whom a court imposed a stated prison term for an offense committed on or after July 1, 1996"); Or. Rev. Stat. § 137.635(1) ("The convicted defendant shall serve the entire sentence imposed by the court and shall not, during the service of such a sentence, be eligible for parole or any temporary leave from custody . . . or for any reduction in sentence . . . or for any reduction in term of incarceration"); Va. Code § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."); id. § 19.2-311 (allowing for the indeterminate sentencing for a 4-year term of persons under 21 "convicted of a felony offense other than" murder or sexual assault, "considered by the judge to be capable of returning to society as a productive citizen following a reasonable amount of rehabilitation"); Wash. Rev. Code § 9.94A.728 (providing that "[n]o person serving a sentence imposed pursuant to this chapter [the Sentencing Reform Act of 1981] and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows" [allowing for sentence reductions for "earned release time"]).

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§ 6.07. Credit Against the Sentence for Time Spent in Custody.[39]

(1) A convicted person shall be given credit toward the service of his or her sentence for:

(a) days spent in custody in connection with the course of conduct for which sentence was imposed;

(b) days credited against sentences to be served concurrently pursuant to § 7.04; and

(c) days served on an earlier sentence for the same crime when the current sentence was imposed following proceedings in which the earlier sentence was vacated.

(2) As used in this subsection,

(a) a "day spent in custody" means any portion of a day spent in custody.

(b) "custody" includes detention in a holding cell, jail, prison, or locked therapeutic facility. When a person is subject to other forms of physical restraint, including home detention, the court shall award credit when the restrictions placed on a defendant are the functional equivalent of custody. Electronic monitoring alone does not entitle a defendant to an award of sentence credit.

(c) custody is connected to a course of conduct when it is related in whole or in part to one or more offenses for which the person is arrested or charged, or to any other sentence arising out of the same underlying conduct, either of which occurs while the person is awaiting or undergoing trial, awaiting sentence, or being investigated for or awaiting action as a result of an alleged violation of probation or postrelease supervision.

(3) At sentencing, counsel for the defendant shall provide to the court all necessary records related to the defendant's prior detention in any relevant facility. When in possession of information relating to time the defendant has spent in custody relevant to the offense, the prosecutor and probation office shall also furnish such information to the court. At the time of sentencing, the court shall enter a specific finding of the number of days for which sentence credit is due. In addition to credit awarded pursuant to subsection (1), credit shall be awarded against the sentence for all "good time" credit earned pursuant to § 305.1(1). A copy of the sentence credit record shall be given to the defendant.

(4) Upon a defendant's revocation from probation or postrelease supervision, the correctional agency to which the defendant is assigned shall gather all necessary records related to the defendant's prior detention in the case and submit them to the court, which

[39] This Section was originally approved in 2016; see Tentative Draft No. 4.

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shall enter a specific finding of the number of days for which sentence credit is due. In addition to credit awarded pursuant to subsection (1), credit shall be awarded against the sentence for all "good time" credit earned pursuant to § 305.1(1). A copy of the sentence credit record shall be given to the defendant.

(5) If any person who is in custody or on postrelease supervision believes he or she has not been properly credited for time served in custody, the person may petition the sentencing court to be given credit under this Section. Upon proper verification of the facts alleged in the petition, credit shall be applied retroactively, and the judgment amended accordingly.

Comment: [40]

a. Scope. This Section reflects the fundamental proposition that a defendant should serve no more time in custody than authorized by a lawfully imposed sentence. Subsection (1) sets forth the basic rule that credit should be awarded against a sentence for every day spent in custody in connection with that offense, and in connection with any other offense for which a concurrent sentence is ultimately imposed. Subsection (2) defines key terms, including what constitutes a "day of custody" for purposes of sentence credit, what constitutes custody, and when custody is connected to a course of conduct. Subsection (3) pertains to the award of credit at initial sentencing and assigns defense counsel the duty of compiling documents relevant to the award of sentence credit, and providing them to the court for a determination of credit, including any "good time" credit earned pursuant to § 305.1(1). Subsection (4) addresses the award of sentence credit following revocation from probation or postrelease supervision, and requires that upon revocation the correctional agency to which the defendant is assigned shall gather and submit all necessary records related to the defendant's prior detention to the court for a determination of sentence credit to include any "good time" credit earned pursuant to § 305.1(1). Subsection (5) provides that when a prisoner or person on postrelease supervision believes he or she has not been properly credited for time served in custody, the person may petition the sentencing court to correct the error.

b. Credit for custody on related conduct. Subsection (1)(a) provides that the defendant shall receive credit against the sentence for all time spent in custody in connection with a course of conduct for which sentence is imposed. This broad formulation of custody for which credit is due is intended to encompass cases in which the conduct that leads to detention is not identical to the crime of conviction for which sentence is imposed. This includes cases in which a person is booked into jail on a charge that goes unprosecuted or is later dismissed, but is replaced by a related charge that ultimately leads to conviction. It also covers instances in which a person is charged with multiple offenses arising out of the same course of conduct and is granted bond on only one of several related charges, leaving the defendant ineligible to post bond and forced to

[40] This Comment has been minimally revised since § 6.07's approval in 2016. All Comments will be updated for the Code's hardbound volumes.

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remain in custody. In addition, it is intended to cover situations in which a defendant may be in custody for conduct that later provides a basis for charges arising in more than one jurisdiction (e.g. in both state and federal court). In all such cases, subsection (1)(a) would award credit on all related charges against each sentence ultimately imposed, as the period of custody for each would be connected to the conduct for which sentence was imposed.

c. Credit on all concurrent sentences. The decision to impose concurrent sentences in cases of multiple convictions reflects a decision by the court that the purposes of punishment can be achieved by allowing a defendant to serve multiple sentences simultaneously. By awarding credit on all concurrent sentences for time served in connection with any one of those sentences, subsection (1)(b) ensures that the defendant is properly credited for time served, a result that would be undermined if credit were awarded on any but the longest concurrently imposed sentence.

d. Credit for time served in connection with a vacated sentence. Subsection (1)(c) is a restatement of § 7.09(2) of the original Code, which required the court to credit a defendant for time served "[w]hen a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime." This rule is not only equitable, but constitutionally mandated: failure to credit past service for the same crime violates the guarantee against double jeopardy.

e. Measuring custody. Subsection (2)(a) provides that any portion of a day spent in custody is sufficient to count the day as time served against the sentence. This bright-line rule is easy to administer and ensures that no period of custody goes uncounted for purposes of sentence credit. Moreover, it accounts for the fact that formal documentation of custody often does not include detailed information about the number of hours a prisoner was confined on any given day.

f. Defining custody. Subsection (2)(b) addresses the use of both traditional and modern forms of close confinement, including detention in a holding cell, jail, prison, and locked therapeutic facility. With respect to nontraditional forms of physical restraint, including house arrest, the subsection requires the court to award sentence credit when "the restrictions placed on a defendant are the functional equivalent of custody." This standard does not require full-time detention, however, since even jails and other locked facilities often provide prisoners with some period of release for work or other activities in the community. Subsection (2)(b) specifies that sentence credit is not appropriate for cases in which individuals are permitted to travel freely in the community on electronic monitoring with no additional constraints. In cases where electronic monitoring is combined with house arrest, credit could be given if the standard for custody is otherwise met.

g. Finding a nexus between custody and the sentence. Subsection (2)(c) clarifies two points relevant to the award of custody.

First is that custody may be awarded in instances where the connection between the underlying sentence conduct and custody is either direct or indirect. By specifying that "custody

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is connected to a course of conduct when it is related in whole or in part" to conduct underlying the crime of conviction, the provision indicates that credit is appropriate even when there is more than one reason for a defendant's detention, so long as one of those reasons relates to the conduct that later gives rise to the sentence. As an example, imagine that a person is arrested for a battery committed during a bar fight. If the defendant is on probation for a separate offense at the time of the battery, his probation officer may place a "hold" (temporary detention) on the defendant on the ground that he has violated several rules of probation, including consuming alcohol, breaking curfew, and committing a new criminal violation. The probation hold is not directly linked to any later charge of battery, and it would serve as an independent basis for continuing the defendant's detention were the battery charge never to be filed. Consequently, during the time the defendant is in custody waiting for the prosecutor to make a charging decision, his custody is not *solely* the result of either the battery arrest or the alleged probation violation. Nevertheless, subsection (2)(c) provides that because the custody is connected "in part" to both the probation hold and the battery arrest, if the defendant is sentenced for the battery and is also revoked for the probation violation, he is due credit against both sentences.

The second important clarification made in subsection (2)(c) relates to the periods of confinement that are eligible for sentence credit. The Section liberally defines these periods of custody to include all precharge, pretrial, prerevocation, and posttrial confinement. As a general rule, courts are not constitutionally bound to award credit for pretrial confinement so long as a sentence does not exceed the statutorily authorized maximum penalty for an offense—except perhaps when the sole reason for the defendant's detention is his indigency. The argument against awarding sentence credit by statute is that the court can account for the length of pretrial confinement when imposing sentence in the first instance. The trouble is that courts are sometimes ill-informed about the exact amount of time the defendant has been confined prior to sentencing and may fail to fully adjust for earlier periods of custody—particularly if any were served in another jurisdiction or in connection with another charge or if accounting for pretrial detention would lead the court to depart from the guideline range. In addition, as the original Code emphasized, "the unfavorable conditions that frequently characterize such presentence detention emphasize the justice" of requiring presentence credit to be awarded. Model Penal Code 3 Commentary at 308.

h. Determination of credit. Many jurisdictions require the court to order sentence credit at the time of sentencing; others make correctional agencies responsible for later awards of sentence credit. Although assigning credit at the time of sentence is expeditious in simple cases where the amount of custody due the defendant is straightforward, in cases involving multiple sentences or custody in foreign jurisdictions, computing credit awards may be time-consuming and require substantial verification. To ensure the accuracy of the court's sentence credit order, subsection (3) assigns defense counsel the primary duty of compiling documentation of pretrial custody before initial sentencing and presenting it to the court for a determination of credit due. It also requires prosecutors and probation agencies to share with the court any information they

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possess at the time of sentencing related to relevant time the defendant has spent in custody in connection with the course of conduct for which sentence is being imposed. When sentencing occurs because a defendant is being revoked from probation or parole, subsection (4) assigns to community correctional agencies the duty of providing the court with records of all relevant time spent in custody. Once presented with the relevant information regarding time spent in custody, courts must determine the amount of credit owed to the defendant under this Section. Once credit has been computed, the defendant must be provided with timely notice of the credit awarded. If at any point in the sentence, the defendant wishes to contest the calculation of sentence credit, he or she may petition the sentencing court for additional credit, which shall be applied retroactively if awarded.

REPORTERS' NOTE [41]

a. Scope. This provision attempts to address recurrent issues involved in awarding sentence credit, with the purpose of ensuring that individuals are given credit for all time spent in custody in connection with sentences arising out of a single incident or course of conduct. In addition to setting forth the basic principle that time spent in custody prior to sentence should be credited against the final sentence imposed, this provision addresses a host of matters related to sentence credit that have been a source of repeated litigation and disagreement, including the definition of custody, the calculation of time served, and the application of credit in cases where multiple sentences are imposed concurrently. Like the original provision, the revision places responsibility for calculating sentence credit on correctional agencies, although the revision assigns the task to the agency to which the defendant is committed, rather than the agency that last confined the defendant before sentencing.

b. Credit for custody on related conduct. The original Model Penal Code recognized "the defendant's right to credit against his ultimate sentence for time served prior to the imposition of sentence as a result of the same criminal charge." Model Penal Code §7.09 Note. Although the original Code provision provided that credit should be awarded only for detention for "the crime for which [the] sentence was imposed," the comment to that provision clarifies:

> Suppose that a person is arrested and detained for rape but convicted and sentenced for assault. Obviously, if the detention is for the same series of acts as the sentence, credit should not depend on their being for the same crime in a narrow sense. Thus, "the crime" in this subsection should be interpreted to include detention for the same conduct that ultimately leads to conviction and sentence.

3 Model Penal Code Part I Comm. at 309. The revised language of subsection (1)(a) is intended to ensure the same result.

c. Credit on all concurrent sentences. Subsection (1)(b), which awards credit on all sentences imposed concurrent to the sentence on which credit is due pursuant to (1)(a), is an extension of § 7.06(2)(b) of the original Code, which provided that whenever multiple sentences are imposed, whether they are concurrent or consecutive,

[41] This Reporters' Note has not been revised since § 6.07's approval in 2016. All Reporters' Notes will be updated for the Code's hardbound volumes.

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"the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served."

A substantial amount of litigation has attended the question of whether and how to award credit for time served on sentences that are being served concurrent to other sentences unconnected to the time served for which sentence credit is due. See, e.g., Harris v. Comm'r of Correction, 860 A.2d 715, 730 (Conn. 2004) (denying credit on concurrent sentence); State v. Johnson, 767 N.W.2d 207 (Wis. 2009) (denying credit on concurrent sentence). As commentators have observed, a strict application of the rule awarding credit only for sentences with a direct nexus to conduct underlying the custody "could sometimes have the effect of converting a presumptive concurrent sentence into a *de facto* consecutive sentence." 9 Henry W. McCarr and Jack S. Nordby, Minn. Practice, *Criminal Law and Procedure* § 36:11 (4th ed.). For this reason, subsection (1)(b) requires that credit be awarded by the court for all sentences imposed concurrently, thereby ensuring that the length of pretrial detention reduces the longest sentence imposed and has a measurable effect on the length of time the defendant spends in custody following sentencing. Cf. 15B Elizabeth Bosek et al., *Florida Jurisprudence 2d Criminal Law—Procedure* § 2726 (reporting general Florida rule that "when a defendant receives jail-time credit on a sentence that is to run concurrently with one or more other sentences, the same credit must apply, in full, to all the concurrent sentences").

d. Credit for time served in connection with a vacated sentence. In North Carolina v. Pearce, 395 U.S. 711, 718-719 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 798-803 (1989), the Supreme Court held that "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." Such credit includes not only days actually spent in custody, but also any "good time" credit earned pursuant to institutional rules. Id. at 719 n.13. Both subsection (1)(c) and subsection (3) require that same result.

e. Measuring custody. Subsection (2)(a) requires credit to be awarded for any day in which any portion of time is spent in custody. This rule simplifies sentence calculation and eliminates the need for often-missing documentation on the number of hours spent in custody on any given day. It also is consistent with the widespread practice of allowing prisoners full credit against their sentence for time spent on work release. Although providing a day's credit for a short period of confinement may seem generous, by some standards it might be considered conservative: until 2010, Canada provided sentence credit of two to three days for every day spent in pretrial custody, in part to reflect the challenging conditions that exist in many pretrial detention facilities. See Ken Chasse, *Untruth in Sentencing Credit for Pre-Sentence Custody*, 15 Can. Crim. L. Rev. 75, 76 (2010). Subsection (2)(a) takes the simple position that a defendant receive a day's credit for any day in which the person spends any amount of time in custody. That bright-line rule is easy to administer and ensures that no period of custody goes uncounted for purposes of sentence credit.

f. Defining custody. Jurisdictions are divided over what qualifies as "custody" outside the traditional context of confinement in a jail or prison cell. Some jurisdictions permit credit for time spent in secure treatment facilities (see Alaska Stat. § 12.55.027 (2014)), while others do not. See Reno v. Koray, 515 U.S. 50, 52 (1995) (holding that 18 U.S.C. § 3585(b) does not authorize award of sentence credit for time spent in secure treatment programs). See also George L. Blum, Annotation, *Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Environment as Condition of Pretrial Release*, 46 A.L.R.6th 63 (2009). A similar

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1 controversy exists with respect to house arrest. Compare State v. Guzman, 112 P.3d 120, 123 (Kan. 2005) (finding
2 no credit for house arrest) with Harris v. Charles, 256 P.3d 328, 333-339 (Wash. 2011) (en banc) (discussing
3 Washington's practice of awarding sentence credit to felons but not misdemeanants for time spent on home
4 detention) and Ky. Rev. Stat. § 532.120(7) (2012) (awarding credit for time spent in "pretrial home incarceration").
5 A newer area of controversy has been the question whether electronic monitoring alone should count as "custody"
6 for purposes of sentence credit. The argument in favor of credit focuses on the geographic restraints that accompany
7 electronic monitoring (sometimes referred to as an "electronic leash"), whereas courts that oppose credit find
8 electronic monitoring more analogous to probation than confinement. The current weight of practice leans against
9 awarding credit for electronic monitoring, particularly when unaccompanied by house arrest. See, e.g., Perry v.
10 State, 13 N.E. 3d 909, 912 (Ind. Ct. App. 2014); Commonwealth v. Maxwell, 932 A.2d 941, 948 (Pa. Super. Ct.
11 2007). But see 2015 Alaska Sess. Laws Ch. 20 (amending § 12.55.027 to award credit for time spent under
12 electronic monitoring when "the court imposes restrictions on the person's freedom of movement and behavior").
13 Subsection 2(b) does not permit the award credit for electronic monitoring alone. With respect to house arrest and
14 other nontraditional forms of physical restraint, however, this provision allows the court to determine when the
15 restrictions placed on a defendant are sufficiently constraining that they amount to the functional equivalent of
16 custody, and consequently entitle the defendant to an award of credit against the sentence.

17 *g. Finding a nexus between custody and the sentence.* Subsection (2)(c) addresses two matters on which
18 jurisdictions differ greatly: whether to assign sentence credit to more than one sentence when detention occurs as a
19 result of more than one pending charge or current sentence, and for what periods of detention to award credit against
20 the final sentence. With respect to the latter question, the Comments to the original Model Penal Code contained a
21 nine-page appendix setting forth the differences between jurisdictions with regard to what periods to count against
22 the sentence. A modern update would reveal that states today remain widely varied in the credit they award. To the
23 degree that there is an agreed-upon constitutional dimension to the award of pretrial sentence credit, it exists when
24 the sum of the pretrial detention and the sentence imposed by the court exceeds the statutory maximum penalty for
25 the crime of conviction. See Hall v. Furlong, 77 F.3d 361, 364 (10th Cir. 1996) (concluding that the equal-
26 protection guarantee requires that indigent defendants receive sentence credit when failure to award credit results in
27 a sentence longer than the maximum penalty authorized by statute). Even in the absence of a clear constitutional
28 mandate, however, awarding credit against the sentence for time served in custody is a standard practice in the
29 states. See generally Wade R. Habeeb, Annotation, *Right to Credit for Time Spent in Custody Prior to Trial or*
30 *Sentence*, 77 A.L.R.3d 182 (1977). Like the original Code, which favored the point of arrest as the moment from
31 which to credit all subsequent periods of detention (see 3 Model Penal Code Part I Comm. at 307-308), the current
32 draft favors an expansive approach to sentence credit, awarding it for all periods of custody from arrest forward (or
33 detention forward in the case of probation and postrelease supervision) that are connected with the course of conduct
34 for which sentence is ultimately imposed.

35 *h. Determination of credit.* In U.S. v. Wilson, 503 U.S. 329 (1992)—a case involving the interpretation of the
36 federal statute governing sentence credit—Justice Stevens observed:

> 37 In most cases, the calculation of [sentence] credit is a routine, ministerial task that will not give rise to
> 38 any dispute. Occasionally, however . . . there may be a legitimate difference of opinion either about the
> 39 meaning of the statute or about the relevant facts. Such a dispute must, of course, be resolved by the

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> judge. The only question that remains, then, is *when* the judge shall resolve the issue—at the time of sentencing, when the defendant is represented by counsel, or at some later date, after the defendant has begun to serve his sentence.

Id. at 338-339 (Stevens, J., dissenting) (citations omitted). The original Model Penal Code § 7.09 required the institutional custodian to certify the amount of sentence credit due to the defendant, and provide that information to the court at the time of sentencing. Many states still require the court to enter sentence credit on the judgment of conviction at the time of sentencing, while others make correctional agencies responsible for awards of sentence credit. Compare Ala. Code § 15-18-5 (2014) (requiring sentencing court to credit defendant for pretrial confinement "upon conviction and imprisonment") with Ohio Rev. Code Ann. § 2967.191 (West 2012) (making department of rehabilitation and correction responsible for reducing sentences to account for pretrial confinement). In *Wilson*, the Supreme Court affirmed that 18 U.S.C. § 3585(b) assigns to the Bureau of Prisons the task of computing federal sentence credit after sentencing, rather than assigning it to the sentencing judge at the time sentence is imposed. 503 U.S. at 333.

The current provision retains the original Code's approach of asking the sentencing court to award sentence credit at the time of sentencing. Doing so is expeditious in simple cases where the amount of custody due the defendant is straightforward, and the sentence imposed is likely to be short—making the proper determination of credit a matter in which time is of the essence. In cases involving multiple sentences or custody in foreign jurisdictions, computing credit awards at sentencing may be more difficult, though no less important. This Section assigns the primary job of compiling relevant documentation to defense counsel at the time of initial sentence, and to the correctional agency at the time of revocation from probation or postrelease supervision. Although defense counsel bears primary responsibility for providing the court with the records it needs to award sentence credit at the time of the initial sentencing, when a prosecutor or probation office has knowledge of time the defendant has spent in custody in connection with the course of conduct for which sentence was imposed, subsection (3) imposes a duty to disclose that information to the court to assist in its sentence credit computation. The amount of sentence credit due to a defendant is a question of law, not a discretionary decision; consequently, a defendant who disputes the amount of credit awarded at sentencing may later petition the court to correct the judgment and apply retroactively any additional credit due.

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§ 6.09. Postrelease Supervision.[42]

(1) When the court sentences an offender to prison, the court may also impose a term of postrelease supervision.

(2) The purposes of postrelease supervision are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, and address their needs for housing,

[42] This Section was originally approved in 2014; see Tentative Draft No. 3.

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employment, family support, medical care, and mental-health care during their transition from prison to the community.

(3) The court shall not impose postrelease supervision unless necessary to further one or more of the purposes in subsection (2).

(4) When deciding whether to impose postrelease supervision, the length of a supervision term, and what conditions of supervision to impose, the court should consult reliable risk-and-needs-assessment instruments, when available, and shall apply any relevant sentencing guidelines.

(5) The length of term of postrelease supervision shall be independent of the length of the prison term, served or unserved, and shall be determined by the court with reference to the purposes in subsection (2).

(6) For a felony conviction, the term of postrelease supervision shall not exceed five years. For a misdemeanor conviction, the term shall not exceed one year. Consecutive sentences of postrelease supervision may not be imposed.

(7) The court may discharge the defendant from postrelease supervision at any time if it finds that the purposes of the sentence no longer justify continuation of the supervision term.

(8) The court may impose conditions of postrelease supervision when necessary to further the purposes in subsection (2). Permissible conditions include, but are not limited to:

(a) Compliance with the criminal law.

(b) Completion of a rehabilitative program that addresses the risks or needs presented by individual offenders.

(c) Performance of community service.

(d) Drug testing for a substance-abusing offender.

(e) Technological monitoring of the offender's location, through global-positioning-satellite technology or other means, but only when justified as a means to reduce the risk that the probationer will reoffend.

(f) Reasonable efforts to find and maintain employment, except it is not a permissible condition of probation that the offender must succeed in finding and maintaining employment.

(g) Reasonable efforts to obtain housing, or else residence in a postrelease residential facility.

(h) Intermittent confinement in a residential treatment center or halfway house.

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(i) Good-faith efforts to make payment of victim restitution under § 6.04A, but compliance with any other economic sanction shall not be a permissible condition of postrelease supervision.

(9) No condition or set of conditions may be attached to postrelease supervision that would place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community.

(10) Prior to an offender's release from incarceration, [the postrelease-supervision agency] may apply to the court to modify the conditions of postrelease supervision imposed on an offender.

(11) The court may reduce the severity of postrelease-supervision conditions, or remove conditions previously imposed, at any time. The court shall modify or remove any condition found to be inconsistent with this Section.

(12) The court may increase the severity of postrelease-supervision conditions or add new conditions when there has been a material change of circumstances affecting the risk of criminal behavior by the offender or the offender's treatment needs, after a hearing that comports with the procedural requirements in § 6.15.

(13) The court should consider the use of conditions that offer incentives to offenders on postrelease supervision to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the supervision term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

Comment: [43]

a. Scope. The transition from imprisonment, and its pervasive discipline of inmates' lives, to the freedom of the outside world is fraught with perils and historically has been handled poorly in this country. In the past 15 years, ambitious efforts to reconceive and address problems of "prisoner reentry" have been led by the U.S. Justice Department, the Urban Institute, and the Council of State Governments' Justice Center. The revised Model Penal Code joins these ongoing efforts, and sets forth many original recommendations based on the Code's general policies for the administration of community sanctions; see § 6.03 and Comment *b* (underlying policies of probation provision).

Postrelease supervision is a near-universal practice of American criminal-justice systems, although it has many different names. This Section is intended to provide information and guidance to all states, across all types of sentencing systems.

[43] This Comment has not been revised since § 6.09's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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The timing of prison release is set in many different ways across the nation, but questions of *when* prison release should occur, or how such release decisions should be made, are not central to the instant provision. New § 6.09 applies equally to determinate- and indeterminate-sentencing structures. For the revised Code's views on questions of prison-release discretion, see § 6.06 and Comment *e* (Tentative Draft No. 2, 2011) (recommending determinate sentencing structure); id., Appendix A ("Reporters' Study: The Question of Parole-Release Authority").

In this Comment, the terms "postrelease supervision" and "parole supervision" will be used interchangeably. Many practitioners in determinate jurisdictions continue to speak of "parole" supervision even though their systems have no parole-releasing agency. The terminology is so commonplace that it would be pointless to attempt to eradicate it. The Code opts for the term "postrelease supervision" in formal black-letter language to avoid the connotation that release dates have been or should be fixed by a paroling agency, and also to help signal that postrelease supervision under the Code is a freestanding sanction whose duration does not depend on what portion of a prison sentence has been served by the offender. See Comment *c* below.

The instant provision does not speak to all that can or should be done to facilitate the successful reentry of offenders; it focuses on the judicial sentencing decision as a part of a greater whole. Numerous other Sections of the Code address issues central to the reentry and reintegration of ex-offenders, including a series of provisions in this volume on collateral consequences of conviction,; see Article 6x. Many of the most promising innovations in postrelease supervision unfold at the level of agency and program practices, which cannot be governed directly by provisions of a sentencing code. In addition, successful postrelease supervision of offenders depends heavily on the funding and availability of reentry programming, which varies enormously from state to state and county to county.

Section 6.09 does not address the subject of revocation of postrelease-supervision sentences (often called "parole revocation"), which is taken up in § 6.15.

This Section relocates the major provisions governing postrelease supervision in the original Code, moving them from Article 305 of the 1962 Code to Article 6 of the new Code. The change reflects the revised Code's philosophy that criminal sentencing does not begin or end in the courtroom. "Sentencing" decisions continue to be made during the administration of community punishments, some of which go to sentence severity (as when a postrelease-supervision term is shortened or, in the opposite direction, revoked and the offender returned to prison) and some of which change the operative purposes to be served by a sentence (as when a supervision agency finds it necessary to shift from a rehabilitative focus in supervision to an emphasis on surveillance and control).

b. Underlying policies. A series of policy judgments are incorporated throughout this provision. Most of these are likewise reflected in the Code's provision on probation sanctions, and are discussed at length in commentary to that Section; see § 6.03 and Comment *b*. Adapted

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to the setting of postrelease supervision, these policy observations may be summarized as follows:

- Resources for postrelease supervision are likely to remain in critically short supply for the foreseeable future, and all states should take steps to conserve those resources and channel them to areas of greatest need and highest use.
- The first goal of postrelease supervision is to reduce or eliminate new criminal behavior by supervised offenders.
- The justice system's allocation of surveillance and treatment resources should be aided by the best available processes for classification of offenders according to their individualized risks and needs.
- Punishment, or holding offenders accountable for their criminal conduct, is a legitimate purpose of postrelease supervision.
- Judges and supervision agencies should make use of positive incentives for good behavior by prison releasees, alongside predictable and consistently applied penalties for noncompliance with sentence conditions.
- A forward-looking policy of community supervision should recognize that technologies of surveillance are developing more quickly than technologies of rehabilitation, so that deliberate efforts are likely to be needed to maintain a balance between traditional goals of reintegration and control.
- States should invest in greater information and evaluation research concerning postrelease supervision and particular programs employed, and should seek out and use good-quality knowledge and research in the ongoing development and improvement of postrelease-supervision practices.

In addition to the above policy observations, applicable to both probation and parole, special considerations exist in the postrelease setting. Perhaps most important are the differences in the two correctional populations. On average, prison releasees are a more dangerous group than offenders sentenced to probation. Defendants thought to present a high risk of serious reoffending are unlikely to be given a probation sentence. Prison releasees, on the other hand, include offenders from all ranks of crime seriousness and with a much broader range of risk profiles. Both statutorily and in supervision practice, states must be prepared to devote greater resources and effort in the supervision of parolees than probationers.

In addition, prison releasees typically have greater needs for services than probationers, and those needs tend to be most acute in the early days and weeks following release. Rates of new offending, relapses into drug use, health crises, and even offender deaths are startlingly high in the early postrelease period. Arguments in favor of front-loading community correctional resources are especially compelling in the setting of postrelease supervision. However, efforts to meet immediate and predictable needs at the prison-to-community transition point must be

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juggled alongside the needs of some releasees for longer and more sustained attention than afforded to average probationers.

c. Purposes of postrelease supervision. In the revised Code, postrelease supervision may be used to serve both utilitarian and retributive purposes. In many cases, the two kinds of goals will overlap, that is, supervision conditions designed to further utilitarian aims will almost always carry a degree of punitive force. Even so, in appropriate cases, postrelease supervision may be imposed to hold offenders accountable for their criminal conduct, even in the absence of expected utilitarian benefits. For example, there may be instances in which a court can best respond to the seriousness of an offense by imposing a short term of incarceration followed by a period of postrelease supervision. Such a sentence could be equivalent in punitive force to a longer period of incarceration—and the Institute would not want to promote the misconception that only a prison sentence can serve as a "genuine" punishment. Under the Code's scheme, the proportionality of sentences dispensed by sentencing courts should be assessed in light of all sanctions imposed; see § 6.02(4).

Goals of crime reduction through rehabilitation, reintegration, and responses to recidivism risk are given emphasis in subsection (3). While the mechanisms of offender rehabilitation remain to a large degree mysterious, there is a growing knowledge base concerning the attributes of offenders, or circumstances of their lives, that are associated with success on parole and the cessation of criminal activity. Leading "protective" factors that emerge from research literature are: employment in a satisfying job, adequate housing, a healthy marriage and strong family ties, and reductions in drug and alcohol use.

Subsection (3) focuses attention on the initial period of transition from prison life to the free community, during which offenders' needs are most acute. Ex-prisoners face greatly elevated risks of death, health problems, mental-health problems, homelessness, and a return to substance abuse and crime in the first days and weeks following their release. In the fashioning of the postrelease-supervision sanction itself, the exigencies of this transitional period should be given high priority. Although outside the ambit of a sentencing code, best correctional practice would provide for significant postrelease or "reentry" planning in the latter stages of an offender's prison stay.

d. Postrelease supervision used only when necessary. Subsection (3) recommends that postrelease supervision should be imposed at the discretion of the sentencing court, and only in those cases where it serves an identifiable public purpose.

The Code views postrelease supervision as an essential part of a criminal sentence in many cases in which an offender has been sent to prison. This is particularly so, for example, when an offender has been incarcerated for a lengthy period, has a history of violence, or is especially likely to have a difficult period of readjustment to community life. At the same time, however, postrelease supervision is often imposed on offenders for whom it makes little sense. For many minor felons, first-time offenders, and those for whom age, health, or other personal attributes

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make recidivism unlikely, ongoing state supervision serves little purpose—other than to impose the contingent liability of revocation and re-incarceration. A primary evil of gratuitous supervision is that it drains resources that could be channeled more effectively into other cases.

Prison releasees are a highly heterogeneous group in their profiles of risks and needs. A growing number of states have responded to these realities by making the use of postrelease supervision discretionary rather than automatic or mandatory, thereby allowing courts and corrections agencies to be selective in the allocation of resources. There is great diversity of practice across U.S. states—and a wide range of policies from which "best practices" may be derived for a Model Code. Many states mandate supervision for all prison releasees, and some terms of supervision are quite long, including "lifetime parole" in some jurisdictions. At the opposite extreme, two states have abolished post-prison supervision entirely.

The Code takes no position on optimum rates of postrelease supervision except that the sanction should not be imposed reflexively. Sentencing courts should be aided by the tools of risk-and-needs assessments, when good-quality instruments are available. The sentencing commission may provide useful guidance through the presumptions and recommendations of sentencing guidelines; see subsection (4). The Institute does take note, however, that rates of community supervision in U.S. criminal-justice systems are very high by international standards, see § 6.03 and Comment *e*, noting that average American probation rates among all states are seven times the average in reporting European countries. Comparative statistical data on parole is not as extensive as for probation, but the available information suggests that America is likewise at the high end of world practice in use of postrelease supervision. For example, the national U.S. parole supervision rate for 2011 was five times that in Australia, seven times that in Denmark, and four times that in Austria.

e. Assessment of offenders' risks and needs. Individualized risks and needs vary greatly among prison releasees. For example, recidivism rates are relatively low for first-time parolees, who make up more than 40 percent of prison releasees every year. Many in this group do not require further intervention, and could be spared the imposition of postrelease supervision entirely. Aside from unnecessarily intruding on individual liberty, the uncircumspect use of criminal sanctions can backfire. Research has shown that, in some cases, unneeded community supervision can be criminogenic.

Many jurisdictions employ risk-assessment instruments to help them determine the length of term and intensity of restrictions individual offenders should receive on parole. The same techniques can help identify those who require no supervision at all. Similarly, needs assessments can help identify those offenders most likely to benefit from rehabilitative programs, and may help match individuals with the treatment regimes best fitted to their specific deficits, receptivities, and learning styles.

f. Use of sentencing guidelines. In the revised Code's sentencing system, judicial sentencing discretion is applied within a framework of presumptive guidelines promulgated by an expert

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1 and nonpartisan sentencing commission. The statutory outlines of § 6.09 can be given
2 considerable substantive content by guidelines devoted to the subject of postrelease-supervision
3 sanctions, and their appropriate elements in particular types of cases. See § 6B.02(6) (Tentative
4 Draft No. 1, 2007) ("The guidelines shall address the use of prison, jail, probation, community
5 sanctions, economic sanctions, postrelease supervision, and other sanction types as found
6 necessary by the commission."). The Code anticipates that sentencing guidelines will be
7 developed to help courts make use of relevant information about offenders' risks and needs in
8 individual cases.

9 *g. Length of postrelease-supervision terms.* One recommendation of the original Code that
10 failed to gain wide influence was that durations of parole terms should be fixed through
11 individualized consideration of each case, and should not be based on the balance of the prison
12 sentence unserved by offenders upon release. See Model Penal Code § 6.10(2) (1962). The
13 unserved-prison-term rule, still common in many states, has the perverse effect of imposing the
14 longest supervision terms on offenders who have been released the earliest, either by parole
15 boards or through the accrual of good-time credits. In most instances, these will be the inmates
16 with records of best behavior while institutionalized. For offenders with disciplinary records so
17 poor that they were required to serve their full maximum sentences (called "maxing out"), no
18 postrelease supervision is provided at all in many state systems.

19 The new Code reasserts the Institute's original position on this score. Subsection (5)
20 provides that "[t]he length of term of postrelease supervision shall be independent of the length
21 of the prison term, served or unserved, and shall be determined by the court." The revised Code
22 goes further than its predecessor in recommending that all decisions relating to the imposition of
23 postrelease supervision must respond to the policy considerations in subsection (2), and be
24 informed by risk-and-needs assessments as set forth in subsection (4), as well as sentencing
25 guidelines promulgated by an expert, nonpartisan sentencing commission, see Articles 6A and
26 6B (Tentative Draft No. 1, 2007).

27 Subsection (6) provides that postrelease-supervision terms may extend for a period of up to
28 five years. One driving force behind § 6.09 is the judgment that parole-supervision agencies
29 across the United States are grossly under-resourced and have access to too few outside services
30 to meet the needs of their clientele. The original Code also recommended a maximum five-year
31 parole term for felony offenders, see Model Penal Code § 6.10(2) (1962).

32 For the mass of parolees, a supervision period no longer than one or two years should be
33 sufficient, particularly if energy and resources now wasted on much longer supervision terms are
34 reallocated to the most critical, early months following release. The Code's choice of a five-year
35 period is informed by criminological research into the behavior of prison releasees. The first year
36 following exit from prison is when most reoffending occurs, with diminishing rates of criminal
37 involvement in subsequent years. In the aggregate, each successive year of supervision yields

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diminishing returns—in the sense that effort is wasted on ever-larger numbers of ex-offenders no longer in need of treatment or surveillance.

For some offense categories, public acceptance of nonprison sanctions may demand a longer term of supervision than authorized in § 6.09. Such instances are best accommodated through legislation on an offense-by-offense basis. The policy choices in § 6.09 were made with the vast majority of prison releasees in mind, while setting aside the question of unique subsets of crimes that might call for a significantly different approach. For example, policy and proportionality questions surrounding the practice of extended supervision terms for some sex offenders is not a part of the current revision effort, including—at the extreme—the use of "lifetime" supervision. The Institute has recently launched a project on the Model Penal Code: Sexual Assault and Related Offenses, which will consider the desirability of specialized penalty provisions for those categories of crimes.

h. Early discharge. Subsection (7) grants courts the authority to terminate postrelease-supervision terms at any time, when the court determines there is no longer a policy justification for the sanction. This power is central to the Code's overarching philosophy of prioritization and conservation of community-supervision resources. It is also necessary to execute the full ambit of reward strategies recommended in subsection (13).

i. Authorized conditions of postrelease supervision. The Code's approach to postrelease-supervision conditions, as articulated in subsection (8), discourages laundry lists of standard conditions, and requires that conditions be based on an authorized purpose of supervision in the individual case, see subsection (2). Subsection (8) contains a nonexclusive list of conditions that may be imposed consistent with this Section. Several of these are familiar to existing practice in nearly every jurisdiction.

Subsection (8)(c) provides that community service is, in appropriate cases, well employed as a condition of postrelease supervision. Community service is an especially useful condition to use as a substitute for an economic sanction that cannot be imposed because of the financial circumstances of the offender; see § 6.04(6) ("No economic sanction [other than victim restitution] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."). Seen as in-kind labor, community service can in theory be reduced to a dollar value. Certain caveats should be kept in mind, however. Community-service requirements can interfere with an offender's employment obligations in the free economy. Because ongoing employment is a factor strongly associated with lower rates of recidivism, a condition of community service should, when possible, be structured so that it can be satisfied outside the offender's normal working hours. Research indicates that community-service requirements of overlong duration become exceedingly difficult to enforce. The policy literature includes recommendations that no more than 120 to 240 hours of community service be required of offenders.

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Subsection (8)(e) refers to the growing use of global-positioning-satellite technology as a means of monitoring the whereabouts of offenders, often combined with a condition of home confinement for designated hours of each day. As this technology becomes more available and less expensive, net-widening and overuse become concerns. When excessive use occurs, gratuitous punishment is inflicted on the offender, and there is an increased risk of sentence violations and unneeded drains on judicial and correctional resources. Subsection (8)(e) both authorizes GPS-like conditions of supervision and places an important limitation upon them: They may not be employed unless justified by the risk of criminal behavior presented by the particular offender.

Subsection (8)(f) speaks to a condition that is frequently used in parole supervision today, that the offender must find and maintain employment. The subsection would soften this condition to require only that the probationer make reasonable efforts to secure a job. While work is a known "protective" factor, statistically associated with reduced risks of recidivism, it is increasingly difficult for ex-offenders to secure ongoing employment—and much of the difficulty stems from the large number of employment disqualifications imposed by state and federal law; see Article 6x. The Code takes a strong view that unemployment cannot be regarded as an imprisonable offense.

Subsection (8)(g) addresses the urgent need among many prison releasees for housing. A substantial percentage of ex-prisoners become homeless, and the lack of a stable residence is strongly associated with an increased probability of recidivism. Subsection (8)(g) would allow the requirement that offenders make reasonable efforts to obtain housing and, if these efforts fail, they may be ordered to establish residence in a postrelease residential facility. Research has demonstrated that well-run residential programs can be effective at reducing rates of reoffending and other high-risk behaviors, such as returns to drug use.

Subsection (8)(j) clarifies the relationship between economic sanctions under § 6.04 et seq. and conditions of postrelease supervision under § 6.09. Ordinarily, economic sanctions are freestanding penalties with their own terms and conditions, timelines for compliance, and sanctions for violations. Because the revised Code gives priority to collection of victim restitution over other economic sanctions, see § 6.04(10), sentencing courts are given authority to designate full payment, or payment on an installment schedule, of victim restitution a condition of postrelease supervision subject to the violation and revocation procedures set forth in § 6.15.

j. Limits on the severity of postrelease-supervision conditions. All sanctions or combinations of sanctions under the Code must fit within the boundaries of proportionate sentences as defined in § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007) (one general purpose of sentencing is "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). Section 6.02(4) makes reference to this injunction, and adds that:

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In evaluating the total severity of punishment . . . the court should consider the effects of collateral sanctions likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.

Under current law, collateral sanctions in many cases amass to greater punitive force than any criminal sanctions that have been imposed, even though they are denominated as civil disabilities, see Article 6x. Section 6.02(4) provides a mechanism for the sentencing court to account appropriately for the functional impacts of collateral consequences in the criminal-sentencing process.

Sections 1.02(2)(a)(i) and 6.02(4) both operate as limits on the severity of postrelease-supervision sanctions, including the intensity and intrusiveness of any conditions imposed. Section 6.09(9) further states that no supervision condition or set of conditions may be imposed "that would place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community." Society has a compelling interest in offenders' successful rehabilitation and reintegration. Although this consideration should be in the forefront of the sentencing process, it is not unqualified. Burdens on offenders' rehabilitative chances cannot always be avoided. Prison releasees frequently pose risks to public safety that are best met with restrictive sentencing conditions, such as tight monitoring requirements, frequent drug testing, and travel limitations—all of which might impose a burden on the reintegration process, such as the offender's efforts to keep regular work hours or spend time reestablishing family contacts. In addition, postrelease supervision may be imposed to serve purely retributive purposes, and the need for proportionate punishment may come in tension with best rehabilitative practices. Subsection (9) in effect lays down a balancing test that would allow other permissible purposes to eclipse the goals of rehabilitation and reintegration, but only to the extent of "reasonable burdens" on those utilitarian objectives.

k. Respective court and agency authority. Subsection (10) gives courts control of postrelease-supervision requirements, but creates a routinized process for the postrelease-supervision agency to apply for necessary changes. This provision expresses the Code's view that postrelease supervision should be conceived as a judicially imposed sanction, and an important stage in the overall sentencing process.

l. Judicial modification of postrelease-supervision sanctions. Subsection (11) continues the original Code's view that the conditions and durations of parole-supervision terms should be subject to modification by the court at any time, and that offenders may be discharged by the court at any time. For modifications that increase the severity of the sanction, subsection (12) requires that the procedures for sentence violations must be observed; see § 6.15.

Subsection (13) recommends that judges structure postrelease-supervision sanctions to take advantage of the power of rewards for good behavior, and to maximize the effectiveness of sanctions for unwanted behavior. Social-science research for many decades has shown that behavioral change is more readily facilitated through a system of rewards than a system of

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punishments. American correctional practice has begun to exploit this knowledge, and some agencies now offer "carrots" as well as "sticks" in the administration of community supervision. Subsection (13) seeks to encourage this strategy through authorization of conditions that offer predictable rewards to prison releasees in return for the accomplishment of identifiable goals. One particularly powerful incentive that may be offered is reduction of the supervision term.

Bracketed language in subsection (13) would allow a state legislature to exclude victim restitution from the economic sanctions that may be modified as a reward for partial but substantial compliance with sentence requirements. As a general matter, the Code places a higher priority on the imposition and collection of victim restitution than on other economic sanctions, see § 6.03(10). On principle, a jurisdiction may take the view that victim-restitution payments should never be discounted, see § 6.04A and Comment *h* above, or may want to keep the possibility of full collection open indefinitely for those rare cases in which offenders' financial circumstances greatly improve; see § 6.04A and Comment *f* above. A statutory exemption from subsection (13) may not always increase the net amount of restitution that is collected for a victim's benefit, however. It is possible, for example, that a particular offender might be encouraged to pay half of a restitution order over a designated period of time, if given the incentive that the total amount due will be reduced, but that the same offender would make no payment at all or pay less than half in the absence of the incentive. The optimum policy balance in the use of carrots and sticks under subsection (13) is a subtle equation, and room for experimentation by sentencing courts may be preferable to unbending rules.

REPORTERS' NOTE [44]

a. Scope. Each year, about 600,000 prisoners are released from prisons and returned to communities across America—or about 1600 per day. National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 8. In 2012, the nation's parole-supervision population stood at over 851,200. Bureau of Justice Statistics, Probation and Parole in the United States, 2012 (2013), at 1. As with prison populations, minority groups are substantially overrepresented in parole populations, with the highest disparities among African Americans. In 2011, 41 percent of parolees were white, 39 percent were black, and 18 percent were Hispanic. Bureau of Justice Statistics, Probation and Parole in the United States, 2011 (2012), at 20, 43 app. table 6. Compared with probationers, prison releasees on average have greater needs for services and are more likely to commit new crimes. More than two-thirds of probationers successfully completed their supervision terms in 2012, compared with 58 percent of parolees, and parolees' chances of reincarceration for sentence violations were nearly twice that of probationers. Bureau of Justice Statistics, Probation and Parole in the United States, 2012 (2013), at 1.

Parolees are a small fraction of all offenders under criminal-justice supervision, making up only about 12 percent of the total population of 7,166,000 who were in American prisons, jails, on probation, or on parole on any one day in 2011. In contrast, probationers make up 55 percent of the total. Bureau of Justice Statistics, Probation and Parole in the United States, 2011 (2012) (at year-end 2011, there were 3,971,300 probationers and 853,900

[44] This Reporters' Note has not been revised since § 6.09's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes

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parolees); Bureau of Justice Statistics, Prisoners in 2010 (2011) (1,605,127 prisoners at year-end 2010): Bureau of Justice Statistics, Jail Inmates at Midyear 2011 – Statistical Tables (2012) (735,601 jail inmates from June 2010 to June 2011).

Issues of postrelease supervision are largely overlapping in determinate and indeterminate systems—and the term "parole supervision" is commonly used in the context of determinate sentences, where "parole release" no longer exists. See Christine Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. 421, 434 (2011) ("despite the fact that many states no longer refer to 'parole' supervision and instead use terms like 'community supervision' or 'supervised release,' qualitatively there are few differences in what this means once the person has been released"). The policy questions of how release decisions should be made, and what services and supervision should be provided after release, are separable. Jeremy Travis, the nation's most visible proponent of improved prisoner reentry programs, also advocates the abolition of parole agencies' release discretion. See Jeremy Travis, But They All Come Back: Facing the Challenges of Prisoner Reentry (2005); Jeremy Travis, Thoughts on the Future of Parole (Urban Institute Justice Policy Center, 2002), at 2.

b. Underlying policies. Strategies to improve postrelease supervision must take account of the reality that available resources are sharply limited. Many experts estimate that, to make effective programs available to all offenders on community supervision, funding levels would have to increase several times over from current spending.

As a group, prison releasees pose considerable risks of new offending; see Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998). Within three years of release, roughly two-thirds of parolees are rearrested, and one-half are returned to prison. See Pew Center on the States, State of Recidivism: The Revolving Door of America's Prisons (2011); Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994 (2002); Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 (1989). The initial weeks and months of postrelease-supervision terms are fraught with dangers for offenders and the communities to which they return. Recidivism rates among new releasees are double that of parolees who have been out of prison for roughly one year. Other high-risk activities and adverse consequences are also concentrated near the time of release. Returns to drug use, health crises, and death rates among parolees are especially acute problems near the time of transition from prison to community. Many newly released offenders do not have a place of residence to return to—and the lack of satisfactory housing is associated with especially high rates of reoffending and other problem behaviors. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 52-53 ("It has been well established that a large proportion of parolees who return to prison fail in the first weeks and months after their release. . . . [T]he probability of arrest declines with months out of prison: that probability during the first month out of prison is roughly double that during the 15th month, and it then stabilizes through the end of the 3-year period").

The importance of the immediate postrelease time period was underscored by a recent National Academy of Sciences panel. After a multi-year study, the panel was able to make only one policy recommendation with confidence:

> The committee recommends that parole authorities and administrators of both in-prison and postrelease programs redesign their activities and programs to provide major support to parolees and other releasees at the time of release. These interventions should be subjected to rigorous

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> evaluation. National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 82.

Little statistical information is collected on the characteristics of postrelease-supervision populations, see Joan Petersilia, Reforming Probation and Parole (2002), at 146. Individual states sometimes publish reports that are suggestive of national patterns. All indicators point in the direction of a correctional population with extremely high needs. For example, a 1997 report from California found that 85 percent of parolees were chronic substance abusers, 10 percent were homeless, 70 to 90 percent were unemployed, 50 percent were functionally illiterate, and 18 percent had some form of mental illness. California Department of Corrections, Preventing Parolee Failure Program: An Evaluation (1997). See also National Center on Addiction and Substance Abuse at Columbia University, Behind Bars II: Substance Abuse and America's Prison Populations (2010), at 57 (offenders entering parole supervision "are twice as likely as members of the general population age 18 and over to be either current users of illicit drugs or binge drinkers (55.7 percent vs. 27.5 percent), and four times likelier to meet clinical criteria for a substance use disorder (36.6 percent vs. 9.0 percent)"); National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 57-58 ("Among prisoners, the rates of mental illness are two to four times higher than among the general population. . . . A more recent study reports that about one-half of state and federal prison inmates have a mental health problem . . . ").

Often, prison releasees return to disorganized communities with few resources to assist their reentry. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 68, 70 ("A high proportion of releasees go to communities that are actually negative environments, with high crime rates or extensive drug markets that represent real threats to successful reentry. . . . Releasees who report living in neighborhoods in 'unsafe' or disorganized communities or where drug dealing is common are more likely to report using drugs after release, are less likely to be employed, and are more likely to return to prison than other releasees.") (citations omitted). Recognizing these sizeable problems of prisoner reentry, Congress passed legislation in 2007 authorizing hundreds of millions of dollars in funding for programs and research to improve outcomes for people leaving jails and prisons. See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657.

c. Purposes of postrelease supervision. There is little research or scholarly writing on the use of postrelease supervision for punitive purposes. Most of the contemporary debate focuses on different models for the achievement of utilitarian ends. There are competing "social work" and "control" philosophies of parole supervision; see National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 32:

> Since the 1970s, the focus of parole supervision has shifted from the dual purposes of making sure that parolees complied with their conditions of parole and aiding their social reintegration by providing community resources (e.g., job training, drug counseling) to a more direct emphasis on crime control. Parole agents increasingly emphasize their police function and deemphasize the casework portion of their role . . . yet there is wide variation across agencies.

See also Amy L. Solomon, Vera Kachnowski, and Avinash Bhati, Does Parole Work? Analyzing the Impact of Postprison Supervision on Rearrest Outcomes (Urban Institute 2005); Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003). On swift advances in surveillance technology, see United States v. Jones, 565

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U.S. __, 132 S. Ct. 945 (2012) (Justices in separate opinions remarking the recent advent of inexpensive GPS tracking devices, and the challenges such technologies will pose for constitutional law).

Successful implementation of the utilitarian goals of postrelease supervision presents major challenges. Our knowledge of how to supply successful rehabilitative and reintegrative programming is limited, and the available studies are often discouraging. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 75: ("The limited research that has been done shows that formal parole supervision has only a small effect on recidivism."); Amy L. Solomon, Vera Kachnowski, and Avinash Bhati, Does Parole Work? Analyzing the Impact of Postprison Supervision on Rearrest Outcomes (Urban Institute 2005), at 1 ("Despite its widespread use, remarkably little is known about whether parole supervision increases public safety or improves reentry transitions."). Professor Petersilia estimated in 2004 that fewer than one percent of all reentry programs in the United States had ever been subject to empirical evaluation, and the evaluations that did exist generally lacked a randomized experimental design. She concluded that "using this 'body' of research to conclude anything about which reentry programs 'work' or 'don't work' seems misguided." See Joan Petersilia, What Works in Prisoner Reentry? Reviewing and Questioning the Evidence, 68 Federal Probation 4, 7 (2004).

Apart from questions of which interventions do or do not "work," there is illuminating research on those aspects of ex-offenders' lives that are most associated with long-term reductions in recidivism. The leading "protective" factors are: employment in a satisfying job, adequate housing, a healthy marriage and strong family ties, and reductions in drug and alcohol use.

Employment. Strong work ties correlate with lower rates of reoffending, although one study found that desistance was contingent on a "satisfying job," not just any job. Robert J. Samson and John H. Laub, Crime in the Making: Pathways and Turning Points Through Life (1993); Neal Shover, Great Pretenders: Pursuits and Careers of Persistent Thieves (1996). A recent study found the employment effect greatest for men over the age of 27, with no measurable effect for younger participants. Christopher Uggen, Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism, 65 American Sociological Review 529 (2000). The leading studies on the employment effect are based on data that are several decades old, so there is a chance that their findings have become outdated. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 24.

Housing. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 54-55 ("Released prisoners who do not have stable housing arrangements are more likely to return to prison. . . . Supportive housing programs . . . and halfway houses that include on-site services—could be an option for former prisoners, but they have not been implemented on a wide scale.") (citations omitted).

Family ties. One widely cited study found that being married was associated with a 35 percent reduction in risk of reoffending. Robert J. Sampson, John H. Laub, and Christopher Weimer, Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects, 44 Criminology 465 (2006). Other research has discovered similar but smaller effects. Alex R. Piquero, John M. MacDonald, and Karen F. Parker, Race, Local Life Circumstances, and Criminal Activity, 83 Social Science Quarterly 654 (2002); Julie Horney, D. Wayne Osgood, and Ineke Haen Marshall, Criminal Careers in the Short-Term: Intra-Individual Variability in Crime and Its Relation to Local Life Circumstances, 60 American Sociological Review 655 (1995) (finding that, while marriage is

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associated with reduced recidivism, cohabitation is associated with an increased risk). On the importance of family ties more generally, see National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 44-45 (prisoners with close family ties have lower recidivism rates than those without such attachments. Greater contact with family during incarceration (by mail, phone, or in-person visits) is associated with lower recidivism rates.) (citations omitted).

Reduced drug and alcohol use. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 50-51 ("In summary, although sustained abstinence is associated with substantial reductions in crime (perhaps 50 percent or more), only a small percentage of drug-abusing offenders receive appropriate treatment for the length of time necessary to achieve these outcomes. Best practice would call for better targeted in-prison treatment for substance-using offenders, better coordination between in-prison and postrelease treatment providers, and better joint community case management between the criminal justice system and community treatment providers.") (citations omitted). See also Federal Bureau of Prisons, Office of Research and Evaluation, Triad Drug Treatment Evaluation Project: Final Report of Three-Year Outcomes (2000) (reporting 16 percent reduction in recidivism among participants in residential drug-treatment program); Ying Hser, Maria Elena Stark, Alfonso Paredes, David Huang, M. Douglas Anglin, Richard Rawson, A 12-Year Follow-Up of a Treated Cocaine Dependent Sample, 30 J. of Substance Abuse Treatment 219 (2006) (men who remained abstinent from cocaine use for five years or more reported less criminal activity, more employment, and less use of substances other than cocaine).

Positive behavioral change and reduced offending are most likely to occur if programming begins within the prisons and is part of a continuous plan that extends into offenders' communities after release. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 41 ("Intervention research has shown that the most successful programs fostering individual change and leading to desistance are those that start in prison and then continue in the community setting once an individual is released."). Thus, many of the interventions cited as "successful" in the literature, that is, in studies that have found measurable reductions in recidivism, are programs that begin during an offender's prison stay. See id. at 43 ("research supports a strong programmatic emphasis on increasing prisoners' and releasees' employability, through skills training, job readiness, and, possibly, work-release programs during incarceration and after release.").

d. Postrelease supervision used only when necessary. There are wide differences in state approaches toward postrelease supervision. In some states, a period of post-release supervision is mandatory. See, e.g., 18 N.H. Rev. Stat. § 504-A:15 (2010) (requiring minimum of nine months' supervision for all prisoners prior to completion of prison sentence); Wis. Stat. § 973.01 (requiring all sentences of imprisonment to include bifurcated terms of confinement and "extended supervision"). Two states, Maine and Virginia, have no such programming for the vast majority of prison releasees. Among the other states, per capita populations of parolees in 2011 varied from a low of 28 per 100,000 in Florida to a high of 1015 per 100,000 in Arkansas, with a national average of 357 per 100,000. Bureau of Justice Statistics, Probation and Parole in 2011 (2012), at 18 app. table 4. Comparative statistics relied upon in the Comment are taken from Australian Bureau of Statistics, Year Book Australia, 2012, at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Community-based%20corrections~72 (last viewed September 14, 2013) (In Australia, the reported parole supervision rate for 2011 was 69 per 100,000 adults); Dirk van Zyl Smit and Alessandro Corda, American Exceptionalism in Parole

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Release and Supervision, in Kevin R. Reitz ed., American Exceptionalism in Crime and Punishment (forthcoming 2014) (calculating Danish and Austrian rates from Council of Europe data).

For arguments that parole supervision is not needed for all releasees, see Joan Petersilia, California's Correctional Paradox of Excess and Deprivation, in Michael Tonry ed., 37 Crime & Justice: A Review of Research 207 (2008) (California's "mandatory parole system . . . fails to properly focus resources on the most dangerous and violent paroled offenders, at the expense of public safety"). In light of the statistical evidence, Professor Petersilia advocated the following policy reforms for the state of California:

> Employ parole supervision selectively and in a more concentrated way, so that it targets the most likely recidivists. End or dramatically reduce the imposition of parole on those who are least likely to reoffend, which wastes resources and provides a negligible public safety benefit.

Another scholar has argued that, at least in the case of lower-risk offenders, post-release supervision has outlived its usefulness, and advocates its abolition. Christine S. Scott-Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. 421, 431 (2011). The former Commissioner of Corrections for New York City, Martin Horn, has proposed the abolition of postrelease supervision and instead providing releasees vouchers for needed transitional services. Martin F. Horn, Rethinking Sentencing, 5 Correctional Management Quarterly 34, 38 (2001).

e. Assessment of offenders' risks and needs. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 51-52 ("Research emphasizes the importance of conducting detailed needs assessments shortly before release and periodically after release to develop appropriate individualized services. Because it is widely agreed that not every offender needs the same level and type of service and sanction and that offenders differ on their likelihood to reoffend once released back into the community, such assessments are the foundation for an individualized reentry plan.') (citations omitted).

It is important to stress the heterogeneity of the prison-release population, which is part of the justification for sorting them into a wide range of risk-and-needs classifications. See National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 72 ("[D]esistance from crime varies widely among parolees. Released prisoners with lengthy criminal records and who have been to prison several times before have very high recidivism rates—over 80 percent are rearrested within three years of release from prison. In contrast, less than half of first-time releasees and older releasees are rearrested within three years of their release") (citation omitted); id. at 74 ("Recidivism rates, defined as the probability that parolees are rearrested or returned to prison, are significantly different for different groups of parolees. They are lower for women than for men; lower for older than younger parolees; lower for people with relatively short criminal records; and lower for violent offenders than for property or drug offenders.") (citations omitted). See also Richard Rosenfeld, Joel Wallman, and Robert Fornago, The Contribution of Ex-Prisoners to Crime Rates, in Jeremy Travis and Christie Visher eds., Prisoner Reentry and Crime in America (2005); Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003).

g. Length of postrelease-supervision terms. Consistent with the Code's recommendation, a number of determinate-sentencing states already treat the term of postrelease supervision as separate from the unserved balance of the prison term. See Colo. Rev. Stat. §§ 18-1.3-401(1)(a)(V)(A) ("mandatory period of parole" of 2 to 5 years for felonies); N.C. Gen. Stat. § 15A-1368.2(c) ("A supervisee's period of post-release supervision shall be for a period

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of nine months, unless the offense is an offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes [Sex Offender and Public Protection Registration Programs]. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years"). For examples of states that measure the postrelease term against the unserved balance of the prison term, see Minn. Stat. § 244.05, subd. 1 ("the supervised release term shall be equal to the period of good time the inmate has earned [normally 1/3 of the prison sentence], and shall not exceed the length of time remaining in the inmate's sentence"); N.D. Century Code § 12-59-21 (parole term cannot be shorter than the court-imposed prison term reduced for good time, but may be extended five years beyond the expiration date for the prison sentence for felonies, and two years for misdemeanors).

On the decline in prison releasee's reoffending rates in the months and years following release, see Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994 (2002), at 3 table 2. Similar statistics were reported in Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983 (1989) (39 percent arrested in first year, another 15 percent in second year, another 8 percent in third year). The critical importance of the early postrelease period has been documented in many studies. See National Research Council, Parole, Desistance from Crime, and Community Integration (2007); Douglas B. Marlowe, Evidence-Based Policies and Practices for Drug-Involved Offenders, 91 The Prison Journal 27S-47S (2011), at 39S ("Nearly a third of [addicted] inmates resume substance abuse within 1 to 2 months after leaving prison."). On decreasing long-term risks of reoffending for ex-offenders, see Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327, 338 (2009) (finding that declines in recidivism risk among ex-offenders vary with age and type of offense, but the longest period of crime-free life needed to return offenders to a risk level close to the general population in their age cohort was about nine years—for offenders who committed armed robbery at the age of 16); Megan C. Kurlychek, Robert Brame, and Shawn Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology 1101, 1101 (2006) (finding that "the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record.").

h. Early discharge. Subsection (7) continues the policy of the original Code, see original Model Penal Code, § 305.12. It also runs parallel with the revised Code's recommendation that probation terms should be subject to early termination in the court's discretion, see § 6.03(6) and Comment *g*.

A number of states currently allow for the shortening of parole terms after they have begun. See, e.g., Colo. Rev. Stat. § 17-22.5-403(8)(a) ("The state board of parole may discharge an offender granted parole under this section at any time during the term of parole upon a determination that the offender has been sufficiently rehabilitated and reintegrated into society and can no longer benefit from parole supervision."); N.C. Gen. Stat. § 15A-1368.2(d) ("A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law."); N.D. Century Code § 12-59-21 ("The board may terminate a parolee's supervision at any time earlier than the established date of release from parole if the parole board determines that early termination of supervision is warranted and termination of supervision is in the interest of justice."). See also Joan Petersilia, Employ Behavioral Contracting for "Earned Discharge" Parole, 6 Criminology & Pub. Pol'y 807 (2007) (arguing in favor of earned-time incentives for parolees).

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i. Authorized conditions of postrelease supervision. Edward Rhine surveyed parole boards in 1988, asking them to list the standard conditions of parole in their jurisdictions. See Edward E. Rhine, Paroling Authorities: Recent History and Current Practice (1991). His findings were summarized in Joan Petersilia, Reforming Probation and Parole (2002), at 155 ("Boards were asked in 1988 to indicate from a list of 14 items which were standard parole conditions in their state. The most common, of course, was "obey all laws." However, 78 percent required "gainful employment" as a standard condition; 61 percent required "no association with persons with criminal records"; 53 percent required "all fines and restitution paid"; and 47 percent required "support family and all dependents," none of which can consistently be met by most parolees."); see id. at 156 (the most common factors leading to revocation: "failing to report, ignoring stipulated programs, possessing a weapon, leaving the area without permission, and failing to secure or hold a job."). See also American Correctional Association, Parole, 26 Corrections Compendium 8 (2001). The most recent report is found in National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 9-10:

> "Standard" conditions of parole include "not committing crimes, not carrying a weapon, seeking and maintaining employment, reporting changes of address, reporting to one's parole agent, and paying required victim and court restitution costs." "Special" or "tailored" conditions vary with offender and crime type. Drug testing is the most common special condition. Sex offenders may be required to participate in therapy, comply with registration requirements, and stay away from child-safety zones. Domestic-violence offenders may be subject to no-contact orders.

Professor Petersilia has written that the number of special conditions imposed upon parolees has been increasing in recent decades: "Parolees in state systems also are being required to submit more frequently to drug testing, complete community service, and make restitution payments." She argues that this detracts from available services: "Parole officers work for the correction system, and if paroling authorities are imposing a greater number of conditions on parolees, then field agents must monitor those conditions. As a result, contemporary parole officers have less time to provide other services, such as counseling, even if they were inclined to do so." Joan Petersilia, Reforming Probation and Parole (2002), at 160.

One model of postrelease supervision that sentencing courts should consider is the "fast-track" approach of Project H.O.P.E., pioneered in Hawaii, in which supervision conditions are enforced consistently and speedily, with an array of graduated sanctions that include very short terms of incarceration; see § 6.03 and Comment *k*. The H.O.P.E. model is a promising evidence-based strategy. Early evaluation research suggests that, properly implemented, it can achieve recidivism reduction at lower cost than familiar supervision practices. See Angela Hawken and Mark Kleiman, Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE (National Institute of Justice, 2009).

l. Judicial modification of conditions of postrelease supervision. Providing incentives to offenders to succeed on parole may be just as important, or more so, than the threat of sanctions. See American Probation and Parole Association, Effective Responses to Offender Behavior: Lessons Learned for Probation and Parole Supervision (2013), at 14 ("research indicates that the number of incentives provided to probationers and parolees should be larger than the number of sanctions imposed during the supervision process"); Eric J. Wodahl, Brett Garland, Scott E. Culhane and William P. McCarty, Utilizing Behavioral Interventions to Improve Supervision Outcomes in

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Community-Based Corrections, 38 Crim. Justice & Beh. 386, 400 (2011) (finding that a four-to-one ratio between rewards and punishments promotes highest success rates on community supervision); National Research Council, Parole, Desistance from Crime, and Community Integration (2008), at 39 ("Positive incentives for compliance are important complements to sanctions for violations. Less intrusive supervision and the remission of previously collected fines are both likely to be valued by releasees, but a wide variety of rewards, such as tickets to sporting events, may also have a role. The benefits of even small reductions in recidivism can easily cover the costs of such rewards").

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§ 6.11A. Sentencing of Offenders Under the Age of 18.[45]

The following provisions shall apply to the sentencing of offenders under the age of 18 at the time of commission of their offenses:

(a) When assessing an offender's blameworthiness under § 1.02(2)(a)(i), the offender's age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.

(b) Priority shall be given to the purposes of offender rehabilitation and reintegration into the law-abiding community among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii), except as provided in subsection (c).

(c) When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii).

(d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

(e) The court shall impose a juvenile-court disposition in the following circumstances:

(i) The offender's conviction is for any offense other than [a felony of the first or second degree];

(ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction;

[45] This Section was originally approved in 2011; see Tentative Draft No. 2.

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(iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or

(iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]

Comment: [46]

a. Scope. This provision governs the sentencing of offenders under the age of 18, regardless of whether they would normally be considered "juveniles" within the ordinary jurisdiction of the state's juvenile court. Large numbers of such offenders are sentenced in the adult criminal courts each year, and there are alarming disparities by race and ethnicity among transferred youths. Under existing law in most states, youths under 18 who are convicted in the criminal courts are subject to the same penalties as older offenders. Adult sentencing codes generally lack specialized provisions for offenders at the borderline between the juvenile and adult justice systems and, where such provisions exist, they are piecemeal and fail to reflect comprehensive policy choices concerning this important age group.

[46] This Comment has not been revised since § 6.11A's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

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Offenders under 18 reach the adult criminal courts by many different routes. There is some variation among states in the age limits for juvenile-court jurisdiction. There is also great diversity in state law and practice concerning waiver and other mechanisms to remove particular cases from the juvenile to the criminal courts. Section 6.11A is built on the policy judgment that, no matter what road is taken to the adult courtroom, special considerations attach to the sentencing and correction of offenders below the age of 18.

b. Setting the legal boundary at age 18. No fixed age boundary of the type recommended in this provision will fit every individual who comes before the courts. Research in developmental psychology, however, supports the majority view of state legislatures that offenders under the age of 18 are, as a group, distinguishable from older offenders. A defined age cutoff provides a useful benchmark for large numbers of cases, and avoids the costs of individualized psychological evaluations.

Under the revised Code's general scheme, which carefully preserves judicial sentencing discretion in individual cases, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007), a statutory age cutoff need not create a "cliff effect" that subjects offenders just above and below the age limit to radically different sentence regimes. Where offenders above the age of 18 display personal attributes of developmental immaturity, sentencing courts have discretion to treat this as a mitigating factor under the Code's provisions for adult sentencing—whether or not the factor is expressly recognized in sentencing guidelines, see § 6B.02(7) (id.) ("The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court."). In an extraordinary case, a young adult's developmental deficits may even provide grounds for departure from any mandatory penalty affixed to the offense of conviction, or might supply the basis for a proportionality ceiling on the severity of any punishment prescribed by law. See §§ 7.XX(3)(b) (id.), 7.09(5)(b) (id.) (draft provision submitted for informational purposes only).

For jurisdictions that desire greater age flexibility in the application of this Section, subsection (k), given as an option in bracketed language, would grant trial judges discretion to extend most of the substance of the provision to offenders under the age of 21 at the time of their offenses.

c. Purposes of sentencing and offenders under 18. The Code's framework of utilitarian sentences within limits of proportionality is applicable to offenders under the age of 18. See § 1.02(2)(a) and Comment *b* (Tentative Draft No. 1, 2007). Special considerations arise in cases involving young offenders, however. Subsection (a) provides that offenders under 18 should be judged less blameworthy for their criminal acts than older offenders—and age-based mitigation should increase in correspondence with the youthfulness of individual defendants.

Offender blameworthiness is one of the key indicia of proportionate penalties under § 1.02(2)(a)(i) (stating that proportionality is to be measured by "the gravity of offenses, the

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harms done to crime victims, and the blameworthiness of offenders"). Subsection (a) will therefore exert downward pressure on the ceiling of permissible sentence severity for cases under § 6.11A. This is especially important because, under the revised Code, no utilitarian sentencing goal may ever justify the imposition of a disproportionate punishment. See § 1.02(2)(a)(ii) and Comment *b*. And, under the Code, the judicial branch has final statutory authority to make proportionality determinations in individual cases, see §§ 6B.03(4) (Tentative Draft No. 1, 2007), 7.XX(2), 7.XX(3)(b), 7.09(5)(b). This subconstitutional power of proportionality review is designed to be considerably more exacting than the courts' infrequently exercised authority to strike down penalties as "grossly disproportionate" under the federal constitution.

The mitigating effect of subsection (a) may be offset or overridden by other circumstances in specific cases. The provision is not intended to foreclose the judge's ability to find, when supported by the facts, that an offender under 18 acted with an unusually high degree of personal blameworthiness. For instance, a sentencing judge might find an offender unusually culpable—despite his youth—if guilty of a violent offense committed only for a thrill, or for sadistic purposes, or out of racial animus. It is also important to recognize that proportionality determinations under § 1.02(2)(a)(i) are not based solely on offender blameworthiness. The courts must also attend to "the gravity of offenses" and "the harms done to crime victims" when reaching final judgments of proportionality. The seriousness of victim injuries does not diminish when their assailants were underage.

Subsections (b) and (c) speak to the rank ordering of utilitarian objectives to be applied to the sentencing of offenders under the age of 18. Section 1.02(2)(a)(ii) embraces the utilitarian goals of "offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community," but sets forth no hierarchy among these goals that must be applied across the board, to every individual sentencing. However, the Code contemplates that, for definable classes of cases, specification of priorities among utilitarian goals will often be desirable. This task is commended to the Sentencing Commission as part of its guidelines-drafting responsibilities; see § 6B.03(5) and Comment *e* (Tentative Draft No. 1, 2007) (providing that "[t]he [sentencing] guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes."). It is appropriate for the legislature to perform this function, as well, when it is prepared to lay down firm policy judgments that should not be delegated to the commission and the courts. Subsections (b) and (c) state theoretical principles that are sufficiently fundamental to be enshrined in statutory language. Other examples of the statutory prioritization of utilitarian purposes may be found (in future drafting) in provisions dealing with drug courts and mental-health courts, and creating special alternative "restorative justice" sentencing procedures for selected cases.

Subsection (b) addresses the vast majority of cases that will arise under this provision, and requires that the goals of offender rehabilitation, and offender reintegration into the law-

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abiding community, must normally be assigned priority over all other utilitarian aims in § 1.02(2)(a)(ii). Thus, while considerations of general deterrence, incapacitation of dangerous offenders, and restitution for crime victims remain operative, they are subsidiary to the pursuit of rehabilitation and reintegration. This approach is consistent with the statutorily defined purposes of most juvenile codes in the United States.

As an exception to the general rule of subsection (b), subsection (c) recognizes that the goal of incapacitation of dangerous offenders will and should be given highest priority in some cases involving defendants under the age of 18. Based on the overall patterns of criminal behavior among juveniles, this will be true in only a small percentage of all cases. Most juvenile criminal careers last a very short time, and the typical injury done by juvenile offenders is less grave than in cases of adult offending. But the unfortunate truth is that some young offenders pose unacceptable risks of serious reoffending and, even giving great weight to the factor of their age, the countervailing moral claims of prospective crime victims rise to a compelling level.

Subsection (c) places restrictions on the incapacitation-based sentencing of offenders under 18, and is intended to regulate such reasoning more closely than existing law. The subsection erects threshold requirements that the offender must have been convicted of a serious violent offense, and there must also be a reliable basis for belief that the offender presents a high risk of serious offending in the future. The "reliable basis" standard does not pretend to be exact. It is, however, meant to rule out conjecture or intuition about an offender's future dangerousness—and this will preclude much contemporary sentencing practice across the United States today. The reliable-basis standard could be satisfied by the use of validated actuarial risk-assessment instruments, which are consistently shown to be more reliable than professional clinical judgments in individual cases, see § 6B.09 and Comment *b* (this draft). The courts of each jurisdiction will be required to give specific content to the standard, and its application can be expected to evolve with advancing knowledge in the prediction sciences.

One notable effect of subsections (b) and (c) in combination is that the policy of general deterrence can never be treated as the primary goal in the sentencing of offenders under the age of 18. Just as such offenders are considered less blameworthy as a group, they are also viewed as less deterrable. This prescription is addressed to legislatures and sentencing commissions under the Code's scheme, as judges are not authorized to impose penalties in individual cases based on considerations of general deterrence; see § 6.06(2) and Comment *f*.

The policy judgments reflected in subsections (a) through (c) are based on current research in psychology and criminology. The key findings are summarized below.

(1) Blameworthiness. While normally developing human beings possess a moral sense of morality from their early years, important capacities of abstract moral judgment, impulse control, and self-direction in the face of peer pressure, continue to solidify into early adulthood. The developmental literature suggests that offenders under 18 may be held morally accountable for their criminal actions in most cases, but assessments of the degree of personal culpability should

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be different than for older offenders. This principle of reduced blameworthiness has been recognized by the Supreme Court in recent decisions under the Eighth Amendment, holding that the sanction of life without parole may not be imposed on juvenile offenders for non-homicide offenses, and that the death penalty may never be imposed.

(2) Potential for rehabilitation. Many believe that adolescents are more responsive to rehabilitative sanctions than adult offenders. While the evidence for this proposition is mixed, it is clear that some rehabilitative programs are effective for some juvenile offenders. Success rates are at least comparable to those among programs tailored to adults. Moreover, natural desistance rates—uninfluenced by government intervention—are higher for youths under 18 than for young adults whose criminal careers extend into their later years. Subsection (b) takes the policy view that society has a greater moral obligation to attempt to rehabilitate and reintegrate young criminal offenders, and that the benefits of doubt concerning the efficacy of treatment should normally be resolved in favor of offenders under 18.

(3) Harm prevention. Longitudinal studies show that the great majority of offenders under 18 will voluntarily desist from criminal activity with or without the intervention of the legal system. For this large subset of youthful offenders, a primary goal of the legal system should be to avoid disruption of the normal aging progression toward desistance.

There is reason for concern that criminal-court interventions might derail an otherwise natural progression toward law-abiding adulthood for many youths. The research literature suggests that transfer of juvenile offenders to the adult courts can itself be criminogenic. There is reason for concern, therefore, that punishments meted out in pursuit of public safety may have the opposite of the intended effect—and that this danger arises in the ordinary case of an adolescent offender, not the unusual case.

(4) Small group of serious violent offenders. Pushing in the opposite direction of considerations of reduced blameworthiness and high probabilities of desistance among younger offenders, it must also be recognized that a minority of adolescents and young adults commit serious crimes at very high rates. Age-crime curves, developed to track criminal careers over the life course, show that the peak years of criminal involvement are in the late teens and early 20s. Longitudinal research has documented time and again that a small fraction of all juvenile delinquents, roughly only 6 or 8 percent, go on to become "chronic" or "persistent" offenders who commit outsized numbers of serious crimes. For this subgroup, offenders' moral claims to reduced assignment of personal culpability come into tension with the moral claims of past and prospective crime victims, whose injuries are equally serious regardless of the age of the criminal.

(5) Deterrence. Section 6.11A would in every case relegate general deterrence to a subsidiary position among the utilitarian purposes of sentencing. For offenders of any age, there is no persuasive empirical support for the proposition that increased punishment severity acts as an effective deterrent of criminal acts. The prospects of a general deterrence effect are especially

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remote for offenders under the age of 18. Even more than older criminals, they are unlikely to know the state of the law and the likely consequences attached to specific crimes, are more likely to engage in risk-taking behavior despite known costs and benefits, and are more vulnerable to behavior bred of impulsivity and peer pressure.

If enacted into legislation, § 6.11A's proscription would be addressed primarily to the sentencing commission when fashioning systemwide policy. Sentencing courts are not authorized to impose penalties in individual cases based on considerations of general deterrence; see § 6.06(2) and Comment *f*. Rather, the evidence for and against the effectiveness of policies of general deterrence are best weighed as a matter of statewide sentencing policy, by a body competent to undertake the necessary factfinding, research, and study.

d. Availability of juvenile-court sanctions. The age group addressed in this Section falls at the uncertain borderline between the adult criminal-justice system and the juvenile courts. While the revised Code always protects the courts' discretion to tailor sentences to the facts of particular cases, § 6.11A supplies the courts with a number of specialized tools to individualize sentences for offenders under 18, greatly expanding their sentencing discretion in such cases. Subsection (d) grants sentencing judges discretion in every case to impose a juvenile-court disposition as an alternative to an adult sanction. The court may also select a juvenile-court sanction while reserving authority to impose an adult sentence if the offender violates the conditions of the juvenile disposition. This is one form of "blended sentencing," which exists in numerous permutations across American jurisdictions.

The Code's policy choice locating blended sentencing authority in the adult criminal courts is motivated in part by the conclusion that power to impose a blended sentence should not reside in the juvenile courts. Giving juvenile-court judges the power and responsibility to pronounce adult sentences stretches and distorts the juvenile-court mission away from its traditional groundings in rehabilitation and the best interests of the child. There is much about the unique character of juvenile courts that is worth preserving. Over the last several decades, the juvenile courts have charted a remarkably different course than the adult courts in their responses to criminal conduct. Juvenile institutional populations have increased only slowly in years when the adult prisons have seen explosive growth, and in recent years those populations have declined substantially. Rates of transfer to the adult system have shown similar changes, but only a tiny fraction of juvenile cases as a whole have ever been removed to the adult courts. Indeed, the history of American juvenile justice, dating to the late 19th century, shows longstanding commitment to a less punitive, more rehabilitative, set of values than applied to adult criminals. Subsection (d) helps to preserve the unique character of the juvenile court, while conceding that some of its cases must and should be removed to the adult system.

e. Mandatory juvenile disposition. Section 6.11A does not address transfer decisions itself, which is one process that brings a juvenile offender into the adult court system, nor does it speak to the powers of the adult courts—such as "reverse waiver"—to return a case involving a

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young offender to the juvenile system. The provision assumes that a case involving an offender under the age of 18 has reached the stage of conviction in the adult courtroom, and speaks only to the sentencing decision that follows on the heels of such a conviction. Even so, as a matter of substantive sentencing law, the trial court should have discretion to evaluate whether societal interests are best served by the continued treatment of the offender as an adult criminal for purposes of the sanctions that will be administered. Subsection (d) gives the court two important options: First, the court may impose any sanction that would have been available in a juvenile court for the same offense. Second, the court may impose such a sanction while holding an adult sentence in reserve, to be available if the offender violates the terms of the juvenile disposition.

Subsection (e) defines several scenarios in which an adult penalty is inappropriate. In each instance, the sentencing judge must impose a juvenile-court disposition. These circumstances include, in subsection (e)(i), cases in which the conviction obtained is for a crime at the middle or low end of graded severity among felonies. Because the revised Code would allow for a number of different grading schemes, see § 6.01 and Comment *c* (this draft), the grading cutoff in subsection (e)(i) is set forth in bracketed language. A state legislature may prefer to express the cutoff descriptively, such as a limitation to cases of "a serious violent felony."

Subsection (e)(ii) applies in cases where a charge requisite to the adult court's jurisdiction has not resulted in conviction. In most states, only certain charges may support waiver to the adult system, or permit direct filing by the prosecutor in the adult courts. Consistent with the policies of those limitations, an adult punishment should no longer be available when the predicate charge has been dismissed or has resulted in an acquittal.

Subsection (e)(iii) mandates a juvenile disposition for low-risk offenders, with the exception of offenders who have committed crimes of such gravity that proportionality concerns standing alone would support an adult punishment. There must be a reliable basis for the assessment of low risk, which may be established through the use of a validated actuarial risk-assessment instrument, see Comment *c* above. The offense or offenses to be included in subsection (e)(iii)'s proviso can be selected only by consideration and debate of contestable retributive values. The bracketed language reflects a conclusion that murder, as defined in the Model Penal Code, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.2 (1980), is such an offense.

Finally, subsection (e)(iv) speaks to the situation in which a young offender has been convicted of a serious crime, but played only a minor and fractional role in its commission. Most serious juvenile offenses are committed in groups, much more so than with adult offenders, and the inability to resist peer pressure is one of the best-documented features of adolescence. Nonetheless, the substantive criminal law makes all accomplices equally liable for the primary offense, as though all were primary actors. For adult offenders, this crude one-size-fits-all premise is justified in part on the premise that sentencing courts will differentiate among

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complicitors according to their true levels of responsibility. For juvenile offenders, the same assumption should operate, but in a more formalized way. Subsection (e)(iv) leaves room for fact-specific debate, and judicial discretion, concerning what degree of participation by a juvenile accomplice should qualify as a "minor role" in a group offense. Once the court has made such a finding in good faith, however, the extraordinary measure of an adult criminal penalty for an underage offender should no longer be permitted.

f. Authority to deviate from mandatory penalties. Both the original Code and the revised Code assert the Institute's unqualified policy that no mandatory-minimum penalty should be authorized for any offense; see § 6.06 and Comment *d* (this draft). Despite this longstanding policy, however, every American jurisdiction has enacted numerous mandatory-penalty provisions. The revised Code, while continuing the Institute's categorical disapproval of such laws, also seeks to soften their scope and impact wherever possible. Within the instant provision, subsection (f) recommends that, even when a state legislature has seen fit to adopt mandatory penalties into its criminal code, it should exempt underage offenders from the rigid force of such laws. A dominant theme of § 6.11A is that an unusual degree of flexibility, and power to individualize sentences, ought to be part of adult penalty proceedings for offenders under the age of 18. No provision in law stands farther removed from this principle than a mandatory-minimum penalty.

g. Cap on severity of prison sentences. As a matter of constitutional law, the maximum penalties permissible for juvenile offenders are sometimes lower than for adult offenders who commit the same acts. For all non-homicide offenses, the Supreme Court has found that a sentence of life without parole violates the Eighth Amendment when imposed on offenders under the age of 18. The Court has also held that the death penalty may never be imposed on juvenile offenders. These holdings rest in part on the strong presumption that juvenile offenders are less culpable than adults, see subsection (a), and the empirical conclusion that prospective juvenile offenders are less likely to be deterred by the threat of harsh punishments than adults. In addition, the Court has recognized that juvenile offenders are generally seen as more amenable to rehabilitation than older individuals, so that their criminal propensities may change markedly during a lengthy period of incarceration.

As a matter of legislative policy, these principles require that lowered maximum penalties should be established for youthful offenders at the highest level of the sentence-severity scale, even if not—or not yet—constitutionally mandated. The Court has made it clear that such judgments normally reside with state legislatures, and that the constitution prohibits only the most egregious instances of disproportionality in punishment. Given the fundamental values involved in the setting of juvenile crime and punishment, which command a high degree of consensus in our society, a responsible legislature should aspire to lawmaking that is well above the constitutional minimum standard. Subsection (g) therefore recommends an approach of staggered maximum penalties for any offense, with the absolute ceiling to be set according to the age group of the offender.

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The maximum terms in subsection (g) are set out in bracketed language, to indicate that no ineluctable formula has been employed to generate the ceilings specified for each age group. The maximums suggested are far lower than existing penalty ceilings for juveniles tried as adults in any U.S. jurisdiction. In setting these absolute limits on punishment severity, it is important to consider that they will apply to the most serious offenses, including homicide, and that they regulate the cumulative severity of sentences for multiple counts of conviction. At the highest level of case gravity, difficult moral judgments of proportionality are required: the harms to victims may be as great as for any adult offense, yet we may assume in most cases a reduced level of offender blameworthiness. How those concerns translate into specific absolute maximum penalties for different age groups cannot be resolved in a model code for all jurisdictions. What is most important in subsection (g) is its recommendation that each state should adopt some such framework of staggered maximum penalties.

h. Eligibility for sentence modification. Subsection (h) accelerates eligibility for sentence modification under § 305.6 (this draft) for underage offenders sentenced to extremely long prison terms. First eligibility is to occur after 10 years of time served, set forth in bracketed language, rather than the 15-year period in force for adult prisoners. The use of brackets is meant to indicate that no mathematical calculation has been used to derive the 10-year time period. Its length is set in reference to the adult eligibility requirements under § 305.6, and reflects a policy judgment that first eligibility should occur substantially earlier for offenders under 18 at the time of their offenses. Nor is the 10-year period written in stone, or even in indelible ink. Sentencing courts are given discretion in individual cases to order a shorter eligibility period under § 305.6.

This provision recognizes that adolescents can generally be expected to change more rapidly in the immediate post-offense years, and to a greater absolute degree, than older offenders. It also responds to the need to provide courts with maximum flexibility when sentencing underage offenders. Such cases may present a range of considerations not present in adult prosecutions. For instance, although subsection (h) does not propose staggered periods for different age groups, shorter times to § 305.6 eligibility may be justified for younger defendants.

i. Sentencing guidelines. Specially formulated sentencing guidelines are needed for the age group that falls under this provision. Subsection (i) provides that the sentencing commission will author such guidelines, governed by Article 6B of the revised Code. As with all sentencing guidelines in the revised Code, those promulgated under subsection (i) may carry no more than presumptive force, subject to a generous judicial departure power, see §§ 6B.02(7) (Tentative Draft No. 1, 2007), 7.XX(2) (id.), to ensure that the greatest share of sentencing authority always remains with the courts.

j. Prohibition on housing juveniles in adult institutions. This provision is consistent with the policy of the American Bar Association, yet states a principle that is frequently overlooked by most American jurisdictions. Over 10,000 youths under the age of 18 were housed in the adult prisons and jails on any given day in 2009. Roughly 7500 were held in adult jails in more than 40

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states, and another 2800 in adult prisons. Youths are especially vulnerable to victimization in adult institutions, and are at greater risk than adult inmates of psychological harm and suicide. They are often in need of age-specific programming that is unavailable in adult institutions. Research indicates that incarceration in adult prison substantially increases the risk that a young person will reoffend in the future. Although substantial resources will be needed to fully segregate young offenders from adults in the nation's prisons and jails, there are compelling moral and instrumental reasons for doing so.

k. Selective extension of this provision to older offenders. The psychology of human development does not translate neatly into sharp age-based cutoffs such as the 18-year threshold in this provision. The sentencing structure of the revised Code gives the courts tools to avoid a "cliff" effect for offenders slightly over 18, or even for offenders into their 20s whose acts are partially explicable by their stage of development toward full adulthood. As explained in Comment *b*, many of the substantive results available to sentencing judges under § 6.11A may be reproduced in the sentencing of offenders older than 18 through use of judicial departure discretion from sentencing guidelines and mandatory-minimum-penalty provisions. The bracketed language of subsection (k) would extend still more flexibility to sentencing courts in cases involving defendants who were under the age of 21 at the time of their offenses. It would allow the courts to render most of the provisions of § 6.11A expressly applicable to this older age group, provided there are "substantial circumstances" supportive of the conclusion that application of § 6.11A will best effectuate the purposes of sentencing in § 1.02(2)(a). Subsections (d) and (e), which authorize or mandate the imposition of a juvenile-court disposition, would not apply to the older age group.

REPORTERS' NOTE [47]

a. Scope. The overall framework of § 6.11A, providing for specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much to Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 289-290, 302-315 (proposing "an age-based 'youth discount' of sentences [in adult courts]—a sliding scale of developmental and criminal responsibility—to implement the lesser culpability of young offenders in the [adult] legal system"). Professor Feld wrote that, "Such a policy would entail both shorter sentence durations and a higher offense-seriousness threshold before a state incarcerates youths than older offenders." Id. at 315.

By one estimate, more than 250,000 youths under the age of 18 are tried each year in the criminal courts and sentenced as adults. Barry C. Feld, A Slower Form of Death: Implications of *Roper v. Simmons* for Juveniles Sentenced to Life Without Parole, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 11 (2008). See also American Bar Association, Report, Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001), at 1 (estimating "at least two hundred thousand" offenders under 18 sentenced in adult courts each year).

[47] This Reporters' Note has not been revised since § 6.11A's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 Many of these cases reach the adult criminal courts through a variety of mechanisms that exist in the states
2 to remove offenders otherwise subject to juvenile-court jurisdiction. The three most common vehicles are judicial
3 waiver (juvenile court is authorized or required to transfer certain cases), concurrent jurisdiction (prosecutor has
4 discretion to file in juvenile or criminal court), and statutory exclusion (certain classes of cases must by statute be
5 filed in adult criminal court). See U.S. Dept. of Justice, Office of Justice Programs, Delinquency Cases Waived to
6 Criminal Court, 2005 (2009), at 1. There has been large year-by-year variation in the use of these transfer
7 mechanisms. For example, the number of cases waived to criminal courts by juvenile-court judges grew from 7200
8 in 1985 to 13,000 in 1994, but then declined by 2005 to 6900. Id. at 2. Large racial and ethnic disparities exist in the
9 groups selected for transfer from the juvenile to the adult system. See Neelum Arya et al., America's Invisible
10 Children: Latino Youth and the Failure of Justice (2009) (Latino youth are "43% more likely than white youth to be
11 waived to the adult system"); Amanda Burgess Proctor, Kendal Holtrop, and Francisco A. Villarruel, Youth
12 Transferred to Adult Court: Racial Disparities (2008), at 9-10 (collecting studies showing that African American
13 youths are more likely to be transferred than their white counterparts).

14 In most states, the juvenile court's jurisdiction over delinquency cases extends to youths under the age of
15 18. Twelve states, however, set the upper limit at age 16 (Georgia, Illinois, Louisiana, Massachusetts, Michigan,
16 Missouri, New Hampshire, South Carolina, Texas, and Wisconsin) or at age 15 (New York and North Carolina).
17 Roughly two million 16- and 17-year-olds live in those states. See U.S. Dept. of Justice, Office of Justice Programs,
18 Juvenile Offenders and Victims: 2006 National Report (2006), at 103, 114; Alison Lawrence, State Sentencing and
19 Corrections Legislation: 2007 Action, 2008 Outlook (Washington: National Conference of State Legislatures, 2008),
20 p. 10 (Connecticut recently increased its juvenile-court age limit from 15 to 17). In these states, there is a regular
21 flow of offenders under 18 to the criminal courts, all of whom are classified as "adults" rather than "juveniles" for
22 purposes of state criminal law. See Juvenile Offenders and Victims: 2006 National Report, at 114 ("it is possible
23 that more youth younger than 18 are tried in criminal court in this way than by all other transfer mechanisms
24 combined").

25 *c. Purposes of sentencing and offenders under 18.*

26 *(1) Blameworthiness.* See Roper v. Simmons, 543 U.S. 551, 569-571 (2005) (discussing reduced culpability
27 of juveniles); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("developments in psychology and brain science
28 continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain
29 involved in behavior control continue to mature through late adolescence"); Jeffrey Fagan, Adolescents, Maturity,
30 and the Law, Why Science and Development Matter in Juvenile Justice, The American Prospect (August 14, 2005)
31 ("[T]he new science reliably shows that adolescents think and behave differently from adults, and that the deficits of
32 teenagers in judgment and reasoning are the result of biological immaturity in brain development. . . . Studies of
33 brain development show that the fluidity of development is probably greatest for teenagers at 16 and 17 years old,
34 the age group most often targeted by laws promoting adult treatment."); Barry C. Feld, Bad Kids: Race and the
35 Transformation of the Juvenile Court (1999) ("Young people's inexperience, limited judgment, and restricted
36 opportunities to exercise self control partially excuse their criminal behavior."); Franklin E. Zimring, American
37 Youth Violence (1998), at 75-81 (arguing for a doctrine of "diminished responsibility" for adolescents because of
38 their still-developing cognitive abilities to comprehend and apply moral and legal rules, powers of impulse control,
39 and abilities to resist peer pressure). Studies confirm that normal children by the age of nine have the capacity for

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1 intentional behavior and a developed moral sense of the difference between right and wrong. See James Rest,
2 Morality, in John H. Flavell and Ellen M. Markman, Handbook of Child Psychology, vol. 3, Cognitive Development
3 (1983). Typically, however, the full range of human capabilities continues to expand dramatically from ages 12 to
4 17. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in
5 Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to
6 the Criminal Court (2000), at 383 ("the period from twelve to seventeen is an extremely important age range . . .
7 [O]ther than infancy there is probably no period of human development characterized by more rapid or pervasive
8 transformations in individual competencies, capabilities, and capacities.").

9 A presumption of mitigation similar to that stated in subsection (a) has been recognized in Canadian
10 constitutional law. The Supreme Court of Canada has ruled that, under § 7 of the Canadian Charter of Rights and
11 Freedoms, juveniles cannot be assigned the burden of showing that they should receive the benefit of Canada's
12 youth sentencing provisions. Instead, the onus of showing that a juvenile should be tried and sentenced as an adult
13 must always be on the government. The court grounded its ruling on the "principle of fundamental justice" that
14 "young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the
15 fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral
16 judgment." R. v. D.B., 2008 SCC 25 (2008), Slip Op. at 3.

17 *(2) Potential for rehabilitation.* Empirical research has long shown that rehabilitative programming can
18 succeed for some criminally involved juveniles. See Peter W. Greenwood and Susan Turner, Juvenile Crime and
19 Juvenile Justice, in James Q. Wilson and Joan Petersilia eds., Crime and Public Policy (2011); Mark W. Lipsey, The
20 Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analysis, 4 Victims and
21 Offenders 124 (2009); Department of Health and Human Services, Youth Violence: A Report of the Surgeon
22 General (2001); Delbert S. Elliott series ed., Blueprints for Violence Prevention: Promoting Alternative Thinking
23 Strategies (PATHS) (1998). There is no persuasive evidence, however, that rehabilitation success rates are higher
24 for juveniles than adults. Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on
25 Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice:
26 Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 403 ("Despite our
27 optimistic notions about the inherent malleability of young people, or our pessimistic notions about the inability of
28 old dogs to learn new tricks, there is no research that supports either of these contentions"). Efforts at "primary
29 prevention," usually aimed at very young children, or even at mothers in the prenatal period, yield much larger
30 reductions of future criminal behavior than interventions aimed at older youths who have already become involved
31 in criminal activity. See David P. Farrington and Brandon C. Welsh, Saving Children from a Life of Crime (2007);
32 Peter W. Greenwood, Changing Lives: Delinquency Prevention as Crime Control (2006).

33 *(3) Harm prevention.* Overall rates of criminal behavior are high, especially among males, in the teenage
34 years, yet rates of desistance from crime are also very high as youths mature into their teens and early adulthood.
35 Survey research indicates that 30 to 40 percent of males have committed at least one act of violence by age 18.
36 Delbert S. Elliott, Serious Violent Offenders: Onset, Developmental Course, and Termination, 32 Criminology 1
37 (1994), at 9. Involvement in property offending and vandalism by this age group is still more commonplace. U.S.
38 Dept. of Justice, Office of Justice Programs, Juvenile Offenders and Victims: 2006 National Report (2006), at 70;
39 Lewis Yablonsky, Juvenile Delinquency: Into the Twenty-First Century (2000), at 562-566. Despite high rates of

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criminal involvement, most youths discontinue their criminal behavior of their own accord. Self-report research indicates that only one-quarter of juveniles who offended at ages 16 to 17 continued to offend at ages 18 to 19. See 2006 National Report at 71 ("most of the youth who reported committing an assault in the later juvenile years stopped the behavior, reporting none in the early adult years"). Another study, based on official record data, found that 46 percent of males aged 10 through 17 who had committed a crime desisted after a single offense, and, of the group who did not stop with one offense, an additional 35 percent desisted after a second offense. Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (1972), at 160-163 (cohort of males born in Philadelphia in 1945). See also Paul E. Tracy, Marvin E. Wolfgang, and Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (1990), at 104 table 8.3 (for later cohort of males born in Philadelphia in 1958, 42 percent of offenders 10 to 17 desisted after one offense and, among those continuing to offend, 28 percent stopped after a second offense).

On the criminogenic effects of transfer, see Angela McGowan, et al., Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Systematic Review, 32 Amer. J. Preventive Med. S7 (2007) (reporting findings of the Centers of Disease Control, Task Force on Community Preventive Services), at S15 (finding "strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system"); Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 ("Evaluations of these programs [of waiver to adult courts] suggest that they increase future criminal behavior rather than deter it, as advocates of this approach had hoped"); Donna Bishop and Charles Frazier, Consequences of Transfer, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 261 (surveying studies and concluding that "transferred youths are more likely to reoffend, and to reoffend more quickly and more often, than those retained in the juvenile justice system"); Jeffrey Fagan, Separating the Men From the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, in James C. Howell et al. eds., Sourcebook on Serious, Violent & Chronic Juvenile Offenders 238 (1995).

Franklin Zimring has argued that the dominant historical purpose of the juvenile-court system has been to avoid the harms inflicted upon young offenders when they are adjudicated and sentenced in the adult criminal-justice system, and that this underpinning has survived during increasingly punitive eras of adult criminal-justice policy. See Franklin E. Zimring, The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in Margaret K. Rosenbaum, Franklin E. Zimring, David S. Tanenhaus, and Bernardine Dohrn eds., A Century of Juvenile Justice (Chicago: University of Chicago Press, 2002). See also Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003), at 262-266.

(4) Small group of serious violent offenders. On the age-crime curve, see Michael R. Gottfredson and Travis Hirschi, A General Theory of Crime (Palo Alto: Stanford University Press, 1990), at 124-130 (noting that "the shape or form of the [age-crime] distribution has remained virtually unchanged for about 150 years"). The original Model Penal Code focused § 6.05 on the age group 17 to 21, in part because this group manifested "high offense rates," "serious forms of criminality," and "high rates of recidivism, with repetition persistent over extended periods of time." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.05 (1985), at 74.

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Longitudinal research into the criminal careers of large cohorts of American males yielded the finding that only a tiny fraction became serious, repeat offenders. See Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972), at 89 tables 6.1 and 6.2 (finding that a small group of chronic offenders, who made up 6.3 percent of the total cohort of 14,313 males born in Philadelphia in 1945, and 18 percent of cohort offenders, committed 52 percent of the offenses committed by the entire cohort from ages 10 through 17); Paul E. Tracy, Marvin E. Wolfgang, and Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (New York: Plenum Press, 1990), at 15 (reporting that "chronics [6.3 percent of the 1945 birth cohort] had committed 63% of the Uniform Crime Report (UCR) index offenses, including 71% of the homicides, 73% of the rapes, 82% of the robberies, and 69% of the aggravated assaults"), id. at 83, 90 (among a second cohort of males born in Philadelphia in 1958, 7.5 percent of the total cohort, and 23 percent of those ever adjudged delinquent, were chronic offenders; this group committed "68% of the index offenses, 60% of the murders, 75% of the rapes, 73% of the robberies, [and] 65% of the assaults" committed by the entire cohort from ages 10 through 17).

(5) Deterrence. See Roper v. Simmons, 543 U.S. 551 (2005) (discussing reduced deterrent efficacy of penalties aimed at juvenile offending); Graham v. Florida, 130 S. Ct. 2011 (2010) (same). See also Bonnie L. Halpern-Felsher and Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Developmental Psychol. 257 (2001). The efficacy of general deterrence strategies that turn on the severity of criminal penalties, rather than their probability of being imposed, is in grave doubt even for adult offenders. See Cheryl Marie Webster and Anthony N. Doob, Searching for Sasquatch: Deterrence of Crime Through Sentence Severity, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research. (1999). On the known propensity of adolescents to engage in risk-taking behaviors, see Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 310-312 ("Youths' developmentally influenced cost-benefit calculus may induce them to weigh benefits and consequences differently and to discount negative future consequences in ways that may systematically skew the quality of their choices.").

d. Availability of juvenile-court sanctions. Seventeen states give adult sentencing courts a blended sentencing option for transferred juveniles. This allows the court to impose a sanction that would ordinarily be available only in the juvenile court. Often the juvenile sanction is conditional, however, and is accompanied by an adult suspended sentence. See National Center for Juvenile Justice, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term); Patrick Griffin, State Juvenile Justice Profiles, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, National Center for Juvenile Justice (2011), available at http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term).

e. Mandatory juvenile disposition. Numerous states give adult sentencing courts discretion to impose a juvenile disposition as an alternative to an adult criminal penalty. Subsections (e)(i) through (iv) would go further to make imposition of a juvenile disposition mandatory in some circumstances. Subsection (e)(ii) addressing cases in

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which the offender's presence in the adult courtroom was predicated on the existence of one or more serious felony charges, yet those charges did not result in conviction in the adult court, was inspired by Barry C. Feld, Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 112 (advocating transfer back to the juvenile court in such cases).

f. Authority to deviate from mandatory penalties. Washington State bars the application of mandatory-minimum penalties to juvenile offenders in adult courts. Wash. Rev. Code § 9.94A.540(3). Montana and Oregon exempt juveniles in adult criminal courts from mandatory penalties in some instances. Mont. Code §46-18-222; Or. Rev. Stat. §161.620.

g. Cap on severity of prison sentences. The numbers of young offenders receiving extremely long prison sentences has been increasing in recent decades. See Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 16 ("There are currently 6,907 individuals serving life sentences for crimes committed when they were a juvenile. Among these, 1,755 have a sentence of life without parole."). More than two-thirds of juvenile offenders serving life sentences are African American or Hispanic. Id. at 21, 23.

j. Prohibition on housing juveniles in adult institutions. See Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 ("Results from a series of reports indicate that young people placed in adult correctional institutions, compared to those placed in institutions designed for youth, are eight times as likely to commit suicide, five times as likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent as likely to be attacked with a weapon."). Some state laws speak to age limitation in adult institutions, but no state has passed legislation in full compliance with subsection (j). See, e.g., Cal. Penal Code § 1170.19(a)(2) ("The person shall not be housed in any facility under the jurisdiction of the Department of Corrections, if the person is under the age of 16 years").

k. Selective extension of this provision to older offenders. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 384:

> [A]dolescence is a period of tremendous intra-individual variability. Within any given individual, the developmental timetable of different aspects of maturation may vary markedly, such that a given teenager may be mature physically but immature emotionally, socially precocious but an intellectual late bloomer. . . .
>
> Variability *among* individuals in their biological, cognitive, emotional, and social characteristics is more important still . . . . [M]ost research suggests that, from early adolescence on, chronological age is a very poor marker for developmental maturity—as a visit to any junior high school will surely attest.

See also Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation, 21 J. Neurosci. 8819 (2001);

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Jeffrey Jensen Arnett, Emerging Adulthood: Theory of Development from the Late Teens Through the Twenties, 55 Am. Psychologist 46 (2000).

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§ 6.14. Victim-Offender Conferencing; Principles for Legislation.[48]

The Institute does not recommend a specific legislative scheme for carrying out the victim-offender conferencing permitted by this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in an Appendix containing Principles of Legislation. ***See page 555.***

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§ 6.15. Violations of Probation or Postrelease Supervision.[49]

(1) When there is probable cause to believe that an individual has violated a condition of probation or postrelease supervision, the supervising agent or agency shall promptly take one or more of the following steps:

(a) Counsel the individual or issue a verbal or written warning;

(b) Increase contacts with the individual under supervision to ensure compliance;

(c) Provide opportunity for voluntary participation in programs designed to reduce identified risks of criminal re-offense;

(d) Petition the court to remove or modify conditions that are no longer required for public safety, or with which the individual is reasonably unable to comply;

(e) Petition the court to impose additional conditions or make changes in existing conditions designed to decrease the individual's risk of criminal re-offense, including but not limited to inpatient treatment programs, electronic monitoring, and other noncustodial restrictions; or

(f) Petition the court for revocation of probation or postrelease supervision.

(g) If necessary to protect public safety, the agency may ask the court to issue a warrant for the arrest and detention of the individual pending a hearing

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[48] This Section has been approved by the Council and is presented to the membership for a vote for the first time in this draft.

[49] This Section was originally approved in 2014; see Tentative Draft No. 3.

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pursuant to subsection (2). In exigent circumstances, the agency may arrest the individual without a warrant.

(2) When the supervising agent or agency petitions the court to modify conditions or revoke probation or postrelease supervision, the court shall provide written notice of the alleged violation to the individual under supervision, and shall schedule a timely hearing on the petition unless the individual waives the right to a hearing.

(a) At the hearing, the accused shall have the following rights:

(i) The right to counsel;

(ii) The right to be present and to make a statement to the court;

(iii) The right to testify or remain silent; and

(iv) The right to present evidence and call witnesses.

(b) The hearing must be recorded or transcribed.

(3) If, after hearing the evidence, the court finds by a preponderance of the evidence that a violation has occurred, it may take any of the following actions:

(a) Release the individual with counseling or a formal reprimand;

(b) Modify the conditions of supervision in light of the violation to address the individual's identified risks and needs;

(c) Order the offender to serve a period of home confinement or submit to GPS monitoring;

(d) Order the offender detained for a continuous or intermittent period of time not to exceed [one week] in a local jail or detention facility; or

(e) Revoke probation or postrelease supervision and commit the offender to prison for a period of time not to exceed the full term of supervision, with credit for any time the individual has been detained awaiting revocation. [If an individual on probation has received a suspended sentence under § 6.02(2), the court may revoke supervision and impose the suspended sentence or any other sentence of lesser severity.]

(4) When sanctioning a violation of a condition of probation or postrelease supervision, the supervising agent or agency and the court shall impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, keeping in mind the purpose for which the sentence was originally imposed.

Comment: [50]

[50] This Comment has been minimally revised since § 6.15's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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a. Scope. Recognizing that probation and postrelease supervision share the common goals of helping those who have committed crimes stop offending and reintegrate into law-abiding society, this unified provision sets forth the responses to rule violations available to supervision agents and to the court. The responses authorized by this Section assume that the conditions of release set by the court comply with the requirements of §§ 6.03, 6.04, and 6.09, and have been imposed parsimoniously. Subsection (1) sets forth the authorized power of the agent to respond to suspected rule violations. Subsection (2) sets forth the procedural protections that must be afforded to a person accused of violating the terms of release if the supervising agent requests court action. Subsection (3) sets forth the powers of the court to respond to violations brought before it. Subsection (4) sets forth the standard by which agents and courts are to exercise their discretion with respect to rule violations.

There is variation among jurisdictions in the way conditional release is administered. In most states, probation (as an outgrowth of the suspended sentence) is administered by the courts. Revocation from probation is almost always a judicial decision. Jurisdictions that authorize post-incarceral release are divided between those that retain parole (whether mandatory or discretionary) and those that do not grant parole release but nonetheless provide for a period of postrelease supervision (also called "supervised release" or "extended supervision"). In both sets of jurisdictions, supervision is provided by the department of corrections or a parole board. Revocation from parole or supervised release is usually a decision made by an administrative agency, rather than a court.

The proposed provision authorizes the court to address changes in the conditions of postrelease supervision and to make revocation decisions. As the original author of the sentence the offender is serving, the court sets the conditions and duration of conditional release. This provision requires courts to remain responsive to developments during the period of supervision that may require a change in release conditions or revocation of conditional release. While the federal government and several states place judges in charge of setting conditions for postrelease supervision and ruling on motions for revocation, it remains a distinctly minority practice. The revision embraces the minority practice by giving courts authority over all sentencing dispositions, from probation to postrelease supervision. Doing so creates consistency in the enforcement of the sentence, giving judges input on revocation decisions and ensuring that conditions imposed at sentencing are being enforced in ways that are consistent with the purposes for which the court imposed them.

b. Need for response. Subsection (1) requires agents to respond in some manner to all detected rule violations, on the ground that accountability is an important component of successful supervision. As subsection (4) makes clear, the agent's response should be no more intrusive than necessary to address the risks posed by the offender's conduct. In many cases, the proper response will be to remind a person of the rules of supervision or provide assistance in overcoming barriers to compliance. In other instances, where the behavior at issue is especially risky or where noncompliance has become habitual, the agent may ask the court to modify the

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conditions of supervision, either to add needed services or surveillance, or to remove unnecessarily burdensome conditions. With the consent of the individual under supervision, subsection (1)(c) authorizes the agent to add program or service requirements without court intervention. All other requests to add or remove conditions of supervision, or to detain the individual or revoke supervision for any period of time, are subject to a hearing and court approval.

c. Warrant requirement. The original Code gave probation officers immediate arrest power, and provided that parole officers could arrest in emergency situations or when directed to do so by the Parole Board. Given the ease with which an arrest warrant can now be secured telephonically, subsection (1)(g) requires supervising agencies to secure an arrest warrant before detaining individuals for alleged violations of their release conditions, unless exigent circumstances exist.

d. Timeliness and certainty of response. Because rules of supervision are tied to the risks an offender poses to the community, any rule violation is a matter of importance that requires some kind of official response, however mild. When a supervising agent has probable cause to believe a violation has occurred, subsection (1) directs the agent to act promptly in responding to the violation. In doing so, subsection (1) permits the agent to select from a broad array of responses to ensure that individuals under supervision are held accountable for infractions in a way that is proportionate to the risks posed by their conduct.

e. Due-process requirements. The original Code provided basic due-process protections at hearings on both probation and parole revocation. See Model Penal Code §§ 301.4, 305.15(1) (1962). Subsequent case law has clarified a constitutional basis for some of those protections, including the right to a hearing and the ability to present evidence. See Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). This provision continues those protections for all individuals on conditional release, extending beyond constitutional requirements to provide a right to counsel in connection with revocation proceedings. Affording the right to counsel at hearings on rule violations is consistent with both the original Code (which provided counsel in connection with probation revocation) and with common practice among the states.

f. No categorical revocations or mandatory sanctions. This provision does not prescribe mandatory or categorical sanctions for rule violations, instead directing agents and courts to impose the least severe consequence needed to address a violation and the risks posed by the offender in the community, "keeping in mind the purpose for which the sentence was originally imposed." While subsections (1) and (3) authorize a wide range of sanctions of varying degrees of severity, the provision does not require agents or courts to strictly employ a practice of "graduated sanctions." Instead, the provision asks agents and courts to hold individuals accountable for compliance, but to do so in a way that fosters their rehabilitation and reintegration in the community whenever possible.

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1 *g. Sentence credit.* Unlike the original Code, which provided sentence credit to individuals
2 for time served in the community prior to revocation, the proposed provision gives sentence
3 credit upon revocation only for time served in custody awaiting the revocation hearing.
4 Individuals who are successful in meeting the conditions of their community supervision may be
5 eligible for sentence reduction pursuant to § 6.03(9) and § 6.09(11); however, those who do not
6 comply receive no credit for time spent on conditional release.

7 *h. Lengths of revocation of probation and postrelease supervision.* When the court
8 determines that revocation is the only appropriate response to rule violations, the court may order
9 any period of confinement up to the maximum length of the probation or postrelease-supervision
10 term originally imposed, with credit for any time served. See § 6.15, Comment *g*, above.

11 *i. Revocation of a suspended sentence.* The bracketed language in subsection (3)(e) is
12 recommended only to states that have chosen to adopt § 6.02(2), which authorizes the use of
13 suspended prison sentences as one route to the use of probation sanctions. The bracketed
14 language in subsection (3)(e) is inapplicable to jurisdictions that have rejected § 6.02(2). Where a
15 judge has already imposed a prison sentence, but has stayed it to allow the individual to serve a
16 term of probation pursuant to § 6.02(2), the maximum sentence upon revocation is the full term
17 of the suspended sentence. Subsection (3)(e) allows the court to impose the full suspended
18 sentence, but it does not require that result. Upon revocation, the court may impose any lesser
19 sanction, including a shorter term of confinement or any other penalty enumerated in subsection
20 (3).

21 **REPORTERS' NOTE** [51]

22 *a. Scope.* Approximately one out of every 47 U.S. adults is currently serving a term of conditional release in
23 the United States, subject to imprisonment for any violation of the rules of supervision. Lauren E. Glaze, Thomas P.
24 Bonczar, and Fan Zhang, Probation and Parole in the United States, 2009, Bureau of Just. Stat. 2 (2010). When a
25 person fails to comply with release conditions, the result is often imprisonment. In a growing number of
26 jurisdictions, more than half of new prison admissions are attributable to revocation, rather than to conviction for a
27 new criminal offense. See, e.g., Louisiana Justice Reinvestment Initiative, Vera Inst. Just. (2010) (reporting that 56
28 percent of 2009 Louisiana prison admissions were the result of probation or parole revocations). As resource
29 constraints continue, there is a growing need for laws that help reduce unnecessary revocations and aid in the
30 success of community supervision.

31 There is wide variation in the ways in which jurisdictions throughout the country allocate authority over
32 revocation decisions. In most jurisdictions, judges are responsible for probation revocation, while parole boards,
33 administrative agencies, and departments of corrections have responsibility for sanctioning violations of postrelease
34 supervision. See, e.g., Pew Center on the States, Smart Responses to Parole and Probation Violations 3 (2007)
35 (discussing difficulty of gathering probation-revocation data from courts and therefore relying on parole-revocation

[51] This Reporters' Note has not been revised since § 6.15's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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data gathered from statewide parole boards). In a few jurisdictions, courts are responsible for sanctioning violations of postrelease supervision as well. See, e.g., 18 U.S. Code § 3583(e); N.C. Gen. Stat. § 7B-2516 (placing court in charge of juvenile postrelease-supervision revocations); W. Va. § 62-12-26 (giving court control over revocation of extended supervision for certain sex offenders).

In most jurisdictions, the decision to revoke conditional release remains wholly discretionary, and rightly so. The needs, risks, and life circumstances of individuals under community supervision vary infinitely, and the decision of how to respond to rule violations turns on a wide variety of factors that do not easily yield to quantification or compartmentalization. At the same time, the dangers of arbitrary judgments inherent in discretionary decisionmaking systems have long been acknowledged. In 1962, Sanford Kadish observed that, when it came to correctional decisionmaking around revocation, "deliberate abandonment of the legal norm" had come to be accepted despite its often detrimental outcomes. Sanford H. Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 919 (1962). That observation holds true 50 years later.

A few jurisdictions have tried to reduce revocation decisions to guidelines, imposing formulaic "graduated sanctions" and predetermined periods of revocation for the most common violations, such as use of controlled substances. Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015 (2013) (discussing several models for revocation guidelines). Although such efforts may increase uniformity and predictability, they may also result in overly harsh or inadequately severe sanctions, depending on the circumstances of any given violation. For example, consider the common violation of failing to submit a timely monthly report form. For one probationer, a late or unfiled report will be the result of disorganization or learning challenges. For another, it will be the result of a concerted scheme to hide assets and carry out fraudulent activities. Sanctioning such behavior for individuals with different risks and different needs requires the use of agent and court discretion.

While discretion plays an important and pivotal role in revocation decisions, few efforts have been made to structure legislative responses that guide discretion. This provision does not attempt to constrain the discretion of either supervising agents or judges. Instead, subsection (4) directs agents and judges to respond to violations of release conditions with predictable yet parsimonious sanctions designed to further the purposes of the sentence, meet the needs of the person under supervision, and reduce the individual's risk of criminal re-offense.

This provision sets forth in general terms the responses available to the supervising agency and to the court to address violations of the conditions of conditional release. Assuming the conditions attached to conditional release comply with § 6.03 and § 6.09, and are limited to those conditions that are necessary to control the risks and needs of the individual in the community, then violations of those conditions require some form of response from the supervising agency, or—if serious enough—from the court itself. The severity of the response should range in proportion to the seriousness of the violation and the context in which it occurred. Some violations are to be expected, especially during times of transition (such as early in the period of supervised release as an individual readjusts to community life), and as individuals participating in substance-abuse treatment struggle to overcome addiction. Violations that pose a risk of harm to the community should be treated more severely than those that merely inconvenience the supervising officer. In every case, the response chosen should be proportional and take account of the purpose for which the sentence, and any violated condition, was originally imposed.

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1 *c. Warrant requirement.* The original Code authorized probation officers to arrest an individual on probation
2 without a warrant whenever there was "probable cause to believe" that the person had "failed to comply with" a
3 release condition or had "committed another crime." Model Penal Code § 301.3(1)(b) (1962). Parole officers were
4 ordinarily required to obtain authorization from the parole board prior to making an arrest, but could arrest a parolee
5 without a warrant when there was "reasonable cause to believe that a parolee has violated or is about to violate a
6 condition of his parole and that an emergency situation exists, so that awaiting action by the Board of Parole . . .
7 would create an undue risk to the public or to the parolee." Model Penal Code § 305.16(2) (1962). Proposed
8 subsection (1)(g) authorizes agents to seek a warrant for an individual's arrest when there is probable cause to
9 believe he or she has violated a condition of release, and public safety demands it. When exigent circumstances
10 exist, subsection (1)(g) authorizes supervising agents to arrest without a warrant.

11 Subsection (1)(g) follows the federal practice of requiring officers to obtain a warrant before making any arrest
12 in the absence of exigent circumstances. Given the speed with which warrants can now be secured, there are few
13 practical impediments to obtaining timely warrants. See, e.g., Donald L. Beci, Fidelity to the Warrant Clause: Using
14 Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence, 73
15 Denv. U. L. Rev. 293, 296-299 (1996). Further, requiring a judicial check on the power to arrest encourages more
16 thoughtful, less reactive responses to rule violations.

17 *d. Timeliness and certainty of response.* Research suggests that when supervising officers respond to rule
18 violations immediately by imposing certain-but-fair consequences, individuals under supervision have higher rates
19 of compliance and lower rates of recidivism. See, e.g., Angela Hawken and Mark Kleiman, Managing Drug
20 Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE (2009); Faye S. Taxman,
21 David Soule & Adam Gelb, Graduated Sanctions: Stepping Into Accountable Systems and Offenders, 79 Prison
22 Journal 182 (1999). Consequently, the provision requires supervising agents to respond to detected rule violations in
23 some way—how they should respond, however, will turn on the reasons for and seriousness of the violation. In
24 many cases, re-education or a verbal warning may suffice.

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ARTICLE 6X. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

§ 6x.01. Definitions.[52]

(1) For purposes of this Article, collateral consequences are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court.

(2) For purposes of this Article, a collateral consequence is mandatory if it applies automatically, with no determination of its applicability and appropriateness in individual cases.

(3) For purposes of this Article, a collateral consequence is discretionary if a civil court, or administrative agency or official, is authorized, but not required, to impose the consequence on grounds related to an individual's conviction.

Comment:[53]

a. Collateral consequences, generally. When the Model Penal Code was adopted in 1962, the primary consequence of conviction was a fine, probation, or a period of incarceration. Collateral consequences were limited in most cases to a temporary loss of the right to vote, hold public office, serve on a jury, and testify in court. Since then collateral consequences have proliferated, and now include mandatory deportation, inclusion on a public registry, loss of access to public housing and benefits, financial aid ineligibility, and occupational licensing restrictions. Some of these consequences last for the duration of the convicted individual's life. This Section, and those that immediately follow (§§ 6x.02-6x.06), address legal mechanisms by which convicted individuals may seek and obtain relief from some types of collateral consequences.

b. Scope. The term of art "collateral consequences" has been defined to include a host of legally imposed or authorized sanctions, usually denominated as civil or regulatory measures triggered by criminal conviction. The Code uses the term to refer specifically to the negative consequences of conviction that are authorized by state or federal law as a result of an individual's conviction. It excludes from the definition of collateral consequences all informal, locally imposed, private, and extralegal consequences of conviction. It also excludes all direct consequences of conviction, that is, those consequences that are authorized by a sentencing court as part of an offender's criminal sentence. (Those direct consequences may include not only fines and terms of community supervision or custody imposed as a penalty for a criminal

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[52] This Section was originally approved in 2014; see Tentative Draft No. 3.

[53] This Comment has not been revised since § 6x.01's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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offense, but also the conditions of supervision and/or institutional restrictions, such as security classification, imposed in connection with the service of the criminal sentence.)

Subsections (2) and (3) define two distinct categories of collateral consequences, distinguished by their legal modes of operation. Mandatory collateral consequences are those imposed automatically by force of law as a result of conviction. The nonindividualized nature of mandatory consequences implicates the Code's policies against mandatory punishments that allow no room for individualization by a sentencing judge; see § 6.06 and Comment *d* (Tentative Draft No. 2, 2011). Discretionary collateral consequences are those consequences that may, but need not, be imposed on an individual as a result of criminal conviction. Although these consequences can be long-lasting, they allow room for consideration of individual circumstances by discretionary decisionmakers, and are therefore less problematic under the Code.

REPORTERS' NOTE [54]

a. Collateral consequences, generally. In America today, estimates suggest that more than one in four adults has a criminal record. Mike Vuolo, Sarah Lageson, and Christopher Uggen, Criminal Record Questions in the Era of "Ban the Box," 16 Criminology & Pub. Pol'y 139 (2017). Increasingly, the harshest and most enduring consequence of conviction is not the sentence imposed by a court, but the penalties and disqualifications imposed by civil statutes and regulatory requirements as a result of conviction. See Margaret Colgate Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 754 (2011). From registration to limits on occupational licensure, residency, and access to public benefits, collateral consequences play an increasingly important role in preventing those who have committed crimes from successfully reintegrating into the law-abiding community. Michael Pinard, Reflections & Perspectives on Reentry and Collateral Consequences, 100 J. Crim. L. & Criminology 1213, 1219 (2010) ("Given the breadth and permanence of collateral consequences, [convicted] individuals are perhaps more burdened and marginalized by a criminal record today than at any point in U.S. history"); Joan Petersilia, When Prisoners Come Home 136 (2003) (collateral consequences "are growing in number and kind, being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history").

Collateral consequences arise under both state and federal law. In a typical U.S. state, hundreds of collateral consequences attach to any felony conviction, and there are additional mandatory collateral consequences that attach to particular classes of offenses, such as sexual assaults, see Article 203, and drug-trafficking offenses. Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele, Collateral Consequences of Criminal Conviction: Law, Theory & Practice (2013). A number of federal collateral consequences are also triggered by state conviction. Id.

Courts have taken the position that collateral consequences are not "punishment" within the meaning of the Eighth Amendment. See Doe v. Dep't of Pub. Safety and Corr. Servs., 430 Md. 535, 600, 62 A.3d 123 (Md. Ct. App. 2013) ("sex offender registration is not punishment, but a collateral consequence of a conviction"); Green v.

[54] This Reporters' Note has been minimally revised since § 6x.01's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Board of Elections of City of New York, 380 F.2d 445, 451 (2d Cir. 1967) ("Depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise'"). Nevertheless, those within the criminal-justice system have become increasingly conscious of the punitive weight of these sanctions. Meda Chesney-Lind and Marc Mauer, Invisible Punishment: The Collateral Consequences of Mass Imprisonment (2003). Major modern developments in charging and sentencing practice, such as the proliferation of deferred-prosecution and deferred-adjudication programs (including "first offender" programs and some problem-solving courts), have been driven by a desire to avoid triggering collateral consequences through formal conviction. See Richard A. Bierschbach and Stephanos Bibas, Constitutionally Tailoring Punishment, 112 Mich. L. Rev. 397, 445 (2013); Jenny Roberts, Why Misdemeanors Matter: Defining Advocacy in the Lower Criminal Courts, 45 U.C. Davis L. Rev. 277, 297 (2011). In light of the degree to which collateral consequences now drive many charging, bargaining, and sentencing decisions, the revised code devotes serious attention to the issue of collateral consequences.

b. Scope. The definitions used in this Section are distinct from, but consistent with, the definition of collateral consequences adopted by two recent law-reform projects—the American Bar Association's Standards for Mandatory collateral consequences and Discretionary Disqualification of Convicted Persons (2004) and the Uniform Law Commission, Uniform Collateral Consequences of Conviction Act (2009). The definitions found in this provision draw upon those earlier efforts, but also represent the independent policy assessments of The American Law Institute. In many respects—including, at the most prosaic level, the definitions of terms found in this provision—the Institute has charted its own course. Where differences exist, they spring from the comprehensive scope of the Model Penal Code project, which includes all aspects of formal sentences imposed on offenders, together with alternative dispositions and noncriminal penalties or disqualifications.

Consistent with the definitions used in the ABA Standards and the Uniform Collateral Consequences of Conviction Act, collateral consequences are defined in this Section as negative repercussions of conviction, authorized by law, that fall outside the direct sentence imposed by the court at sentencing. Collateral consequences do not include informal sanctions, see Wayne Logan, Informal Collateral Consequences, 88 Wash. L. Rev. 1103 (2013), nor are they defined here to include economic sanctions, imprisonment (and its attendant hardships), or periods of community supervision with their attendant conditions. They do include a broad range of legally imposed restrictions, such as loss of civic rights, limits on occupational licensure, and reporting requirements. This provision distinguishes between mandatory and discretionary collateral consequences. Mandatory consequences are those which are imposed automatically by operation of federal or state law, and include bans on voting by convicted felons, see, e.g., Nev. Const. Art. 2, § 1; N.Y. Const. Art II, § 3; Rev. Code Wash. § 10.64.140; and rules prohibiting individuals convicted of certain offenses from obtaining teaching licenses, see, e.g., 5 Cal. Code Reg. § 80301; 105 ILCS 5/21B-15; S.C. Code Ann. § 59-25-280(A). Discretionary consequences are those that permit authorized decisionmakers to deny benefits or opportunities to individuals convicted of certain offenses, but do not require disqualification. See, e.g., Neb. Rev. Stat. § 19-1832 (providing for discretionary discharge of any civil servant convicted of a misdemeanor or felony); N.J. Stat. § 3B:12A-6 (discretionary bar to service as legal guardian for relatives for any misdemeanant or felon). Because discretionary consequences allow decisionmakers to consider the facts underlying an individual conviction when deciding whether a given consequence should be imposed, they

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provide a safeguard against enforcement of sanctions that do not serve legitimate regulatory purposes in specific cases.

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§ 6x.02. Sentencing Guidelines and Collateral Consequences. [55]

(1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.

(a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law.

(b) The commission [or designated agency] shall ensure the compendium is kept current.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under §§ 6x.04 and 6x.05. The commission's guidance shall take into account the extent to which a mandatory consequence is substantially related to the elements and facts of an offense and likely to impose a substantial and unjustified burden on a defendant's reintegration.

Comment: [56]

a. Scope. The goal of this new provision is to aggregate in one location as much information as possible about collateral consequences so that the public, defendants, counsel, and courts can easily access information regarding the full consequences of conviction. This provision requires the sentencing commission to collect and maintain information on all collateral consequences as defined in § 6x.01, whether mandatory or discretionary, and to make that information accessible to the public.

The provision requires the commission to regularly maintain and publish its compendium, making it a reliable and easily accessible resource for individuals and their lawyers at every stage of a criminal prosecution, from charging through sentencing.

b. Information collected. Under subsection (1), the sentencing commission is required to "compile, maintain, and publish a compendium of all legislatively authorized collateral consequences of criminal conviction." Section 6x.02(1)(a) requires the sentencing commission to

[55] This Section was provisionally approved in 2014, see Tentative Draft No. 3, with amendments later incorporated and approved by the Council in 2017.

[56] This Comment has not been revised since § 6x.02's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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set forth in a compendium "all collateral consequences authorized by [the relevant jurisdiction's] statutes and regulations, and by federal law." Excluded from the commission's compendium are all nonfederal, extra-jurisdictional collateral consequences, and all disqualifications and sanctions not contained in statutes or administrative code provisions, such as municipal ordinances.

c. Distribution. Subsection (1) requires the sentencing commission to "publish a compendium of all legislatively authorized collateral consequences." The provision does not mandate how publication should occur or to whom the compendium should be distributed; however, it suggests that the compendium should be made easily accessible to courts, prosecutors, defense counsel, and the general public. Electronic methods of publications may prove most simple, accessible, and cost-effective.

d. Organization. Subsection (1)(a) requires the sentencing commission to provide information about all mandatory collateral consequences that apply to every offense listed in the criminal code, arranged by crime. This requirement is designed to ensure that the compendium is accessible both to legal professionals and to general users who want to know the full consequences of conviction of any given offense. Cf. ABA Standards on Mandatory collateral consequences, Standard § 19-1.2(a)(iii) (designated agency should "provide the means by which information concerning the mandatory collateral consequences that are applicable to a particular offense is readily available"). Although not required by the Code, the compendium would most usefully be organized to distinguish between mandatory and discretionary collateral consequences in order to provide parties and courts with an easy-to-use reference for determining which consequences can be subject to a petition for relief under § 6x.04(2).

e. Challenges of nonstatutory collateral consequences. Many collateral consequences (particularly those that relate to residency) are imposed at the local level, by ordinance or common practice. These low-visibility restrictions change often and are difficult to track. In order to ensure that collateral consequences are fairly publicized and scrutinized, states would ideally mandate that all collateral consequences be imposed at the state, rather than the local, level. Nevertheless, recognizing the significant challenges involved in indexing local restrictions as they are currently compiled, subsection (1) requires the sentencing commission to track only those sanctions and disqualifications that are contained in federal and state statutes and regulations.

f. Guiding courts on petitions for relief. Subsection (2) requires sentencing commissions to develop guidance for courts on how best to exercise their discretion when ruling on petitions for relief from mandatory collateral consequences under § 6x.04(2). This Section allows individual commissions to guide courts by developing standards for determining when there is a clear or close connection between a mandatory collateral consequence and the crime of conviction or the facts underlying the criminal case. The "substantial relationship" standard is meant to embody

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the type of connection that will warrant imposition of a mandatory consequence and, conversely, that will warrant its relief.

Requiring commissions to provide guidance to courts exercising their discretion under § 6x.04(2) furthers the public interest in equitable decisions while preserving judicial discretion. Because such guidance is not currently available from most sentencing commissions, this subsection leaves room for commissions to experiment with offering guidance in forms that differ from traditional structured guidelines.

Alternative formats might take the form of bulletins providing relevant data or supplemental information about the purposes and operation of certain mandatory collateral consequences in terms of their public-safety purposes, and collateral consequences most or least likely to advance public safety for certain categories of offenses or offenders. Thus, for example, a mandatory bar to certification as an operator of a commercial vehicle might have a substantial relationship to a crime involving a driving offense, a tenuous relationship to a crime involving drugs or violence, and little or no relationship to a crime involving theft or false statements. A mandatory bar to public housing might have a substantial relationship to a crime involving serious violence and major drug trafficking, but little or no relationship to dated fraud offenses. A third example is a mandatory bar to a day-care operator's license, which has a clear nexus to violence and sexual assault, but a less clear relationship to a minor drug crime or gambling offense.

The commission's guidance to courts considering motions for relief may also take into account a particular defendant's circumstances that bear on public safety risk, such as other criminal history, age at the time of the offense, time elapsed since the offense, participation in treatment for mental-health or substance-abuse problems, and evidence of rehabilitation.

It is important to bear in mind that, as provided in § 6x.04(3), an order of relief from a mandatory consequence under § 6x.04(2) does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer the benefit or opportunity in question. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be reasonably related to the benefit or opportunity the individual seeks to obtain.

REPORTERS' NOTE [57]

a. Scope. The goal of this provision is to aggregate in one location as much information as possible about the collateral consequences of conviction so that defendants, counsel, and courts can easily access information needed for pre- and post-conviction decisions. This provision requires the sentencing commission to collect and maintain information on all mandatory collateral consequences and discretionary collateral consequences that attend conviction, and to make that information accessible to the public.

[57] This Reporters' Note has been minimally revised since § 6x.02's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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b. Information collected. In many jurisdictions, the number of collateral consequences that attach upon conviction number in the hundreds. The laws that authorize these consequences are scattered throughout statutes and regulations; aggregating such a high volume of information is no easy task, particularly given the pace at which such legislation is passed and modified. The information that subsection (1) requires the commission to gather is similar in nature and scope to that required by the Uniform Law Commission's Uniform Collateral Consequences of Conviction Act (UCCCA) § 4 (requiring "designated governmental agency or official" to "identify . . . any provision . . . which imposes a collateral sanction or authorizes the imposition of a disqualification" and "make that information publicly available, along with a link to an online compilation of the most recent collection of the collateral consequences imposed by federal law and any provision of federal law that may afford relief from a collateral consequence").

While such a task is daunting, it is not impossible and has been made simpler by recent research efforts. In 2007, Congress directed the National Institute of Justice to compile a 50-state inventory of collateral consequences. See Pub. L. 110-177 § 510, 121 Stat. 2534, 2544. Through the efforts of the American Bar Association, the National Inventory of the Collateral Consequences of Conviction was developed and made available online to the public. Since 2017, the repository has been hosted and maintained by the Council of State Governments' Justice Center. The inventory provides a listing of mandatory collateral consequences and discretionary collateral consequences authorized by statute or administrative regulation in every state and in the federal system. Although this resource is one that will require continuous updating, it has removed many of the logistical barriers to the collection of such information that previously existed.

c. Distribution. There are several existing examples of web-based compilations. The National Inventory of Collateral Consequences, https://niccc.csgjusticecenter.org/map/, uses a website to provide a searchable database of information on collateral consequences in a number of jurisdictions, as do Ohio's Civil Impacts of Criminal Convictions (CIVICC) database, http://civiccohio.org/, and Columbia Law School's Collateral Consequences Calculator for New York State, https://calculator.law.columbia.edu/.

f. Guiding courts on petitions for relief. In many states, administrative licensing agencies are called upon to make discretionary decisions about the imposition of employment restrictions for people with criminal records. In doing so, many are guided by statutory standards that permit the imposition of employment and licensing restrictions only when a crime is substantially related to the work for which a license or permit is sought. See generally Margaret Colgate Love, 50-State Comparison Consideration of Criminal Records in Licensing and Employment (2017) (citing Cal. Bus. & Prof. § 490; 74 Del. Laws 262 (2004) (codified in scattered sections of Del. Code. Ann., tit. 24); N.H. Rev. Stat. Ann. § 332-G:10; Wis. Stat. §§ 111.32, 111.335(1)(c)), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/. In determining whether a substantial relationship exists, states look to factors such as the nature of the crime; the relationship of the crime(s) to the activities authorized by the license; the relevance of any conviction to the fitness of the licensee to perform the occupation authorized by the license; the length of time since the conviction; and the behavior and activities of licensee following conviction. Code of Md. Reg. 09.01.10.02. See also Colo. Rev. Stat. § 24-5-101(4); Ky. Rev. Stat. Ann. § 335B.020(2); N.D. Cent. Code § 12.1-33-02 (listing similar factors to guide the finding of a "direct relationship" between the crime and the license sought); Tex. Occupations Code Ann. § 53.022 (same); Va. Code Ann. § 54.1-204(B) (same).

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§ 6x.03. Voting and Jury Service.[58]

(1) No person convicted of a crime shall be disqualified on that basis from exercising the right to vote [, except that an individual serving a custodial sentence as a result of a felony conviction may be disqualified while incarcerated].

(2) A person convicted of a crime may be disqualified on that basis from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

Comment:[59]

a. Scope. This provision closely tracks § 306.3 of the original Model Penal Code, with one primary difference. The original Code required that incarcerated voters be disqualified from voting, while the proposed draft favors a prohibition on disenfranchisement altogether, and offers a bracketed alternative that permits disenfranchisement only during the period of incarceration for those convicted of felony offenses. The original Code, like the proposed provision, required juror disqualification for the full duration of the sentence. The proposed provision does not permit juror disqualification beyond the termination of sentence.

b. Period of disqualification, voting rights. This provision offers jurisdictions a choice with respect to voter disqualification. The favored option prohibits disenfranchisement as a consequence of conviction in all cases. Although disenfranchisement has been justified as a fitting punishment for transgressing the rules of civil society, the legal justification for collateral consequences is that they serve regulatory functions, not punitive ones. (This is why collateral consequences can be applied retroactively and are ordinarily not subject to challenge under the Eighth Amendment.) For that reason, punishment alone cannot justify the denial of voting rights to convicted individuals, and there is no evidence suggesting that ballots cast by prisoners are any more likely to be fraudulent than those cast outside prison walls. Furthermore, there are few logistical obstacles to allowing convicted individuals to vote in prison or jail. Two states allow prisoners to vote, Maine and Vermont, and both authorize prisoners to complete absentee ballots.

Even though there are few principled or practical arguments in favor of disenfranchising prisoners, a bracketed alternative is included that would authorize disenfranchisement for individuals convicted of felony offenses during the period of imprisonment only. Under this alternative, individuals would regain the right to vote automatically upon release from prison.

[58] This Section was originally approved in 2014; see Tentative Draft No. 3.

[59] This Comment has been minimally revised since § 6x.03's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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c. Full opportunity to exercise the right to vote. Retaining the right to vote while incarcerated has little meaning if those behind bars are unable to exercise their civic rights. Subsection (1) specifies that individuals serving jail and prison sentences must be given adequate opportunity to exercise the right to vote. This includes the opportunity to register to vote in the jurisdiction where the prisoner is entitled to vote, and to exercise the right, either by absentee ballot or as otherwise permitted by the jurisdiction in which the prisoner is registered.

d. Period of disqualification, jury service. Recognizing the logistical challenges of arranging for jury service in a custodial setting, this provision allows convicted individuals to be excluded from jury service during the custodial phase of any sentence. Additionally, because jury service (particularly in the context of grand-jury proceedings) may expose jurors to confidential information about law-enforcement operations, subsection (2) allows individuals serving terms of community supervision to be excluded from jury service as well. Once an individual has completed his or her sentence, subsection (2) does not allow the individual to be barred from future jury service on the basis of past conviction alone.

REPORTERS' NOTE [60]

a. Scope. The practice of prohibiting convicted individuals from participating fully in civic life has a long history, with roots in the ancient world. "Civil death"—the loss of the right to hold public office, vote, and bring suit on one's behalf—was an incident of conviction throughout much of Western European history, and continuing into early America. Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789 (2012). Nevertheless, the practice of barring convicted individuals from taking an active role in civic affairs is difficult to square with the principle that collateral consequences are meant to serve a regulatory, rather than a punitive, purpose.

The number of U.S. citizens disenfranchised as a result of past criminal conviction has soared dramatically over the past half century, from an estimated 1.17 million in 1976 to 5.85 million Americans in 2010. Christopher Uggen et al., State-Level Estimates of Felon Disenfranchisement in the United States 2010, The Sentencing Project 1 (2012). One of every 40 adult Americans is disenfranchised by conviction, and one of every 13 African Americans. Id. at 1-2.

Laws governing disenfranchisement vary considerably from one jurisdiction to another. Two states—Maine and Vermont—do not impose any voting restrictions on individuals convicted of crimes. At the other end of the spectrum, 11 states impose lifetime disenfranchisement on at least some convicted individuals. Id. at 3. While many of the states that authorize lifetime disenfranchisement have mechanisms for restoring the right to vote, only a small number of individuals see their rights restored. Jessie Allen, Documentary Disenfranchisement, 86 Tul. L. Rev. 389, 391 (2011).

It is important to acknowledge that the use of felon disenfranchisement in the United States has a checkered past. See, e.g., George Brooks, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 Fordham Urban L.

[60] This Reporters' Note has been minimally revised since § 6x.03's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Rev. 101, 105-109 (2004). Laws disenfranchising those with criminal records have been used to systematically and disproportionately prevent minority voters from casting ballots. With that history as a backdrop, it seems particularly important to use disenfranchisement sparingly, and only when legitimate regulatory concerns so require. When it comes to regulation, however, there are few reasons why disenfranchisement is required at all. Individuals in prison are well-identified and easily located, so preventing voter fraud is no justification. Moreover, there are few logistical obstacles to voting in prison. In Maine and Vermont, prisoners vote by absentee ballot. For those not serving sentences of confinement, there is no evidence that individuals convicted of criminal offense are more likely to abuse the right to vote than any other citizen.

In addition to disenfranchisement, a majority of states impose a lifetime ban on jury service by felons—a practice that, like disenfranchisement, has significant effects on the racial balance of jury pools. Darren Wheelock, A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia, 32 Just. Sys. J. 35 (2011) (reporting that "felon jury exclusion dramatically reduces the pool of eligible African-Americans statewide by nearly one-third"). Unlike felony disenfranchisement, which has been the subject of extensive criticism, the practice of barring convicted felons from serving on juries has been largely overlooked by reformers, despite the fact that state laws take a significantly harsher approach to jury service than to voting rights. See Brian C. Kalt, The Exclusion of Felons from Jury Service, 53 AM. U. L. REV. 65, 67 (2003). Felons are excluded from serving on juries in 48 states, and in 13 states, some misdemeanants are also excluded. Anna Roberts, Casual Ostracism: Jury exclusion on the Basis of Criminal Convictions, 8 Minn. L. Rev. 592, 593 (2013).

Like disenfranchisement, the justifications for banning convicted individuals from jury service appear primarily punitive. It is not clear what regulatory goals are served by barring felons from jury service, when as a practical matter, they may be struck by the parties during the voir dire process. As did the original Code, this provision takes the position that jury service should be prohibited during the period of the sentence only, because legitimate regulatory concerns justify such a limitation. Individuals who remain in or return to the community following conviction should see their right to jury service retained or restored.

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§ 6x.04. Notification of Collateral Consequences; Order of Relief. [61]

(1) At the time of sentencing, the court shall confirm on the record that the defendant has been provided with the following information in writing:

(a) a list of all collateral consequences that apply under state or federal law as a result of the current conviction;

(b) a warning that the collateral consequences applicable to the offender may change over time;

[61] This Section was originally provisionally approved in 2014, see Tentative Draft No. 3, with amendments later incorporated and approved by the Council in 2017.

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(c) a warning that jurisdictions to which the defendant may travel or relocate may impose additional collateral consequences; and

(d) notice of the defendant's right to petition for relief from mandatory collateral consequences pursuant to subsection (2) during the period of the sentence, and thereafter pursuant to §§ 6x.05 and 6x.06.

(2) At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.

(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney.

(c) The court may grant relief from a mandatory collateral consequence if, after considering the guidance provided by the sentencing commission under § 6x.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence is not substantially related to the elements and facts of the offense and is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) An order of relief granted under this Section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity, such as an occupational or professional license. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be substantially related to the benefit or opportunity the individual seeks to obtain. If the decisionmaker determines that the benefit or opportunity should be denied based upon the conduct underlying the conviction, the decisionmaker shall explain the reasons for the denial in writing.

Comment:[62]

a. Scope. This provision, new to the Code, provides assurance that convicted individuals are made aware of the collateral consequences to which they will be subject, and provides courts with a mechanism for alleviating some types of mandatory collateral consequences on a case-by-case basis. This provision recognizes that although collateral consequences can serve important regulatory goals, there are instances in which the application of a particular collateral

[62] This Comment has not been revised since § 6x.04's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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consequence will unnecessarily impede a convicted individual's successful reintegration into the law-abiding community without advancing public safety. This is likely to be most true when the consequence bears little connection to the individual's risk of criminal re-offending.

This Section has two subsections. The first, subsection 6x.04(1), requires courts at sentencing to confirm that defendants have been provided with basic written information about the sources and types of collateral consequences to which they may be subject as a result of criminal conviction. This information, which may come from counsel or the court, includes a comprehensive list of relevant state- and federally-imposed collateral consequences (presumably drawn from the sentencing commission's compendium, see § 6x.02(1)), along with notice that the consequences may change with time or as a convicted person moves from one jurisdiction to another. While this information should be provided to the defendant at earlier points in the criminal process (such as at arraignment and plea), the sentencing court is obliged to confirm at the time of sentencing that the defendant has been given written notice of the laws that will govern his post-sentencing conduct. Such full disclosure is an improvement on current practice in most states, where individuals are provided with no (or very limited) information about the long-term collateral consequences of their convictions.

In addition to providing the defendant with notice, § 6x.04(2) authorizes the sentencing court, upon request from the convicted individual at sentencing, or at any time during the sentence, to grant relief from the automatic imposition of specific mandatory collateral consequences whose burdens outweigh their regulatory benefits in the particular case. Under § 6x.04(2), a convicted individual may petition the sentencing court at the time of sentencing or thereafter to grant relief from the mandatory nature of a collateral consequence that is imposed by state law and is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. Although the sentencing court is not obliged to grant relief, or even to hold a hearing on the petition, the court may grant relief when it finds, after consulting any guidance offered by the sentencing commission under § 6x.02(2), that the defendant has shown "by clear and convincing evidence that the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence." Section 6x.04(2)(c). When the sentencing court grants relief from a mandatory collateral consequence under § 6x.04(2), the court merely removes the mandatory nature of the consequence: it does not prevent other authorized decisionmakers, such as licensing boards, from later considering the conduct underlying the conviction when deciding whether to confer a discretionary benefit or opportunity, so long as the facts underlying the conviction are substantially related to the individual's competency to exercise the benefit or opportunity sought. See § 6x.04(3).

b. Notification of collateral consequences. Under subsection (1), the court must confirm on the record that the defendant has been given written notice of the existence of all mandatory collateral consequences that apply under federal law and the law of the relevant jurisdiction at

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the time of sentencing. (This information is made available by the sentencing commission, which is charged under § 6x.02(1) with "compil[ing], maintain[ing], and publish[ing] a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.") The court must also confirm that the defendant has been informed that discretionary collateral consequences may attend conviction, though it need not specify what those may be. The court must also confirm that the defendant has been given notice of his right to seek relief from any mandatory collateral consequences that are not relieved at the time of sentencing. This notice should include information regarding the offender's right to petition for relief from specific sanctions under § 6x.05 should a need arise after the time of sentencing, and right to petition for a certificate of relief from disabilities under § 6x.06 when the proscribed amount of time has passed.

This provision addresses the obligation of courts to provide information about collateral consequences at the time of sentencing. It is not meant to limit or in any way discourage the practice of providing such information at a much earlier stage of the proceedings. The information about collateral consequences discussed by the court at sentencing should already be familiar to the defendant. Defense counsel should routinely provide and discuss such information with the client at early stages of the prosecution, and before entry of a guilty plea. Even so, ensuring on the record at the time of sentencing that the defendant has been provided with this information in writing guarantees that the individual being sentenced has been given as complete notice as possible of the consequences that attend conviction.

c. The special problem of extra-jurisdictional collateral consequences. Any attempt to limit the application of mandatory collateral consequences is subject to unavoidable jurisdictional constraints. Although a sentencing court can provide relief from some mandatory collateral consequences imposed by the relevant jurisdiction, it cannot relieve those imposed at the federal level or by other jurisdictions to which the offender may travel or move. Section 6x.04 requires the court to ensure that defendants have been advised of all mandatory federal collateral consequences that attach to them as of the date of sentencing. Subsection (1)(c) requires courts to ensure that defendants are aware that additional mandatory and discretionary collateral consequences may be imposed by other jurisdictions and that the consequences imposed by any jurisdiction may change over time.

d. Limits on court's power to grant relief from mandatory collateral consequences. Under § 6x.04(2), the court is only authorized to grant relief from mandatory collateral consequences; it may not remove any discretionary collateral consequences that attend conviction. Furthermore, under this Section the court may only grant relief from mandatory collateral consequences that relate to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. These restrictions ensure that the court's power to grant relief is directed toward removing significant barriers to successful reintegration, rather than toward addressing collateral consequences that do not significantly impede the convicted person's ability to function as a law-abiding member of society.

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e. Notice. Subsection (2)(b) requires that the defendant provide the prosecuting attorney with notice of the mandatory collateral consequences from which relief is being sought in order to ensure that the prosecutor is given adequate opportunity to object to or support the petition.

f. Standard for relief. The strategy of the Model Penal Code is to make the law of collateral consequences consistent with overriding goals of public safety and recidivism prevention. With these objectives in mind, collateral consequences are seen as a negative force whenever they impede the successful reintegration of offenders into law-abiding society without offering a commensurate public-safety benefit. Consequently, § 6x.04(2)(b) allows a court to grant relief from mandatory collateral consequences related to "employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business" when it finds that the defendant has shown by clear and convincing evidence that "the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence."

Applying this standard, courts are most likely to grant relief when a collateral sanction bears little connection to a petitioner's crime of conviction or the facts underlying the criminal case, and when the burden imposed by the consequence also impedes the individual's rehabilitative efforts. Conversely, courts are likely to deny relief in cases where there is a clear or close connection between the collateral consequences and a public-safety risk posed by the offender's criminal conduct. Examples of the latter include the loss of a motor-vehicle license by a person convicted of operating a motor vehicle while intoxicated and prohibiting receipt of a daycare operator's license by a person convicted of the sexual assault of a minor. The defendant bears the burden of proving both the burden and the lack of an adequate public-safety consideration.

g. Prohibition on arbitrary and punitive purposes. Courts have often distinguished between the direct and collateral consequences of conviction by observing that direct consequences of conviction—to which constitutional protections such as the Eighth Amendment apply—are intentionally punitive, while collateral consequences are primarily regulatory. The distinction between direct and collateral consequences is often thin, however. Subsection (2)(d) reminds courts that mandatory collateral consequences should never be justified as a way of enhancing the punishment of any offender, or for any arbitrary reason.

h. Effect of relief. When a court grants relief from a mandatory collateral consequence pursuant to subsection (2), the defendant is excused from complying with any requirements imposed by the sanction and may not be *automatically* barred from receiving specified opportunities and benefits from which he or she would otherwise be barred by virtue of conviction. As subsection (3) makes clear, however, an order of relief does not prevent authorized decisionmakers from later considering the conduct underlying the conviction when deciding whether to confer a *discretionary* benefit or opportunity, such as occupational licensure. In determining whether the conduct underlying the conviction is substantially related to the benefit or opportunity the individual seeks to obtain, the decisionmaker may consider (a) the

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time elapsed since the person's conviction; (b) the person's age at the time of the conviction; (c) the seriousness of the conduct underlying the conviction; (d) the person's conduct following conviction, including the person's progress toward rehabilitation, and any information supplied by individuals familiar with the individual's conduct and character; and (e) any information indicating that granting the benefit or opportunity is likely to pose an unreasonable risk to the safety of the public or of any individual.

REPORTERS' NOTE [63]

a. Scope. Although new to the Code, the type of relief authority conferred by § 6x.04 finds some support in both the original Code and state practice.

The original Code provided a mechanism for relieving mandatory collateral consequences imposed as a result of conviction, allowing courts to order that previously entered judgments should no longer "constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime." Model Penal Code § 306.6(1) (1962). Such orders were available to individuals who had successfully completed both custodial and noncustodial sentences. Id. In addition to ordering relief from collateral consequences under § 306.6(1), the Code authorized the court to vacate the conviction entirely upon proof that a convicted person had lived a law-abiding life for five years following the completion of sentence (or less, if the person was a young-adult offender). Model Penal Code § 306.6(2) (1962). The revision does not authorize courts to vacate convictions, but instead allows them to grant relief from particular mandatory collateral consequences without disturbing the underlying conviction.

Section 6x.04 authorizes the court, upon petition, to relieve an offender of a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business when the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and public-safety considerations do not require mandatory imposition. Although the number of states that currently authorize judicial relief from collateral consequences are few, judges in New York and Illinois have long had such authority, see ILCS 5/5-5.5-15 (2010); N.Y. Corr. Law § 702 (2007), and states such as Vermont, Colorado, and Ohio have enacted legislation in recent years that permits courts to grant relief from certain collateral consequences (particularly those related to employment) for designated categories of convicted individuals. See 13 Vermont Stat. Ann. §§ 8001 et seq. (2014); Col. Rev. Stat. § 18-1.3-213 (2013); Ohio Stat. § 2953.25 (2015) (establishing a judicial process for issuing certificates of qualification for employment, which remove specific mandatory collateral consequences related to employment). Much of the ongoing state legislation in this area was catalyzed by the Uniform Collateral Consequences of Conviction Act and the ABA Standards on Collateral Sanctions and Mandatory Disqualifications, both of which urged courts to inform offenders about collateral consequences and mechanisms for relief from them at the time of sentencing, and to provide mechanisms for relieving the burdens imposed by collateral consequences that are to essential to public safety.

b. Notification of collateral consequences. Notice is the first essential safeguard that needs to be addressed at sentencing. For this reason, the ABA Standards and the UCCCA both insist that notice of collateral consequences be

[63] This Reporters' Note has been minimally revised since § 6x.04's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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provided at sentencing, if not before. See ABA Standards on Mandatory Collateral Consequences, Standard 19-2.4 ("The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of mandatory collateral consequences made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law"); UCCCA § 6(a) (requiring that "[a]n individual convicted of an offense shall be given notice" that collateral consequences may apply, referred to a collection of laws authorizing collateral consequences, and given information about relief mechanisms).

With respect to disclosure, this provision requires the court to confirm at sentencing that the defendant has received written information about specific federal and jurisdictional mandatory collateral consequences. The UCCCA also requires notification, but does not specify how such information will be provided to offenders; see UCCCA § 6(a). Like § 6x.04(1), the ABA Standards on Mandatory Collateral Consequences allow the court to discharge its duty to advise by "confirming on the record that defense counsel has so advised the defendant." ABA Standards on Mandatory Collateral Consequences, Standard 19-2.4(a).

c. The special problem of extra-jurisdictional collateral consequences. Among the full range of collateral consequences, the Model Penal Code addresses only targeted subsets—and these only in specific procedural settings. The Code is intended as model state legislation, and is therefore unable to speak to some of the most significant collateral consequences imposed at the federal level, such as deportation. See Padilla v. Kentucky, 130 S. Ct. 1473 (2010) ("[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."). Instead, the Code appeals to state legislatures to make improvements in law that are within their powers to effect, through changes in their criminal or civil codes. Further, because governmental power over criminal justice is highly localized in our federal system, with enormous diversity of approach across the states, the Code cannot realistically offer "uniform" recommendations with the expectation that nationwide consistency will be achieved. Thus, in this Article, the Code can speak directly only to collateral consequences that exist under authority of state law within a single jurisdiction. The jurisdiction of state lawmakers does not extend to amendments of federal laws or the laws of other states.

d. Limits on court's power to grant relief from mandatory collateral consequences. Under § 6x.04(2), courts are only authorized to grant relief from the mandatory effect of collateral consequences that relate to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business. Excluded from that list are consequences pertaining to deportation and gun rights, as well as family-law-related rights (such as adoption, foster parenting, and guardianship), service on advisory boards, and volunteer opportunities. Some of these consequences—immigration in particular—are imposed at the federal level, making them impossible for a state court to remove. Others, such as volunteer and advisory positions, are more peripheral to reintegration, and are therefore best addressed by the legislature directly, rather than on a case-by-case basis by the sentencing court. Family-law-related consequences, implicating as they do the direct interests of vulnerable persons, are not subject to relief under § 6x.04, though they may be removed by a certificate of relief from civil disabilities after the sentence has been fully served and additional time has passed without re-offense. See § 6x.06.

f. Standard for relief. In deciding whether a collateral sanction is appropriate, the court must consider both the burden the consequence imposes on the individual's ability to reintegrate into law-abiding society, and any public-safety considerations that might require mandatory imposition of the consequence. The burden of persuasive rests

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with the petitioner. For an alternative standard, see Ala. Code 1975 § 15-20A-23 (2011) (allowing courts to relieve sex offenders with terminal illness of residency restrictions upon finding by clear and convincing evidence that "the sex offender does not pose a substantial risk of perpetrating any future dangerous sexual offense or that the sex offender is not likely to reoffend").

g. Prohibition on arbitrary and punitive purposes. As a doctrinal matter, the legal distinction between a "direct" and "collateral" consequence of conviction is whether the law is primarily punitive or primarily regulatory. See, e.g., Smith v. Doe, 538 U.S. 84, 92 (2003) (holding that federal sex-offender registration is not "so punitive either in purpose or effect as to negate" Congress's intent to regulate rather than punish); Sames v. State, 805 N.W.2d 565, 568 (Minn. Ct. App. 2011) (quoting Kaiser v. State, 641 N.W.2d 900, 903-904 (Minn. 2002) ("Direct consequences are those that have 'a definite, immediate and automatic effect on the range of a defendant's punishment.' Collateral consequences, on the other hand, 'are not punishment' but, rather, 'are civil and regulatory in nature and are imposed in the interest of public safety'"). Despite that rule, it is often difficult to discern the regulatory purpose behind many new laws imposing civil restrictions on convicted individuals. Subsection (2)(d) serves as a reminder that punishment cannot serve as the primary justification for retaining a collateral sanction when it otherwise imposes burdens that outweigh its benefits, and that courts should exercise their relief discretion wisely, and not arbitrarily.

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§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.[64]

(1) Any individual who, by virtue of conviction in another jurisdiction, is subject or potentially subject in this jurisdiction to a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business, may petition the court for an order of relief if:

(a) The individual is not the subject of pending charges in any jurisdiction;

(b) The individual resides, is employed or seeking employment, or regularly conducts business in this jurisdiction; and

(c) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on the individual's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(2) An individual convicted in this jurisdiction whose sentence has been fully served may petition under this Section for relief from a mandatory collateral sanction if:

(a) No charges are pending against the individual in any jurisdiction; and

[64] This Section was originally approved in 2014; see Tentative Draft No. 3.

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(b) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on his or her ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(3) The court may grant relief if it finds that the petitioner has demonstrated by clear and convincing evidence a specific need for relief from one or more mandatory consequences, and that public-safety considerations do not require mandatory imposition of the consequence. In determining whether to grant relief, the court should give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.

(4) A petition filed under subsection (1) or (2) shall be decided in accordance with the procedures and standards set forth in § 6x.04(2), and an order of relief shall have the effect described in § 6x.04(3).

Comment: [65]

a. Scope. Given the length of many criminal sentences, changes occurring after the sentence has ended may turn a mandatory collateral consequence overlooked at the time of sentencing into a significant obstacle to later reintegration. Section 6x.05 allows an individual to petition the court for relief from a mandatory collateral consequence in either of two circumstances. Subsection (1) allows an individual convicted in a foreign jurisdiction to petition the court in the jurisdiction where he "resides, is employed or seeking employment, or regularly conducts business" for relief from one or more mandatory collateral consequences imposed by that jurisdiction. Subsection (2) permits similar petitions from individuals convicted within the jurisdiction whose sentences have expired (and over whom the court has therefore lost jurisdiction in the criminal case). In either case, to secure relief petitioners must demonstrate by clear and convincing evidence both a specific need for relief and "that public-safety considerations do not require mandatory imposition of the consequence" from which relief is sought.

b. Standard for relief. Unlike petitions for relief from mandatory collateral consequences that are made during the service of a sentence, see § 6x.04(2), petitions made after the sentence has ended or made by individuals convicted in other jurisdictions require a showing of specific need for the relief sought. Section 6x.05(3). This higher standard reflects the administrative burden of opening a new case and obtaining information about the closed case or foreign conviction. In all other ways, the procedures to be followed and effects of a grant of relief are identical to those relevant to a petition for relief under § 6x.04(2).

[65] This Comment has not been revised since § 6x.05's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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c. Consideration of extra-jurisdictional orders of relief. When a convicted person works, resides, or conducts business in more than one jurisdiction, he or she may seek relief from mandatory collateral consequences in each jurisdiction that imposes such consequences. Section 6x.05(3) provides that a court considering a petition under § 6x.05(1) from an individual convicted in another jurisdiction should give favorable weight to any relief that has already been granted by the original jurisdiction.

REPORTERS' NOTE [66]

a. Scope. As the notice required by § 6x.04(1)(c) suggests, an individual convicted in one jurisdiction may face different collateral consequences flowing from that conviction in each state where he or she lives, works, or conducts business. This provision provides a way for individuals to seek relief from specific collateral consequences imposed by non-convicting jurisdictions when the consequence is not required for public-safety reasons and imposes a substantial obstacle to successful reintegration. This provision is consistent with the ABA Standards on Mandatory Collateral Sanctions, which provide that "[w]here the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction." ABA Standards on Mandatory Collateral Sanctions § 19-2.5(b).

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§ 6x.06. Certificate of Restoration of Rights. [67]

(1) Any individual convicted of one or more misdemeanors or felonies may petition the [designated agency or court] in the [county] in which the individual resides for a certificate of restoration of rights, provided that:

(a) No criminal charges against the individual are pending; and

(b) [Four] or more years have passed since the completion of all the individual's past criminal sentences with no further convictions.

(2) When a petition is filed under subsection (1), notice of the petition and any scheduled hearings related to it shall be sent to the prosecuting attorney of the jurisdiction that handled the underlying criminal case.

(3) In ruling on a petition filed under subsection (1), the court shall determine the classification of the most serious offense for which the individual has been convicted.

(a) When the individual has been convicted of one or more [fourth or fifth] degree felonies or misdemeanors, the [court or designated agency] shall issue the

[66] This Reporters' Note has been not been revised since § 6x.05's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

[67] This Section was originally approved in 2014; see Tentative Draft No. 3.

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certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences.

(b) When the individual has been convicted of a [first, second, or third] degree felony, the [court or designated agency] may issue a certificate of restoration of rights if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community. In making this determination, the court may consider the amount of time that has passed since the individual's most recent conviction, any subsequent involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to any cultural, educational, or economic limitations affecting the petitioner.

(4) A certificate of restoration of rights removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this jurisdiction as a result of prior convictions, except as provided by Article 213. A court may deny a certificate or specify that a certificate should issue with exceptions when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences. A certificate does not entitle a recipient to any discretionary benefits or opportunities, though it may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.

(5) Information regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the individual.

Comment: [68]

a. Scope. Like the original provision from which it is derived, proposed § 6x.06 "is concerned with relief from disqualifications" and with placing "appropriate limits on . . . such relief." Model Penal Code § 306.6, Explanatory Note (1962). A certificate of restoration of rights issued under this section has the effect of removing all mandatory collateral consequences, except as provided in Article 213 (now under revision) and with any specific exceptions provided by the court. Unlike §§ 6x.04-6x.05, which are meant to limit the burden of particular collateral consequences, § 6x.06 is a relief mechanism designed to grant broader relief to individuals who have served their sentences and gone on to live law-abiding lives in the

[68] This Comment has not been revised since § 6x.06's approval in 2014. All Comments will be updated for the Code's hardbound volumes.

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community. As a result, the standard for relief under this section requires proof of law-abiding behavior over a sustained period of time. To qualify, an individual must have served his or her full sentence (including any period of supervised release) and have gone four or more years without reconviction. See § 6x.06(4). The effect of a certificate is to remove most, if not all, collateral consequences and to assist the recipient in obtaining employment by shielding employers from introduction of the petitioner's criminal history "in any civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee." Section 6x.06(5).

b. Eligibility. Before petitioning for a certificate of restoration of rights, a petitioner must have fully served all of his or her sentences, including any period of supervised release, and have gone four years or more without committing any new offense. No charges may be pending at the time of application. Eligibility standards for individuals seeking a certificate of restoration of rights are divided into two categories based on the classification of the petitioner's most serious crime of conviction. Section 6x.06(3). For those convicted of misdemeanors and lower-level felony offenses who have served their full sentence plus four additional years without reconviction, the certificate is presumptively appropriate. That presumption can, however, be overcome when "the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect." Section 6x.06(3)(a).

The four-year exclusion period in subsection (1)(b) is bracketed, and could easily be shortened. There is no one period of sustained law-abiding conduct that indicates conclusively that any given individual will not return to criminal offending. Research shows, however, that in many (though not all) instances offenders who recidivate are most likely to do so soon after a previous offense and sentence. As multiple years of life in the free community go by without incident, the statistical chances of new criminal behavior begin to decline. While risk of criminality never disappears entirely, over time the risk presented by past offenders comes very close to, or matches, the risk presented by ordinary individuals with no record of criminal involvement. Although these "redemption times" vary depending on age of first offense and the type of crime at issue, four years beyond the completion of any sentence is a conservative period of exclusion, especially for more serious crimes for which the sentence length itself may easily last a decade or more.

c. Standard for relief. The standard for obtaining relief from collateral consequences may vary depending on the severity of the crime or crimes for which the petitioner has been convicted. For individuals convicted of less serious crimes, it is enough for the petitioner to demonstrate that he or she has avoided reconviction for a prolonged period of time—unless, that is, the state comes forward with clear evidence that one or more collateral consequences should remain in effect based on considerations of public safety. Section 6x.06(4). For those convicted of more serious offenses, a more searching inquiry is required. In cases where a petitioner has been convicted of a third- or higher-degree felony, the [court or designated agency] has discretion to issue a certificate when the petitioner proves by a preponderance of the evidence

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1 that he or she has successfully reintegrated into the law-abiding community. Section 6x.06(3)(b).
2 Rehabilitation is personal, and therefore proof of reintegration will differ from one individual to
3 the next. In determining whether the petitioner has met his or her burden, the [court or designated
4 agency] should consider the lack of reconviction, but may also consider the amount of time that
5 has passed since the individual's most recent conviction, and factors such as participation in
6 treatment for mental-health or substance-abuse problems linked to past criminal offending.

7 *d. Effect of relief.* A certificate of restoration of rights removes all mandatory collateral
8 consequences, with two potential exceptions. First, for individuals convicted of sexual offenses,
9 the restrictions on relief set forth in Article 213 apply. Second, the [court or designated agency]
10 may grant the certificate with exceptions "when there is reason to believe that public safety
11 considerations require the continuation of one or more mandatory collateral consequences."
12 Section 6x.06(4).

13 Like an order of relief issued under § 6x.04, the effect of a certificate of restoration of rights
14 is to remove the mandatory nature of a collateral consequence, and not to prohibit the imposition
15 of discretionary collateral consequences by authorized decisionmakers. A discretionary
16 decisionmaker may deny a benefit or opportunity notwithstanding the certificate of restoration of
17 rights if it finds that the facts underlying the conviction continue to call into question the
18 individual's competency to exercise the benefit or opportunity the individual seeks to obtain,
19 even in light of the individual's post-sentencing conduct. In evaluating the individual's post-
20 sentencing conduct, weight should be given to the court's issuance of the certificate of
21 restoration of rights, which "may be used as proof of rehabilitation for purposes of seeking such
22 benefits or opportunities." Section 6x.06(4).

23 *e. Protection for employers.* In addition to removing all mandatory collateral consequences
24 except as otherwise provided, a certificate of restoration of rights provides protection to
25 employers who hire certificate recipients. Subsection (5) provides that "[i]nformation regarding
26 the criminal history of an individual who has received a certificate of restoration of rights may
27 not be introduced as evidence in any civil action against an employer or its employees or agents
28 that is based on the conduct of the employee or former employee." Section 6x.06(5).

29 **REPORTERS' NOTE** [69]

30 *a. Scope.* Section 6x.06 provides a mechanism for erasing the stigma of a criminal conviction without hiding the
31 fact of conviction itself. Section 6x.06 does not authorize the court to vacate a sentence, but it does offer a formal
32 mechanism for ameliorating the effects of collateral consequences on individuals who have succeeded in
33 reintegrating into their communities following criminal conviction. This mechanism provides a way for individuals
34 who have reformed their lives to eliminate any lingering mandatory collateral consequences that may inhibit their
35 social and economic prospects.

[69] This Reporters' Note has been minimally revised since § 6x.06's approval in 2014. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Several states already provide legal mechanisms that allow courts, special panels, or parole boards to remove such collateral consequences. New York makes available a Certificate of Relief from Disabilities and a Certificate of Good Conduct, see N.Y. Corr. §§ 700-705, both of which remove legal barriers to employment and create a "presumption of rehabilitation" in applications for discretionary relief and private employment. N.Y. Corr. § 753(2). A similar, though more limited, form of relief was recently authorized by the state of Ohio. Under Ohio law, individuals affected by certain mandatory collateral consequences may petition for a "certificate of qualification for employment" to assist them in obtaining work. Ohio Rev. Code § 2953.25 (2012). If a court determines by a "preponderance of the evidence that granting the petition will materially assist the individual in obtaining employment or occupational licensing, the individual has a substantial need for the relief requested in order to live a law-abiding life, and granting the petition will not pose an unreasonable risk to the safety of the public or any individual," it may issue a certificate lifting the designated sanction or sanctions. Id. North Carolina also allows judicial panels to issue certificates of rehabilitation that remove some collateral consequences, and make it easier for recipients to seek work. N.C. Gen. Stat. § 15A-173.1-173.5. In California, judges are also authorized to issue Certificates of Rehabilitation, though their primary function is to serve as a prerequisite to pardon. Cal. Penal Code §§ 4852.06-21.

b. Eligibility. A growing body of research has attempted to quantify the period of time in which former offenders are most likely to recidivate, and conversely, the amount of time in which rehabilitation can be reasonably inferred for various categories of offenders. For a sample of this rich literature, which discusses the declining risks of reoffending posed by ex-offenders with the passage of time, eventually approximating the risks of criminality in the general population, see Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009) (reporting on empirical studies of the length of time required to reduce the risk of rearrest for a convicted individual to the risk level of the general population); Grant T. Harris & Marnie E. Rice, Adjusting Actuarial Violence Risk Assessments Based on Aging or the Passage of Time, 34 Crim. Just. & Behav. 297 (2007); Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Crime & Pub. Pol'y 1101 (2006).

d. Effect of relief. Unlike the Certificate of Restoration of Rights authorized by the UCCCA, a Certificate of Relief from Civil Disabilities is not revocable. See UCCCA § 13(b). The certificate of relief from civil disabilities recognizes reintegration following past offenses, but it does not purport to predict or guarantee future behavior in any way. Consequently, once relief has been granted, it cannot be rescinded. New collateral consequences will attach to future criminal convictions, but the relief granted by the certificate with respect to past convictions is not revocable.

e. Protection for employers. Subsection (5), like Section 14 of the UCCCA, provides protection against charges of negligent hiring based on criminal record for employers who knowingly hire a recipient of a certificate of relief from civil disabilities. See UCCCA § 14 ("In a judicial or administrative proceeding alleging negligence or other fault, an order of limited relief or a certificate of restoration of rights may be introduced as evidence of a person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting business or engaging in activity with the individual to whom the order was issued, if the person knew of the order or certificate at the time of the alleged negligence or other fault.") This provision is designed to encourage employers to give weight to the judicial certificate as evidence of a convicted person's reintegration without fear of later

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liability should the person's conduct deteriorate. North Carolina has a similar provision in its legislation providing for certificates of relief from collateral consequences. N.C. Gen. Stat. § 15A-173.5.

ARTICLE 6A. SENTENCING COMMISSION

§ 6A.01. Establishment and Purposes of Sentencing Commission.[70]

(1) There is hereby established a permanent sentencing commission as an independent agency of state government.

(2) The sentencing commission shall:

(a) develop sentencing guidelines as provided in Article 6B;

(b) collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework;

(c) provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects;

(d) assemble and draw upon sources of knowledge, experience, and community values from all sectors of the criminal-justice system, from the public at large, and from other jurisdictions;

(e) perform its work and provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2); and

(f) ensure that all these efforts take place on a permanent and ongoing basis, with the expectation that the sentencing system must strive continually to evaluate itself, evolve, and improve.

Comment: [71]

a. Scope. Section 6A.01 recommends to all American jurisdictions that they establish a permanent sentencing commission, as described in Article 6A, as an essential agency of the criminal-justice system. Article 6A presents a flexible series of recommendations that individual states should carry out in ways best tailored to their governmental structures, available resources, and local needs. Article 6A is an exercise in "model" legislation in the sense that it sets forth workable *illustrations* of the architecture and detailed construction of a sentencing commission. The drafters envision creative adaptation of Article 6A by state legislatures.

[70] This Section was originally approved in 2007; see Tentative Draft No. 1.

[71] This Comment has not been revised since § 6A.01's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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The Article is built upon the experience of the roughly two dozen American jurisdictions that have chartered sentencing commissions, including some states with commissions that have enjoyed decades of operation, and some states with commissions that failed in their work or were discontinued after a short lifespan. Article 6A selects features of commission design that have been associated with successful operation over extended periods of time, and avoids features that have proven troublesome, self-defeating, or even fatal to some sentencing agencies.

Sentencing commissions—or equivalent agencies—may be constituted in many different forms. Their institutional trappings do not matter as much as their ability to perform the core functions outlined broadly in § 6A.01, and addressed in greater detail throughout Article 6A. It matters little, for example, whether the terminology "sentencing commission," or related terms such as "sentencing guidelines," are used in all jurisdictions. These word choices appear throughout the black letter of the Code revision only because it is necessary to adopt a consistent lexicon for model statutory drafting. Some U.S. jurisdictions, and the American Bar Association in its Criminal Justice Standards for Sentencing, have employed alternative verbal formulas. More importantly, they have envisioned a host of institutional forms to discharge the functions of lawmaking, monitoring, research, consensus-building, and education assigned in this Article to a "sentencing commission."

b. A permanent commission. Subsection (1) begins with the premise that a sentencing commission or equivalent agency should be chartered in each jurisdiction as a permanent agency. Subsections (1) and (2)(f) endorse the view that sentencing policy should never be viewed as a "settled" matter, but should be allowed to evolve, and must continually be evaluated.

A number of states have elected to create temporary sentencing commissions, or have abolished standing commissions at some point after the commission's guidelines have taken effect. As a result, the monitoring, research, planning, consensus-building, and lawmaking functions normally entrusted to a commission are performed by no one on a continuing basis. Discontinuation guarantees that the commission's work product will become obsolete over time, and no institutional memory will inform ongoing changes to the sentencing structure. All longstanding commissions have found that the environment in which sentencing policy is made is constantly in flux. Crime rates change, as do the politics of punishment, the availability of resources, and the feedback from various sources on how well the sentencing system is working. Most permanent commissions have found it desirable to make substantial changes in their guidelines, or have over time reached into new areas of emerging concern, such as sentence-revocation practices or offender risk assessments. If there is a need for the expertise of a sentencing agency in the first instance, that need does not dissipate once the agency has completed a single set of studies or guidelines.

c. Location in government. Subsection (1) provides that the commission should be "an independent agency of state government," but does not specify any particular location in government that the commission should occupy. A sentencing commission may reside in the

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judicial, legislative, or executive branch, or may be defined as an administrative agency without clear assignment to any one branch. Contemporary practices across American jurisdictions vary, and each state must consult its own constitutional structure in deciding how best to define the commission's identity. Regardless of formal designation in one branch or another, however, the commission's functional attributes should be preserved. Important concepts here are that the agency be independent, nonpartisan, broadly representative of the criminal-justice system and the public, and have a strong contingent of members from the state courts; see § 6A.02.

d. The need for a "purposes-of-commission" provision. Subsection (2) recommends that legislatures adopt a purposes-of-commission provision for three reasons.

First, one function of a criminal code is education, and many readers of the Penal Code will have patchy knowledge of sentencing commissions, particularly as they have existed across various states. Even persons newly appointed as commissioners, most of whom have had great experience in the criminal-justice system, may lack a firm sense of institutional mission.

Second, sentencing commissions nationwide have varied enormously in their powers, duties, and the roles they have assumed vis-à-vis other actors in the system. It does not suffice for the revised Code to hold out generically that a sentencing commission should be chartered—any such policy recommendation must make clear *what kind* of commission the Institute has endorsed.

Finally, to the extent that the work product of a sentencing commission is or might be reviewable by other agencies of government, including the courts, a legislative declaration of purpose helps set parameters for the commission's authority.

e. Guidelines development. First among the commission's purposes is its responsibility to develop guidelines, as recognized in subsection (2)(a). This is perhaps the commission's primary function, although the quality of a commission's guidelines depends on how well it carries out its other basic functions. There is thus a close interaction between subsection (2)(a) and the remaining subsections (2)(b) through (2)(f).

The revised Code does not endorse any and all forms of sentencing guidelines, but only those that allow considerable latitude for judicial discretion and the development of a common law of sentencing through developing case law in the trial and appellate courts. Further, the content of the guidelines, and ongoing projections of their impacts, should be informed by high-quality data and research prepared by the commission in an objective, nonpartisan manner. Policy decisions reflected in the guidelines should be made with the input of knowledgeable persons with varied experience from across the criminal-justice system and the broader life of the community, and should be taken with awareness of any similar policy initiatives in other jurisdictions. The guidelines should rest explicitly upon the underlying goals of the sentencing and corrections system. They should always be considered a work in progress, to be amended and improved over time as the commission oversees and evaluates the guidelines' performance

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in light of their purposes. Subsection (2)(a) cross-references Article 6B, which speaks in detail to the vision of sentencing guidelines endorsed by the Institute.

f. Collaboration with, not domination of, judicial branch. The revised Code takes pains to avoid the creation of a sentencing commission with authority to eliminate, override, or ignore the discretionary input of sentencing courts and the appellate bench. Ideally, the commission's guidelines will provide a framework, and starting points for analysis, from which the courts may develop a common law of sentencing sensitive to the variations of individual cases. The aspiration stated in this subsection is reinforced elsewhere in the revised Code. See §§ 1.02(2)(b)(i) (one general purpose of sentencing system is "to preserve judicial discretion to individualize sentences within a framework of law"); 6B.02(7) (limiting legal effect of commission-created guidelines to "presumptive force"); 7.XX ("Judicial Authority to Individualize Sentences").

g. Nonpartisan forum. Sentencing commissions' substantive achievements, and sometimes their very political survival, have depended in large degree on their reputation for nonpartisanship. The data, research, and projections assembled by a commission increase in value with the commission's credibility and track record of objective reporting. When translating policy into presumptive guidelines, a commission's work product is better respected, and meets less resistance in the field, if there are no suspicions that the commission has been captured by one political viewpoint. The reputational capital of a sentencing commission is an asset that increases over time if the commission consistently works to uphold the aspiration stated in subsection (2)(c). Conversely, a commission that acts, or is perceived to act, as an ideological entity sacrifices its strongest claim to legitimacy. Ideally, a commission should be seen as an advocate only for one position: that systemwide choices about sentencing law and policy should be informed by the best available information.

A related provision is Alternative § 6A.02(5) ("Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system").

h. Roundtable function. Subsection (2)(d) highlights what might be called the "roundtable function," accomplished by the commission's bringing together of many knowledgeable and responsible stakeholders from throughout the criminal-justice system and from the public at large. In most states, there are few forums of any kind that regularly assemble judges, prosecutors, defense lawyers, corrections officials, crime victims, and other representatives of the public in the same room. Many of these stakeholders regularly "do battle," and opportunities are scarce for consensus-building on important policy issues. Anecdotally, the success of many sentencing commissions at the state level has been due in important part to the group dynamics among carefully selected commissioners who, although they come from different walks of life, find that they share many common goals in the quest to improve statewide policy.

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Subsection (2)(d) directs attention to the experience of other jurisdictions as sources of knowledge, experience, and value determinations that may be relevant to the commission's work. See also §§ 6A.03(1)(c) (executive director's responsibilities include "maintenance of contacts with . . . sentencing commissions in other jurisdictions"); 6A.04(3)(b) (start-up commission should "study the experiences of other jurisdictions with sentencing commissions and guidelines"); 6A.05(3)(c) (commission should "remain informed of the experiences of sentencing commissions and guidelines in other jurisdictions").

i. Consistency with purposes of sentencing. The revised Code elevates the operational importance of § 1.02(2) (general purposes of the sentencing system) in comparison with the 1962 Code. See § 1.02(2), Comment *a*. Subsection (2)(e) admonishes the commission that the creation of guidelines, and indeed the performance of all of the commission's tasks, must be done in light of fundamental societal purposes identified by the legislature. The commission's explanations for its actions must be framed in terms of the same goals. See also § 6B.03.

j. Continual self-evaluation and improvement. Subsection (2)(f) interlocks with the injunction in subsection (1) that the commission should be a permanent agency. Subsection (2)(f) defines the functions that justify and make necessary the ongoing life of a commission. These include systemic assessment, critical self-evaluation, and periodic adjustment of the guidelines so that the sentencing system may adapt to changing conditions and improve itself over time. Subsection (2)(f) explicitly recognizes, and seeks to communicate to the members and staff of a commission, that the law and policy of criminal punishment are never closed subjects.

The revised Code does not lock into place any one structure of sentencing guidelines, or any one template for a commission's overall activities. Instead, the Code brings into existence an agency of qualified persons to help drive a process of ongoing knowledge development, consensus-building, innovation, self-awareness, and self-correction.

REPORTERS' NOTE [72]

b. A permanent commission. The suggestion of a sentencing commission as a permanent agency of government was first made by Marvin Frankel in his influential book, Criminal Sentences: Law Without Order 118-124 (1973). In support of his recommendation that the commission be a permanent body, Frankel wrote, "There must be recognition that the subject [of appropriate criminal punishments] will never be definitively 'closed,' that the process is a continuous cycle of exploration and experimental change." Id. at 118-119. The recommendation that all American jurisdictions should adopt a permanent sentencing commission, or equivalent agency, has also been the centerpiece of national law reform initiatives. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a) (1994); ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 29-30; The Constitution Project, Principles for the Design and Reform of Sentencing

[72] This Reporters' Note has not been revised since § 6A.01's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 Systems: A Background Report (2006), at 23-25; U.S. Department of Justice, Bureau of Justice Assistance, National
2 Assessment of Structured Sentencing 127 (1996).

3 Over the past 30 years, the permanent sentencing commission has been the most popular institutional
4 framework for reform among those states that have undertaken comprehensive changes in their sentencing laws. As
5 of early 2007, 23 permanent sentencing commissions had been established in 21 states, the District of Columbia, and
6 the federal system. Seventeen of these commissions were charged initially with the creation of sentencing guidelines
7 and then, on a continuing basis, with oversight of their guidelines systems. See Richard S. Frase, State Sentencing
8 Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (as
9 of 2005, 16 American sentencing-guidelines systems with permanent sentencing commissions existed in Arkansas,
10 Delaware, District of Columbia, Kansas, Maryland, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania,
11 Oregon, Utah, Virginia, Washington, Wisconsin, and the federal system); see also Alabama Code § 12-25-1 (2006
12 legislation making Alabama the 17th jurisdiction to charter a permanent sentencing commission charged with
13 oversight of sentencing guidelines). An additional six permanent sentencing commissions existed in states with no
14 formal sentencing guidelines. See Rachel Barkow and Kathleen M. O'Neill, Delegating Punitive Power: The
15 Political Economy of Sentencing Commission and Guideline Formation, 84 Tex. L. Rev. 1973, 1994 table 1 (2006)
16 (reporting existence of longstanding sentencing commissions in Louisiana, Massachusetts, Nevada, New Mexico,
17 Oklahoma, and South Carolina). Finally, in three states—in addition to the 23 above—sentencing guidelines
18 originally created by sentencing commissions were in operation in early 2007, although the legislature in each state
19 had discontinued the commission following the promulgation of guidelines. See Frase, State Sentencing Guidelines,
20 105 Colum. L. Rev. at 1196 (sentencing guidelines in force, but sentencing commissions abolished, in Florida,
21 Michigan, and Tennessee).

22 In early 2007, active discussions to create new permanent state sentencing commissions were underway in
23 several additional states, including California, Colorado, Connecticut, and New Jersey. See State of California,
24 Office of the Governor, Comprehensive Prison Reform: Sentencing Reform (2006); State of California, Little
25 Hoover Commission, Solving California's Corrections Crisis: Time is Running Out 133-148 (2007); Colorado
26 Lawyers Committee, Task Force on Sentencing, Report on the Sentencing System in Colorado: A Serious Fiscal
27 Problem on the Horizon (2006); New Jersey Commission to Review Criminal Sentencing, Sentencing in the 21st
28 Century and the Necessity of a Permanent Sentencing Commission in New Jersey (2006).

29 *c. Location in government.* With much variation across jurisdictions, American sentencing commissions have
30 been chartered in the judicial branch, the legislative branch, or as agencies of no defined location within the
31 branches of government. Assignment to one or another—or none—of the branches of government has made no
32 obvious difference in commissions' effectiveness within their respective states. See Ala. Code § 12-25-1 (2006)
33 (commission within judicial branch as agency of supreme court); Ark. Code § 16-90-802(a) (2006) (silent on
34 location in government); Del. Code tit. 11, § 6580(a) (2006) (no specified location in government); D.C. Code § 3-
35 101(a) (2006) (creating commission "as an independent agency"); Kan. Stat. § 74-9101(a) (2006) (no specified
36 location within the branches); Mass. Gen. Laws ch. 211E, § 1(a) (2006) (independent commission in judicial
37 branch); Minn. Stat. § 244.09, subd. 1 (2006) (no explicit assignment within branches of government); Rev. Stat.
38 Mo. § 558.019(6)(1) (2006) (no reference to location within the branches); N.M. Stat. § 9-3-10(F) (2006)
39 (commission "administratively attached to the office of the governor"); N.C. Gen. Stat. § 164-45 (2006)

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(commission managed by judicial branch, but holds independent authority to exercise its statutory powers); Ohio Rev. Code § 181.21(A) (2006) (commission created "within the supreme court"); 42 Pa. Cons. Stat. § 2151.2(a) (2006) (establishing commission as "an agency of the General Assembly"); 28 U.S.C. § 991(a) (2000) (commission is independent commission in the judicial branch); Va. Code § 17.1-800 (2006) (commission within judicial branch as agency of supreme court); Wash. Rev. Code § 9.94A.850(1) (2006) (commission is "agency of state government" with no assignment within the branches); Wis. Stat. § 15.105(27)(a) (2006) (commission "attached to the department of administration" in the executive branch). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-1.3, 18-4.2, 18-4.5, 18-4.6 (1994) (recommending creation of a permanent sentencing commission, or equivalent agency, as a "governmental agency," or as an agency of the legislative or judicial branch).

The constitutional law of particular jurisdictions may include structural concerns that must be addressed when a commission's institutional identity, powers, and membership are defined in authorizing legislation. Only a tiny case law exists on this subject. See Mistretta v. United States, 488 U.S. 361 (1989) (upholding United States Sentencing Guidelines against federal constitutional claims of impermissible delegation of legislative power and separation of powers violations in placement of the sentencing commission in the judicial branch); Commonwealth v. Sessoms, 532 A.2d 775, 780-781 (1987) (finding no constitutional impediment to legislature's establishment of Pennsylvania Commission on Sentencing as a "legislative agency," but holding the powers of such a "unique" agency are limited by the state constitution; also questioning in dictum the constitutionality of an "administrative agency" with members from both the legislature and judiciary). Given the large number of sentencing commissions that have been created across the nation since the late 1970s, it is notable that there have been virtually no successful challenges on structural constitutional grounds to the composition of the commissions, or their exercises of authority.

d. The need for a "purposes-of-commission" provision. Provisions on the basic purposes of a sentencing commission exist in a number of states, with varying content and degrees of specificity. See Ala. Code § 12-25-2 (2006); Ark. Code § 16-90-802 (2006); Del. Code tit. 11,§ 6580(b) (2006); D.C. Code § 3-101.01(a) (2006); Md. Code, Crim. Proc. § 6-202 (2006); Mass. Gen. Laws ch. 211E, § 2 (2006); Or. Rev. Stat.§ 137.656(1) (2006); 28 U.S.C. § 991(b) (2000); Utah Code Ann. § 63-25a-304 (2006); Va. Code § 17.1-801 (2006).

e. Guidelines development. A consensus has emerged in the law-reform community that a well-designed sentencing commission is better positioned to draft a comprehensive scheme of sentencing guidelines than are the legislature or courts. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-1.3(b), 18-4.1 (1994); American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates 37 (2004); The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report 22-25 (2006); U.S. Department of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing 127 (1996). As of early 2007, 20 American jurisdictions had in operation sentencing guidelines drafted in the first instance by sentencing commissions, see Reporter's Note to Comment *b*, above.

f. Collaboration with, not domination of, judicial branch. The problem of a hegemonic sentencing commission has not arisen in any state guidelines jurisdiction, but has been a central area of difficulty over much of the life of the

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federal sentencing-guidelines system instituted in 1987. See, e.g., Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), ch. 4; Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity 29 Amer. Crim. L. Rev. 833 (1992).

g. Nonpartisan forum. Observers have noted that sentencing commissions produce their most credible work products when they aim toward consensus positions rather than the adversarial resolution of policy issues. See Richard S. Frase, Sentencing Guidelines in the States: Lessons for State and Federal Reformers, 6 Fed. Sent'g Rep. 123, 125 (1993).

h. Roundtable function. Subsection (2)(d) endorses the practice of numerous existing state sentencing commissions, which have made comprehensive study of sentencing reforms elsewhere in the nation when propounding or revising their own guidelines. See 2002 Annual Report of the District of Columbia Advisory Commission on Sentencing (2002), at 1-28; John Kramer and Cynthia Kempinen, The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines, 8 Fed. Sent'g Rep. 74 (1995). In 1994, numerous sentencing commissions formed a national association to facilitate interstate dialogue and cross-fertilization. See Robin L. Lubitz, The Formation of the National Association of Sentencing Commissions, 8 Fed. Sent'g Rep. 71 (1995). The revised Code discourages commissions from following the early practice of the United States Sentencing Commission, which has been much criticized for its failure in its early years to borrow from the experiences of preexisting state commissions and, indeed, for its failure adequately to investigate those experiences. See Michael Tonry, Sentencing Matters (1996), at 86; Kay A. Knapp and Denis J. Hauptly, State and Federal Guidelines: Apples and Oranges, 25 U.C. Davis L. Rev. 679, 681 (1992).

i. Consistency with purposes of sentencing. See Ala. Code § 12-25-2 (2006); 11 Del. Code § 6580(c) (2006); Delaware Sentencing Accountability Commission Benchbook 2006 21; D.C. Code. § 3-101(b)(2) (2006); Minnesota Sentencing Guidelines and Commentary 1 (2006); N.C. Gen. Stat. §§ 164-41(b), (c), 164-42(b), (c) (2006); Rev. Code Wash. § 9.94A.850(2)(a) (2007). For an argument in favor of a requirement that a sentencing commission explain its actions with reference to statutory purposes, see Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1 (1991).

j. Continual self-evaluation and improvement. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a) & Cmt. at 152-153 (1994).

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§ 6A.02. Membership of Sentencing Commission.[73]

(1) The members of the sentencing commission shall include:

(a) [three] members from the state's judicial branch;

[73] This Section was originally approved in 2007; see Tentative Draft No. 1.

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(b) [two] members from the state legislature;

(c) the director of correction;

(d) [one] prosecutor;

(e) [one] criminal defense attorney;

(f) [one] official responsible for the provision of probation or parole services;

(g) one academic with experience in criminal-justice research; and

(h) [one] member of the public.

(2) One of the [judicial] members of the commission shall serve as chair of the commission.

(3) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms.

Alternative § 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) the chief justice of the supreme court or another justice of the supreme court [designated by the chief justice];

[(b) one judge of the court of appeals appointed by the chief justice of the supreme court;]

(c) [three] trial-court judges [appointed by the chief justice of the supreme court];

(d) [four] members of the state legislature [, one of whom shall be appointed by the majority leader of the state senate, one of whom shall be appointed by the minority leader of the state senate, one of whom shall be appointed by the speaker of the house of representatives, and one of whom shall be appointed by the minority leader of the house of representatives];

(e) the director of correction or another representative of the department of correction [designated by the director];

(2) The sentencing commission shall also include the following members [, to be appointed by the governor]:

(a) [two] prosecutors;

(b) [two] practicing members of the criminal defense bar [including at least one public defender];

(c) [one] official responsible for the provision of probation services;

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1 **(d) [one] official responsible for the provision of parole and prisoner reentry**
2 **services;**

3 **(e) one chief of police;**

4 **(f) [one representative of local government];**

5 **(g) one academic with experience in criminal-justice research;**

6 **(h) [three] members of the public [, one of whom shall be a victim of a crime**
7 **defined as a felony, and one of whom shall be a rehabilitated ex-inmate of a prison in**
8 **the state].**

9 **(3) One of the [judicial] members of the commission shall [be designated by the**
10 **governor to] serve as chair of the commission.**

11 **(4) All members of the commission shall serve terms of [four] years, except that one-**
12 **half of the initial members shall serve [two-year] terms. Members may serve successive**
13 **terms without limitation.**

14 **(5) Commission members should be selected for their wisdom, knowledge, and**
15 **experience and their ability to adopt a systemwide policymaking orientation. Members**
16 **should not function as advocates of discrete segments of the criminal-justice system.**

17 **(6) Commission members shall receive no salary for their service, but shall be**
18 **reimbursed for expenses incurred in their work for the commission.**

19 **(7) Authorities empowered to make appointments to the commission should attend to**
20 **the racial, ethnic, and gender diversity of the commission's membership, and should ensure**
21 **representation on the commission from different geographic areas of the state.**

22 **(8) The commission shall have the power to form advisory committees, including**
23 **persons who are not members of the commission, to assist the commission in its**
24 **deliberations.**

25 **Comment:** [74]

26 *a. Scope.* Alternative versions of § 6A.02 are presented to underscore that the revised Code
27 does not seek to dictate what the precise membership of a sentencing commission should be, or
28 how its members should be chosen. No one formula for a commission's composition has proven
29 superior to all others in past decades of experience—and yet model legislation must give a useful
30 starting point to the drafters of future sentencing codes. The alternative provisions here supply
31 workable illustrations for state legislators. Individual jurisdictions are encouraged to adapt these
32 templates to fit their own circumstances.

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[74] This Comment has not been revised since § 6A.02's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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1 Two basic skeletons are given in black letter. The first version of § 6A.02 describes an
2 agency loosely modeled on the Minnesota sentencing commission, which has operated with
3 fewer than a dozen members. The alternative version takes inspiration from North Carolina and
4 Ohio, which now have commissions of more than 30 members.

5 In addition, the first version of § 6A.02 is as streamlined as possible. It omits much of the
6 detail presented in subsections (3) through (8) of the alternative version. The two iterations are
7 not meant to present a stark choice, but bookends of possibility. Legislators are invited to pick
8 and choose from the terms of both provisions.

9 Liberal use of bracketed language in both alternative versions of § 6A.02 signals that there
10 is no strict formula for the specific composition of commission members, and the best methods
11 for appointment of members may vary from state to state. It is generally desirable that the
12 membership represent a full range of perspectives on criminal-justice issues, and that it not be
13 politically or ideologically unbalanced. To this end, there should be multiple appointment
14 authorities or mechanisms to avoid concentration of appointment power in one official or branch
15 of government. The optimum calibration to meet these concerns is a matter each state must
16 address for itself.

17 *b. Roster of membership.* The success of sentencing reforms in individual jurisdictions often
18 turns on the leadership abilities of a handful of public officials. The ambitious project of
19 systemwide change requires the energy, creativity, and commitment of persons who are widely
20 respected, who have devoted the time required to master the comparative advantages of different
21 sentencing-system designs, who are effective communicators, and who understand the priorities
22 and concerns of the many actors working in the pre-reform system. Such leadership is perhaps
23 most needed in the legislature and judiciary. It must also be fostered within the commission
24 itself, through careful selection of the commissioners and executive director; see § 6A.03(1).
25 Each commission member chosen under the alternative provisions of § 6A.02 should be seen as a
26 potential statewide leader in the enterprise of sentencing reform, and as a spokesperson to
27 important constituencies within the criminal-justice system and the general public.

28 It is desirable that a critical mass of experienced judges from the trial and appellate benches
29 serve on the commission. One underlying philosophy of the revised Code is that sentencing is, at
30 its core, a judicial function. Judges—particularly trial judges—bring essential experience to
31 commission deliberations. Judges are also the most important officials in the administration of
32 sentencing guidelines, and judicial resistance to the form or substance of guidelines can be
33 disruptive to the operation of the system as a whole. Heavy judicial involvement in the
34 promulgation of guidelines and guideline amendments can head off later problems.

35 In addition, § 6A.05(5)(d) instructs the commission over time to "study the need for
36 revisions to guidelines to better comport with judicial sentencing practices and appellate case
37 law." The presence of an adequate number of judges on the commission will help ensure that this
38 legislative directive is heeded.

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Section 6A.02(1)(a) recommends that the commission include "[three] members from the state's judicial branch." The bracketed recommendation would make the judicial members the largest single contingent on the commission, and deliberately so—for the reasons stated above. But there is no reason why a state could not opt to have four or five judicial members, or somewhat more, in order to recruit depth of experience and wide representation from the trial and appellate courts. Alternative § 6A.02(1)(a) through (c), for instance, would result in five judicial members (again in bracketed recommendations).

With a similar attitude of flexibility, subsection (1)(a) of the first iteration of § 6A.02 suggests no method of selection of the commission's judicial members. A state that wishes to adopt the provision will be called upon to specify an appointment mechanism. In contrast, Alternative § 6A.02(1)(a) through (c) recommend that appointments of judicial members should rest with the chief justice of the supreme court. Even here, however, the appointment authority is suggested in bracketed language. Some jurisdictions might prefer an alternative selection process. State-specific judgments on this score may vary with the size of a court system, its number of levels, whether judges are elected or appointed, and other factors. The revised Code does not attempt to anticipate the best procedures for all systems.

Many sentencing commissions have no legislative members, or include legislators only as nonvoting members. The desirability of § 6A.02(1)(b) (commission should include "[two] members from the state legislature") and Alternative§ 6A.02(1)(d) ("[four]" voting members from the state house and senate) should be open for discussion in each state. Over the long haul, the success and even the survival of a sentencing commission can depend upon its good working relationship with the state legislature, and upon the degree of respect and understanding among state lawmakers of the work performed by the commission.

Aside from prudential concerns, some states may encounter constitutional difficulty in including legislators as voting members if the commission is located in the judicial branch of government. (This could be reason enough to avoid the placement of the commission in the judicial branch in such a state.) The current draft opts to include a group of legislators, balanced across party lines, on the theory that the commission needs to have close communications with lawmakers and a realistic view of how commission recommendations will fare in the legislative process. Commissioners from the state house and senate can also be influential advocates of the commission's proposals once they go forward. Even in states that opt not to include legislative members on the sentencing commission, these underlying issues need to be highlighted, and addressed through other means.

Section 6A.02(1)(b) sets forth no mechanism for selection of legislative members. Alternative § 6A.02(1)(d), in bracketed language, suggests an appointment process, borrowed from Kansas law, that achieves balanced representation from majority and minority parties. (The bracketed provision is of course not apposite to a state with a unicameral legislature.) One drafting alternative for this subsection would be to specify that the chairs and ranking minority

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1 members of the judiciary committees in both state legislative chambers should automatically be
2 designated as sentencing-commission members. If the judiciary committees are not formally
3 linked to the sentencing commission, it nonetheless remains essential for the commission to
4 forge and maintain regular ties with the leadership of these committees.

5 The remaining rosters of the commission's membership, as set out in both versions of
6 § 6A.02, seek to achieve balanced representation from those sectors of the criminal-justice
7 system most intimately concerned with sentencing law and policy, and from the public at large.

8 The Director of Corrections, or a qualified designee, contributes to a sentencing commission
9 invaluable knowledge and experience about the conditions of imprisonment, the personal
10 histories of inmates and ex-inmates, program availability and development, the process of release
11 planning, the transitional difficulties of prisoner reentry and postrelease supervision, and the
12 overarching problems of correctional management with limited resources and (often) expanding
13 demand. Section 6A.02(1)(c) and Alternative § 6A.02(1)(e) both treat such input as requisite to
14 the life of a commission. Representation from the Department of Corrections, and the full
15 cooperation of that agency, will be especially important to the commission's performance of
16 such tasks as the preparation of impact projections when new sentencing laws or guidelines are
17 proposed, see§ 6A.07, and the collection of periodic surveys of the correctional populations of
18 the state, see § 6A.05(2)(d).

19 Both versions of § 6A.02 also provide for equally balanced representation from the ranks of
20 prosecutors and defense counsel in the state. The streamlined commission would include at least
21 one member from each side of the adversarial aisle. The larger commission would include at
22 least two. Of paramount importance is that neither side be given precedence over the other in the
23 membership roster. Commissions that appear slanted toward either the government or defense
24 viewpoint are likely to encounter strong political backlash. The ideal—not easily obtainable—of
25 an agency that enjoys a solid reputation for nonpartisanship, see § 6A.01(2)(c), will be placed in
26 imminent danger if this principle of equipoise is ignored.

27 As before, the short-form provisions of § 6A.02(1)(d) and (e) recommend no specific
28 appointment process for government and defense attorneys, while Alternative § 6A.02(2)(a) and
29 (b) come under a heading of gubernatorial appointments—but only as a bracketed suggestion.
30 The best method of selection of members of the bar is anticipated to vary widely across
31 jurisdictions, and so the revised Code offers no firm recommendation to all states. The goal of
32 the selection process is to yield commission members with depth of experience, leadership
33 status, and statewide credibility in their respective fields. They should also be persons who may
34 be expected to adopt the "systemwide policymaking orientation" described in Alternative
35 § 6A.02(5).

36 It will be important for prosecutorial members to serve as ambassadors to prosecutors
37 throughout the state on behalf of the commission and its work. A state's selection process should
38 be tailored to produce appointments that match these demanding criteria. The governor's office

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may be well positioned to discharge the task, as suggested in Alternative § 6A.02(2)(a), but individual states might explore other options. It may be desirable in some jurisdictions, for example, to empower the statewide district attorneys association to elect or designate commission members. If more than one prosecutor is to serve on the commission, legislation may require that selections be made from different geographic regions of the state.

Similar principles apply to appointments of defense lawyers to the commission. The qualities that matter most are experience, statewide recognition, credibility within the defense bar, and the ability to adopt a systemwide perspective on difficult policy issues. The selection mechanism enacted by a state legislature should be the one best calculated to produce commission members who answer that description. In some states, the approach of gubernatorial appointment suggested (only in brackets) in Alternative § 6A.02(2)(b) will work well. In other jurisdictions, a statewide defenders association or a public-defender agency might be ceded power to designate or elect one or more commission members. The organization and composition of defense bars across the states vary so widely that model legislation cannot at once speak to all circumstances.

Both versions of § 6A.02 suggest the inclusion of at least one official responsible for the provision of probation or parole services. The revised Code recommends that sentencing guidelines should address the full range of community sanctions, and may usefully extend to some aspects of prison-release decisions, the conditions of postrelease and reentry supervision, and the appropriate consequences of sentence violations. See Article 6B. In all of these tasks, the commission will benefit from input from persons with depth of experience in community-based programming. Among the many subjects comprehended in sentencing-reform initiatives, the encouragement of intermediate punishments and adequate postrelease services has developed the most unevenly across jurisdictions. Thorny issues of state and local governmental responsibilities exacerbate problems of overwhelming demand for programs sustained by inadequate resources. The problems of allocation of support among many competing state and private providers, and adequate monitoring and evaluation to ensure that money is well spent, are as formidable as they are important. Successful innovations in community sanctions require considerable sophistication in design, but also widespread "buy-in" from officials in the service fields that must implement reforms. Commission members chosen from probation or parole offices, however they are selected, should be persons with depth of knowledge and personal prominence among their professional constituencies.

Both versions of § 6A.02 recommend that "one academic with experience in criminal-justice research" be included among the commission's members. Although the number of standing commissions with a dedicated academic member is small, those jurisdictions that have worked with such a requirement view it as a necessity. Prominent among the commission's start-up and ongoing responsibilities are the development of information systems about sentencing, the consumption and sometimes generation of original research about the effects of sentencing laws, the translation of research findings into sentencing guidelines and policy recommendations

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1 to the legislature, and the regular production of impact projections when new sentencing laws
2 and guidelines come under consideration. See §§ 6A.04 and 6A.05. A qualified academic
3 commissioner provides criminal-justice research expertise that otherwise might be missing
4 entirely from the membership. The academic member can be expected to assist in the
5 formulation of the staff's research agenda, and help guide the recruitment and hiring of a high-
6 quality research director and staff.

7 Both versions of § 6A.02 suggest that at least one member of the public be included in the
8 membership roster. Alternative § 6A.02(2)(h), for jurisdictions that prefer a large commission,
9 suggests approximately three public members, with bracketed recommendations that one should
10 be a crime victim and one should be a rehabilitated ex-inmate of a prison within the state. Public
11 members add appreciably to the breadth of perspective found on a commission's rolls, and can
12 aid other members in the task of reflecting the values of the broader community in all of the
13 commission's work.

14 Although all commission members have the duty to deliberate upon and reflect community
15 values to the best of their ability, these efforts would not be complete without direct
16 representation of the general public among the voting commissioners. Questions of justice in
17 punishment, fairness in process, and proportionality among penalties cannot be resolved by data
18 and research alone. When crafting guidelines, a commission is regularly called upon to make
19 moral judgments as to the penalty framework for the system as a whole, and specific
20 recommended penalties within that framework. The successful operation of the sentencing
21 system requires that the guidelines earn and carry the weight of moral legitimacy. See
22 § 1.02(2)(b)(viii). Public commission members are essential to realization of this goal.

23 The opportunities for public input into the shape and evolution of sentencing guidelines
24 should not be limited to the contributions of formal commissioners. Alternative § 6A.02(8)
25 invites commissions to form advisory committees, including members from outside the
26 commission, to broaden the sources of information and insight available to the commission.
27 Even without explicit authorization, a wise commission will make use of this device to reach out
28 to important constituencies across the state, including individuals or groups who cannot feasibly
29 be represented by one or several public-member commissioners.

30 Further, § 6B.02(10) directs the commission to comply with the state's administrative-
31 procedure act (however denominated) when promulgating guidelines or amended guidelines. At
32 a minimum, this will guarantee that public notice and opportunity for comment are routine
33 features of the guideline-drafting cycle. It is in a commission's self-interest to ensure that these
34 processes are observed in a meaningful fashion, and are not merely perfunctory. The best
35 foundations for the success of a sentencing commission and a guidelines structure are public
36 awareness and satisfaction.

37 For the most part, the expanded roster of commissioners in Alternative § 6A.02 is filled out
38 through the inclusion of multiple members in each of the categories discussed above. The

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1 alternative provision also includes two categories of commissioners not found in the shorter-form
2 provision of § 6A.02: one chief of police and one representative of local government. A law-
3 enforcement perspective is otherwise missing on the commission. Although the police are not
4 linked to the sentencing process as directly as other official members, they deal regularly with
5 probationers and prison releasees, and collaborate in an increasing number of jurisdictions with
6 community corrections officials. Reform initiatives such as community policing and community
7 sentencing share philosophical underpinnings and encounter many of the same operational
8 realities. The pragmatic viewpoint of a police chief can add meaningfully to the perspectives
9 supplied by probation or parole officials on problem-solving in the field.

10 The addition of a representative of local government to the sentencing commission furthers
11 the policy goal that the use of effective intermediate punishments at the community level should
12 be increased and encouraged, see § 1.02(2)(b)(iv). In nearly every state, the Department of Cor-
13 rections subsists on appropriations from the state treasury, while most intermediate punishments
14 are organized and funded by local governments. Thus, apparently straightforward efforts to
15 divert prison-bound offenders to community programs can encounter compound problems of
16 intergovernmental authorities, incentives, shortfalls in resources, and barriers to the equitable
17 distribution of costs. A sentencing commission with realistic ambitions to untangle these
18 difficulties must be cognizant of the concerns of local government officials. This may be
19 achieved through local-government representation on the commission's standing membership as
20 recommended in Alternative§ 6A.02(2)(f), through the use of advisory committees that include
21 local government officials, as recommended in Alternative § 6A.02(8), or both.

22 *c. Selection of chair.* Section 6A.02(2) and Alternative§ 6A.02(3) both incorporate a
23 bracketed recommendation that the chair of the sentencing commission be selected from among
24 the judicial members, without insisting that all jurisdictions adopt this as a strict requirement. A
25 judicial chairperson helps effectuate the revised Code's philosophy that the judicial branch
26 should occupy the centermost position in a well-designed sentencing structure. The chair may
27 also serve as a uniquely effective emissary to judges statewide, to help increase judicial
28 understanding and acceptance of the guidelines, and to assure judges that the commission is alert
29 to their feedback and concerns.

30 The past decades of sentencing-commission history in a variety of states have yielded
31 several examples of outstanding chairpersons who have come from walks of professional life
32 other than the judiciary. As a result, both versions of § 6A.02 invite the separate states to reach
33 their own best judgment concerning the mandate of a judicial chairperson.

34 The chair is appointed by the executive in a plurality of jurisdictions with sentencing
35 commissions, and this method of designation is suggested in bracketed language in Alternative
36 § 6A.02(3). No specific recommendation is given in the short-form provision. If not a
37 gubernatorial appointment, a chairperson may be appointed by the chief justice of the supreme
38 court, selected by the commission membership, or designated through other appropriate means.

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1 *d. Terms of service.* Both versions of § 6A.02 provide for staggered terms of service by
2 commission members. Among the founding members, half should be appointed for abbreviated
3 terms, so that in the future the membership will never turn over completely in a single season.
4 The black letter in both versions of the provision suggests, in brackets, that the full term of
5 service should be four years. A somewhat longer or somewhat shorter term could serve equally
6 well. The goal of the provision is to define a period of service that is long enough for members to
7 become immersed in the relevant issues, and to facilitate continuity and institutional memory,
8 but not so long as to make the assignment overly burdensome to the average member. For the
9 occasional commissioner whose level of personal commitment extends for a longer period,
10 Alternative § 6A.02(4) states that "[m]embers may serve successive terms without limitation."

11 *e. Members' systemwide orientation.* Alternative § 6A.02(5) articulates criteria for the
12 selection of commission members that may be commended to appointment authorities, whether
13 or not these criteria are formally codified. Perhaps the most important ideal is that the
14 commission function as a nonpartisan and collegial body, in which members leave behind their
15 job descriptions and role biases to take a common interest in the operation of the punishment
16 system as a whole. There is no way to guarantee that a commission's group personality will
17 coalesce in this way or that all members will leave their advocacy hats at the commission's door.
18 Alternative § 6A.02(5) promotes realization of the ideal by stating it both as a guide to
19 appointing authorities, and as an aspiration addressed to those chosen to serve as sentencing
20 commissioners.

21 *f. Compensation and reimbursement.* Alternative § 6A.02(6) states a preference that
22 commission members should receive no salary for their service, but may be reimbursed for out-
23 of-pocket expenses incurred in their work for the commission. The experience in most states has
24 been that commission members give high-quality public service without compensation, and a
25 commission's reputation for neutrality is enhanced when commission members are not perceived
26 to have vested interests in their offices. Given also that state sentencing-commission budgets are
27 typically strained to support necessary operations, it is wise to preserve available resources.

28 As with most of § 6A.02 (both versions), the recommendation in Alternative 6A.02(6) is not
29 intended to be written in stone. It adopts the successful practice of a number of state sentencing
30 commissions, but is not meant to foreclose experimentation. If a state legislature were to
31 conclude, for example, that better or longer service might be had from commissioners who
32 received a stipend or salary, this arrangement would not offend the spirit of adaptability that
33 permeates all of § 6A.02.

34 *g. Diversity of commission's membership.* Part of the mission of a sentencing commission is
35 to enhance the legitimacy of the punishment system as perceived by all affected communities in
36 the jurisdiction; see § 1.02(2)(b)(viii). This aspiration is especially important with respect to
37 minority groups who often suffer disproportionately from crime victimization and the human
38 costs of legal punishments. In many states, regional differences in crime and levels of

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punishment are also substantial concerns. Wherever reasonably possible, the composition of the commission should reflect the diversity of communities throughout the state.

h. Advisory committees. Existing commissions have sometimes found it advantageous to form advisory committees to forge lines of communications with identified groups or constituencies, or to address specialized projects undertaken by the commission. An initiative to increase the use of and funding for intermediate punishments, for example, may benefit from the expanded input of persons working in the community corrections field, local government officials, academics or consultants with specialized expertise, and others not otherwise associated with the commission. Alternative § 6A.02(8) explicitly grants authority to the commission to constitute advisory committees. The commission's general powers should allow it to do so, however, even in the absence of statutory invitation.

REPORTERS' NOTE [75]

a. Scope. As examples of legislation creating small and large commissions, Minn. Stat. § 244.09, subd. 1 (2006), and N.C. Gen. Stat. § 164-37 (2006) are set out in the Statutory Appendix to this Section.

b. Roster of membership. Existing sentencing commissions range in size from seven to thirty-one members. See Ala. Code § 12-25-3(a) (2006) (16 members); Ark. Code § 16-90-802 (2006) (9 voting and 2 nonvoting members); Del Code tit. 11, § 6580(a) (2006) (11 members); D.C. Code § 3-102(a)(1), (2) (2006) (15 voting members and 5 nonvoting members); Mass. Gen. Laws § 211E, § 1(a) (2006) (9 voting and 6 nonvoting members); Minn. Stat. § 244.09, subd. 1 (2006) (11 members); Rev. Stat. Mo. § 558.019(6)(1) (2006) (11 members); N.C. Gen. Stat. § 164-37 (2006) (30 members); 2003 N.J. Sess. Law Serv. 265 (15 members); N.M. Stat. § 9-3-10(B) (2006) (23 members); Ohio Rev. Code § 181.21(A) (2006) (31 members); Okla. Stat. tit. 22, § 1502 (2006) (15 members); Or. Rev. Stat. § 137.654(1) (2006) (9 members); 42 Pa. Cons. Stat. § 2151.2(a) (2006) (11 members); S.C. Code § 24-26-10(A), (B) (2006) (13 voting and 4 nonvoting members); 28 U.S.C. § 991(a) (2000) (7 voting members and 1 nonvoting member); Utah Code Ann. § 63-25a-301 (2006) (27 members); Va. Code § 17.1-802 (2006) (17 members); Wash. Rev. Code § 9.94A.860 (2006) (24 members); Wis. Stat. § 15.105(27)(a), (b) (2006) (16 voting members and 3 nonvoting members).

The various professional or public qualifications for membership in both versions of § 6A.02 are drawn from the above sources. Commissions in a handful of jurisdictions include members with professional or public backgrounds not specified in the alternative versions of § 6A.02. See Ala. Code § 12-25-3(a) (2006) (the governor or the governor's designee); D.C. Code § 3-102(a)(1), (2) (2006) ("Corporation Counsel for the District of Columbia or his or her designee"; one member of the bar who does not specialize in the practice of criminal law; "[a] professional from an established organization devoted to research and analysis of sentencing issues and policies, appointed by the Chief Judge of the Superior Court of the District of Columbia"); N.C. Gen. Stat. § 164-37 (2006) (The President of the Association of Clerks of Superior Court of North Carolina, or his designee; A representative of

[75] This Reporters' Note has not been revised since § 6A.02's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 the Department of Juvenile Justice and Delinquency Prevention); Wash. Rev. Code § 9.94A.860 (2006) (an
2 administrator of juvenile-court services).

3 On the unique and essential role of judges as sentencing commissioners, see Michael Tonry, Sentencing
4 Matters (1996), ch. 6. One criticism of the composition of the original U.S. Sentencing Commission was the small
5 role given to federal judges. See Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the
6 Federal Courts (1998), at 44 (arguing that judges were seen by Congress as "the *problem* and as such could hardly
7 be part of the *solution*") (emphasis in original). It may be especially important, in a system of advisory sentencing
8 guidelines, that judges be well represented on the sentencing commission. The effectiveness of advisory guidelines
9 depends in important part on their perceived value and legitimacy among judges. See Kim S. Hunt and Michael
10 Connelly, Advisory Guidelines in the Post-*Blakely* Era, 17 Fed. Sent'g Rep. 233 (2005).

11 On the advantages of legislators as sentencing members, or other close ties between the commission and
12 legislature, see Rachel F. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 800-804 (2005). Much lore of the
13 pros and cons of legislative membership exists only in the oral histories of sentencing commissions, but a good
14 discussion of the (mostly positive) experience in North Carolina can be found in Ronald F. Wright, Counting the
15 Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research,
16 vol. 29 (2002).

17 The method of appointment of sentencing commissioners varies across jurisdictions. Nearly all state codes
18 designate multiple appointing authorities spread across the branches of government. See, e.g., Kan. Stat. § 74-9102
19 (2005) (some members designated by statute; others appointed by the chief justice, governor, the senate president,
20 the senate minority leader, the speaker of the house of representatives, and the minority leader of the house of
21 representatives.); Va. Code § 17.1-802 (2006) (some members designated by statute; others appointed by the chief
22 justice, the governor, the speaker of the house, and the senate committee on rules). See also Ala. Code § 12-25-3(a)
23 (2006); Del. Code tit. 11, § 6580(a) (2006); D.C. Code § 3-102(a)(1), (2) (2006); Md. Code, Crim. Proc. § 6-
24 204(a)(1) (2006); Minn. Stat. § 244.09, subd. 2 (2006); N.C. Gen. Stat. § 164-37 (2006); 2003 N.J. Sess. Law Serv.
25 265; Ohio Rev. Code § 181.21(A) (2006); 42 Pa. Cons. Stat. § 2151.2(a) (2006); Utah Code § 63-25a-301 (2006);
26 Va. Code § 17.1-802 (2006); Wash. Rev. Code § 9.94A.860 (2006); Wis. Stat. § 15.105(27)(a) (2006). But see Ark.
27 Code § 16-90-802 (2006) (governor appoints voting members); Mass. Gen. Laws § 211E, § 1(a) (2006) (same); Or.
28 Rev. Stat.§ 137.654(1) (2006) (same).

29 Federal law differs from the multiple-appointment-authority model used by most states. The President alone
30 appoints all seven voting members of the U.S. Sentencing Commission. See 28 U.S.C. § 991(a) (2006).

31 *c. Selection of chair.* Provisions for the selection of the commission's chair are varied. Almost universally, the
32 chair must be selected from the commission membership. Across jurisdictions, there is some preference for a
33 judicial member to serve as chair. See Ark. Code § 16-90-802(c)(2) (2006) (governor selects chair); Del. Code tit.
34 11, § 6580(a) (2006) (chief justice selects chair from judicial members); D.C. Code§ 3-102(c) (2006) (commission
35 elects chair); Kan. Stat. § 74-9102(c) (2005) (governor to selects chair from judicial members); Md. Code, Crim.
36 Proc. § 6-204(a)(1) (2006) (governor appoints chair); Mass. Gen. Laws § 211E, § 1(a) (2006) (governor appoints
37 chair); Minn. Stat.§ 244.09, subd. 2 (2006) (governor selects chair); Rev. Stat. Mo.§ 558.019(6)(6) (2006) (same);
38 N.C. Gen. Stat. § 164-37(1) (2006) (chief justice selects sitting or former judge as chair); 2003 N.J. Sess. Law Serv.

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265 (commission elects chair); Ohio Rev. Code § 181.21(A) (2006) (chief justice to serve as chair); Okla. Stat. tit. 22, § 1504 (2006) (chair appointed by legislative leaders); Or. Rev. Stat. § 137.654(3) (2006) (governor selects chair); 42 Pa. Cons. Stat. § 2152(c) (2006) (commission selects chair); S.C. Code § 24-26-10 (2006) (commission elects chair); 28 U.S.C. § 991(a) (2000) (President appoints chair); Utah Code § 63-25a-301(1) (2006) (commission elects own officers); Va. Code § 17.1-802 (2006) (chief justice to appoint chair who is not active member of the judiciary); Wash. Rev. Code § 9.94A.860(1) (2006) (governor appoints chair); Wis. Stat. § 15.105(27)(d) (2006) (governor designates chair).

d. Terms of service. Sentencing commissioners' terms of service range from two to six years across the states, with additional terms usually permitted. Four years is the term of service found most frequently in state legislation. See Ala. Code § 12-25-3(b)(1) (2006); Ark. Code§ 16-90-802(c)(1)(B) (2006); Del. Code tit. 11, § 6580(a)(1) (2006); D.C. Code § 3-102(b) (2006); Kan. Stat. § 74-9102(e) (2005); Md. Code, Crim. Proc. § 6-204(b) (2006); Mass. Gen. Laws § 211E, § 1(b) (2006); Minn. Stat. § 244.09, subd. 3 (2006); Rev. Stat. Mo. § 558.019(6)(1) (2006); N.C. Gen. Stat. § 164-38 (2006); Okla. Stat. tit. 22, §§ 1502, 1503 (2006); Or. Rev. Stat. § 137.654(2)(a) (2006); 42 Pa. Cons. Stat. § 2152(b) (2006); S.C. Code § 24-26-10 (2006); Utah Code Ann. § 63-25a-602 (West 2006); Va. Code § 17.1-802 (2006); Wash. Rev. Code § 9.94A.860(3) (2006); Wis. Stat. § 15.105(27)(c) (2006). Members of the U.S. Sentencing Commission serve six-year terms, longer than in any state. 28 U.S.C.§ 992(a) (2000).

Alternative § 6.A2(4), intended to ensure that the full membership of a commission does not expire at the same time, is inspired by Del. Code tit. 11, § 6580(a)(1) (2006).

e. Members' systemwide orientation. See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a)(ii) (1994) ("Members of the commission should be selected for their knowledge and experience and their ability to adopt a systemic, policy-making orientation. Members should not function as advocates of discrete segments of the criminal justice system.").

f. Compensation and reimbursement. State sentencing commissioners receive no or token compensation for their service, but are reimbursed for expenses. The following provisions require volunteer service unless otherwise indicated. See Ark. Code § 16-90-802(c)(3) (2006); D.C. Code § 3-102(d) (2006); Kan. Stat. § 74-9102(f) (2005); Md. Code, Crim. Proc. § 6-205(c) (2006); Mass. Gen. Laws § 211E, § 1(b) (2006); Minn. Stat. § 244.09, subd. 4 (2006) (public members compensated $50 per day); Rev. Stat. Mo. § 558.019(6)(7) (2006); N.C. Gen. Stat. § 164-38 (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(E) (2006); Ohio Rev. Code § 181.21(B) (2006); Okla. Stat. tit. 22, § 1503 (2006); Or. Rev. Stat. § 137.654(8) (2006); 42 Pa. Cons. Stat. § 2152(f) (2006); Utah Code § 63-25a-305(1) (2006); Va. Code § 2.2-2813, 17.1-802, and 30-19.12 (2006) (members compensated $50 per day); Wash. Rev. Code § 9.94A.860(5) (2006); Wis. Stat. § 15.105(27)(e) (2006) (members not full-time state employees receive $25 per day).

Compare 28 U.S.C. § 992(c) (2006) (members of U.S. Sentencing Commission are compensated for full-time or part-time service by formula based on salaries of U.S. Court of Appeals judges). There may be dangers of micromanagement in a structure where commissioners are salaried. See U.S. General Accounting Office, U.S. Sentencing Commission: Changes Needed to Improve Effectiveness (1990), at 12 (finding that "the extensive involvement of individual commissioners in what would normally be staff activities . . . contributes to the

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organizational disarray we found at the Commission. . . . Most troublesome is the direct control by individual commissioners over major research projects.").

g. Diversity of commission's membership. See Ala. Code § 12-25-3(b)(3) (2006) ("membership of the commission shall be inclusive and reflect the racial, gender, geographic, urban/rural, and economic diversity of this state"); Kan. Stat. § 74-9102(a)(9) (2005) (of the 2 members from the general public, at least 1 must be a racial minority); Minn. Stat. § 244.09, subd. 2 (2006) ("[w]hen an appointing authority selects individuals for membership on the commission, the authority shall make reasonable efforts to appoint qualified members of protected groups"); N.M. Stat. § 9-3-10(B) (2006) ("The commission shall reflect reasonable geographical and urban-rural balances and regard for the incidence of crime and the distribution and concentration of law enforcement services in the state"); Ohio Rev. Code § 181.21(A) (2006) (requiring the Chief Justice and the Governor to consider adequate representation by race and gender when making their appointments); Or. Rev. Stat. § 137.654(1) (2006) (requiring Governor to consider different geographic regions of the state when appointing members); Utah Code § 63-25a-301(2)(t) (2006) (governor to appoint 2 public members "who exhibit sensitivity to the concerns of victims of crime and the ethnic composition of the population").

h. Advisory committees. Some codes grant explicit permission to the sentencing commission to form subcommittees and advisory committees. Where not express, these powers are likely assumed. See Md. Code, Crim. Proc. § 6-206(a)(1) (2006); N.C. Gen Stat. § 164-43(a) (2006); Okla. Stat. tit. 22, § 1508(B) (2006).

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§ 6A.03. Staff of Sentencing Commission. [76]

(1) The commission shall employ an executive director to serve at the pleasure of the commission. The executive director's responsibilities shall include:

(a) supervision of the activities of all persons employed by the commission;

(b) ultimate responsibility for the performance of all tasks assigned to the commission;

(c) maintenance of contacts with other state agencies involved in sentencing and corrections processes and with sentencing commissions in other jurisdictions; and

(d) other duties as determined by the commission.

(2) The executive director shall select and hire a research director with research experience and expertise, together with a sufficient staff of qualified research associates.

(3) The executive director shall select and hire a director of education and training, together with a sufficient staff to perform necessary functions of education, training, and guideline implementation.

[76] This Section was originally approved in 2007; see Tentative Draft No. 1.

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(4) The executive director shall select and hire such additional staff to be employed by the commission as are necessary to fulfill the responsibilities of the commission.

Comment: [77]

a. Scope. This provision speaks to the composition of the staff of the sentencing commission. The foundational principle of § 6A.03 is that a commission requires adequate personnel to perform its central functions. Sentencing commissions participate in statewide policymaking that will visit dramatic effects upon large numbers of human lives, including offenders, crime victims (past and prospective), their respective families, and their communities. The commission's work also carries enormous budgetary implications for state and local governments. A well-functioning commission can do much to ensure that public resources are deployed in an effective and cost-efficient manner. Given the magnitude of the human and financial stakes involved, a responsible state legislature should recognize that the costs expended to build a qualified professional staff are a necessary investment.

b. Executive director. It is desirable to have a single staff member with ultimate responsibility to see that the commission's work gets done, that deadlines are met, that budgets are prepared and maintained, and so on. Section 6A.03 as a whole defines a chain of organizational authority from the commission membership to the executive director to the remainder of the staff. A clear chain of command helps ensure that the commission's staff are given clear direction and cannot be pulled in multiple, conflicting directions.

The executive director's duties are outlined in subsections (1)(a) through (1)(d). These include supervision of the activities of all persons employed by the commission, ultimate responsibility for the performance of all tasks assigned to the commission, and other duties as determined by the commission membership.

Subsection (1)(c) provides that an executive director's duties are outward-looking as well as internal. The director is charged with maintaining contacts with other state agencies involved in sentencing and corrections processes. Such lines of communication are needed so that the commission may interact with other government agencies as required in § 6A.08. The director should also forge contacts with sentencing commissions in other jurisdictions. This enables the commission to take advantage of the experiences of other, similar sentencing structures. See § 6A.01(2)(d).

c. Research staff. Subsection (2) gives emphasis to the commission's research capabilities and underscores the need to build a commission staff that is well supported by qualified research associates as well as a research director. The quality of the commission's work in all essential areas—including guideline drafting, monitoring and assessment of the sentencing system's operation, and the preparation of projections of the future impact of sentencing laws—depends

[77] This Comment has not been revised since § 6A.03's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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1 on the recruitment of a research staff capable of gathering, organizing, and interpreting the
2 necessary data.

3 *d. Education and training staff.* Subsection (3) underscores the importance of adequate
4 personnel to discharge functions of education, training, and guideline implementation. No matter
5 how workable a commission's sentencing guidelines may be, the commission plays an essential
6 role in making explanatory resources available to other actors throughout the sentencing system.
7 These may include the preparation of user's guides or benchbooks, the development of user-
8 friendly software, the collection of summaries of relevant case law, the maintenance of an
9 official website, the offering of training seminars or materials, and the establishment of a "hot
10 line" to accept telephone queries; see § 6A.05(6). Although no one doubts the ongoing necessity
11 of educating judges, lawyers, and probation officers, and ensuring that procedures are followed
12 and that proper records are maintained throughout the system, these unglamorous tasks are
13 typically overlooked in authorizing legislation.

14 *e. Additional staff.* Subsection (4) is a catch-all provision authorizing the executive director
15 to employ additional staff as necessary to fulfill the commission's responsibilities. The range of
16 possibilities cover a broad spectrum including clerical workers and maintenance staff, on the one
17 hand, and, if found necessary by a commission, additional professional staff such as in-house
18 counsel or specialized consultants.

19 **REPORTERS' NOTE**[78]

20 *a. Scope.* Most jurisdictions equip sentencing commissions with their own executive director and staff. See
21 Ala. Code § 12-25-12 (2006); Ark. Code § 16-90-802(f) & (g) (2006); D.C. Code § 3-107 (2006); Kan. Stat. § 74-
22 9103 (2005); Md. Code, Crim. Proc. § 6-205(d) (2006); Mass. Gen. Laws § 211E, § 1(c),(g) (2006); Minn. Stat.
23 § 244.09 (West 2006); N.C. Gen. Stat. § 164-39 (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(D)(2)
24 (2006); Ohio Rev. Code § 181.21(C) (2006); Or. Rev. Stat. § 137.654(7) (2006); S.C. Code § 24-26-30 (2006); 28
25 U.S.C. § 996 (2000); Va. Code § 17.1-804 (2006); Wash. Rev. Code § 9.94A.855 (2006); Wis. Stat. § 973.30(2)
26 (2006). See also See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(c) (1994)
27 ("Adequate staff assistance for the commission is essential and should include persons familiar with recent
28 developments in empirical criminology"). A handful of states have provided no staff to the sentencing commission,
29 but allow the commission to draw on staff from other agencies or departments. See Del. Code tit. 11, § 6581(i)
30 (2006); Rev. Stat. of Mo. § 558.019(8) (2006).

31 The sizes of sentencing commissions' staffs, and levels of state funding, vary considerably across
32 jurisdictions. The following table displays legislative appropriations for 17 American sentencing commissions
33 charged with ongoing oversight of sentencing-guidelines systems. The information was compiled in an Internet
34 search of the most recent available budget information in each jurisdiction.

[78] This Reporters' Note has not been revised since § 6A.03's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Legislative Appropriations for Seventeen Sentencing Commissions

Alabama Sentencing Commission	$495,306 for FY 2007
Arkansas Sentencing Commission	$346,571 for 2007-2008
Delaware Sentencing Accountability Commission	$20,000 annual appropriation each year since 1987; Delaware Criminal Justice Council provides administrative support and Delaware Statistical Analysis Center provides research support
District of Columbia Sentencing Commission	$699,567 for FY 2007
Kansas Sentencing Commission	$703,220 for FY 2007
Maryland State Commission on Criminal Sentencing Policy	$338,901 for FY 2007
Minnesota Sentencing Guidelines Commission	$926,000 for 2006-2007 biennium
Missouri Sentencing Advisory Commission	Subsumed within Missouri Supreme Court budget for FY 2006
North Carolina Sentencing and Policy Advisory Commission	$746,701 for 2006-2007
Ohio Criminal Sentencing Commission	$343,730 for FY 2007
Oregon Criminal Justice Commission	$1,126,359 for 2005-2007 biennium
Pennsylvania Commission on Sentencing	$1,120,000 for 2006-2007
United States Sentencing Commission	$13,126,000 for FY 2005

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Utah Sentencing Commission	$147,800 for 2006-2007
Virginia Criminal Sentencing Commission	$886,171 for FY 2006
Washington State Sentencing Guidelines Commission	$863,000 for FY 2007
Wisconsin Sentencing Commission	$308,700 for FY 2006-2007

1 Sources: Alabama Legislative Fiscal Office, State General Fund Comparison Sheets, FY 2007 as Enacted;
2 Arkansas 86th General Assembly, Agency Budget Information, Arkansas Sentencing Commission (Agency 0328)
3 2007-2009 Biennium; Personal communication from John O'Connell, Director, Delaware Statistical Analysis
4 Center, January 24, 2007; Personal communication from Kim Hunt, Director, District of Columbia Sentencing
5 Commission, January 23, 2007; Appropriations Report for Kansas Sentencing Commission (Fiscal Year 2007);
6 Maryland Department of Budget and Management, Summary of Operating Budget Appropriations for the Fiscal
7 Year Ending June 30, 2007 at C.3; Minnesota Department of Finance, State Agency Profiles, Sentencing Guidelines
8 Comm. 2 (2006) The Missouri Budget–Fiscal Year 2007, Judiciary at 12-13;; North Carolina 2006-2007 Revised
9 Certified Budget Volume 4 at 10; Ohio H.B. 66, 126th Leg. (2005); State of Oregon, Legislative Fiscal Office,
10 Analysis of the 2005-2007 Legislatively Adopted Budget 144 (2005); Commonwealth of Pennsylvania, Governor's
11 Office of the Budget, 2006-2007 Enacted Budget 166 (2006); U.S. Sentencing Commission 2005 Annual Report, c.
12 1 at 5; 2006 Utah Laws Ch. 1 (S.B. 1); Virginia Acts of Assembly c. 951 (2005 Sess.); 2006 Wash. Legis. Serv. c.
13 372, § 224 (S.S.B. 6386) (2006); 2005 Assemb. B. 100, Wisconsin Executive Budget Bill FY 2006-2007, at 253.

14 *c. Research staff.* See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(d)
15 (1994) ("The commission's empirical research capacity should be given highest priority and should be adequately
16 funded by the legislature"); Minn. Stat. § 244.09, subd. 10 (2006) (mandating that commission hire a research
17 director). The secondary literature has recognized the critical importance of adequate research expertise and research
18 staffing in order for a sentencing commission to perform its basic functions. See Kay A. Knapp, Organization and
19 Staffing, in Andrew von Hirsch et al., The Sentencing Commission and Its Guidelines (1987).

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§ 6A.04. Initial Responsibilities of Sentencing Commission.[79]

(1) In the first [two years] of its existence, the sentencing commission shall promulgate and present to the legislature one or more proposed sets of sentencing guidelines as provided in Article 6B, and shall develop a correctional-population forecasting model as provided in § 6A.07.

(2) In discharging its responsibilities under subsection (1), the commission shall:

(a) collect information on all correctional populations in the state;

(b) survey the correctional resources across state and local governments; and

(c) conduct research into crime rates, criminal cases entering the court system, sentences imposed and served for particular offenses, and sentencing patterns for the state as a whole and for geographic regions within the state.

(3) In discharging its responsibilities under subsection (1), the sentencing commission should:

(a) consult available research and data on the current effectiveness of sentences imposed and served in the jurisdiction as measured against the purposes in § 1.02(2); and

(b) study the experiences of other jurisdictions with sentencing commissions and guidelines.

(4) In conjunction with its activities under this Section, the sentencing commission may:

(a) advise the legislature of any needed reallocations or additions in correctional resources;

(b) recommend to the legislature any changes needed in the criminal code, and recommend to [the rulemaking authority] any changes needed in the rules of criminal procedure, to best effectuate the sentencing guidelines promulgated by the commission; and

(c) identify and prioritize areas where necessary data and research are lacking concerning the operation of the sentencing system, and recommend to the legislature means by which the commission or other state agencies may be empowered to address such needs.

(5) The commission shall make and publish a final report to the legislature and the public on its activities as outlined in this Section.

[79] This Section was originally approved in 2007; see Tentative Draft No. 1.

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Comment: [80]

a. Scope. This provision defines the essential mission of a sentencing commission during the startup phase of its existence. The required initial period is expected to be roughly 24 months, as indicated in bracketed language in § 6A.04(1). Following the start-up phase, a commission's continuing responsibilities are defined in § 6A.05.

b. Time period. The time frame in subsection (1) is a crucial element of the provision. It is important that legislators and other policymakers plan sensibly for the manifold difficulties of a commission's early duties. The revised Code seeks to dispel any notion that a new commission can discharge its role in wholesale sentencing reform over a short period. Startup commissions in some jurisdictions have been hampered by unrealistic deadlines. Although these may be extended, and often are in the face of necessity, the thoughtful and efficient promulgation of statewide sentencing policies is best achieved within a workable timeline established from the outset.

The suggested two-year period is close to the minimum necessary for a new commission to do its work carefully and with proper staging. The appropriate timeline for each jurisdiction will vary somewhat depending on a host of factors, including the size, population, and regional diversity of the state, the resources given the commission, the complexity of the pre-reform sentencing structure, the quality of preexisting criminal-justice information systems, the political climate of the state, and the clarity of instructions conveyed to the commission in authorizing legislation. Depending on such circumstances, the startup phase could be pared to as little as 18 months or extended to as much as three years.

c. Guidelines and forecasting model. The commission's primary tasks in its early life are the promulgation of sentencing guidelines and the development of a correctional-population forecasting model, as highlighted in subsection (1). These are, respectively, the commission's most significant prescriptive work product and its most useful research tool. All other responsibilities in § 6A.04 are calculated to facilitate the commission in performance of its primary tasks.

Section 6A.04 itself provides no instruction on the shape and legal effect of the guidelines the commission is asked to prepare. These subjects are treated in Article 6B, which is cross-referenced in § 6A.04(1). Similarly, this provision does not lay out the details of the correctional forecasting model to be developed by the commission, a subject dealt with in the cross-referenced § 6A.07.

d. Required research agenda. Subsection (2) describes research activities that a commission must undertake in order to assemble foundational knowledge of the existing sentencing and corrections system in the state. Any sentencing guidelines authored by the commission must be

[80] This Comment has not been revised since § 6A.04's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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sensitive to standing correctional populations, available correctional resources, crime rates, past case-processing patterns, and past sentencing patterns. Any correctional-population forecasting model developed by the commission will require at least this much information if it is to generate reliable projections. Subsection (2) does not grant a commission discretion to deviate from its stated research agenda.

e. Encouraged research agenda. Subsection (3) encourages the commission to consult available research about the effectiveness of sentences imposed and served in the jurisdiction in light of their underlying purposes, and to study the experiences of other jurisdictions with sentencing commissions and guidelines. The first task is meant to comprehend a survey of evaluation research of criminal sanctions. This includes such things as a survey of research into the crime-reductive benefits of incarceration for specific offense types and offenders, the effectiveness of in-prison and outpatient drug-treatment programs depending on the characteristics of their clientele, the costs and benefits of victim-offender conferences for certain offense types, and so on.

The research tasks in subsection (3) are discretionary with the commission. Relevant evaluation research may not always be available, may describe out-of-state programs not replicated in the commission's home jurisdiction, and may not be of high quality. The injunction to study the experiences of other commission-guideline states will be more important to some commissions than others, and its application may be topic specific. A commission working in a sentencing system that is closely modeled on one or more outside jurisdictions may have greater reason to consult outside experience than a commission in a state that has created a wholly unique sentencing structure.

Nothing in subsections (2) and (3) is intended to preclude a commission from identifying and performing research tasks in addition to those enumerated in the statute.

f. Recommendations for change elsewhere in the sentencing system. In both its early and later periods of existence, a sentencing commission may find that its observations of the guidelines in action, its proposals to amend the guidelines, the findings of its impact projections, or some other aspect of its work counsel in favor of legislative or rulemaking changes outside the commission's authority. Subsection (4) creates official lines of communication between the commission, the legislature, and the rulemaking authority of the state, so that the commission's recommendations on such matters will receive an official hearing.

Subsection (4)(a) authorizes the commission to advise the legislature of needed reallocations or additions in correctional resources within the state. It is meant to be read broadly so that the words "correctional resources" are understood to include not only prisons and jails, but the full range of community-based punishments. Some commissions have persuaded their legislatures to allocate substantially increased appropriations to intermediate punishments, in conjunction with sentencing guidelines designed to divert offenders away from confinement

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1 sanctions. Other commissions have accurately projected state-prison population growth in time
2 for new prison construction to get underway. All such functions are embraced in this subsection.

3 Subsection (4)(a) is also intended to direct the commission's attention to problems of
4 intergovernmental funding. If statewide planning suggests that substantial numbers of offenders
5 who would formerly have been sent to the state penitentiary (funded by the state treasury) should
6 now be punished in the community (at the expense of local governments), appropriate
7 mechanisms must be devised to shift costs and cost savings across levels of government.

8 Subsection (4)(c) carves out a special area of concern. A commission often will have need
9 of data and research that it itself is not equipped to generate. For example, the information on
10 correctional populations that the commission is required to "collect" in § 6A.04(2)(a) will
11 typically be prepared by the Department of Corrections and the department of probation or
12 community of corrections, however denominated. Evaluation research concerning the
13 effectiveness of sanctions, which the commission is encouraged to "consult" in § 6A.04(3)(a)
14 must for the most part be conducted by public or private entities other than the commission.
15 Many other examples could be given. In most jurisdictions, however, the sources of data and
16 research about the criminal-justice system are badly lacking. All sentencing commissions for the
17 foreseeable future will be forced to do their work in the face of serious knowledge gaps.
18 Subsection (4)(c) provides the startup commission with formal opportunity to "identify and
19 prioritize areas where necessary data and research are lacking concerning the operation of the
20 sentencing system, and recommend to the legislature means by which the commission or other
21 state agencies may be empowered to address such needs." The provision ensures that the
22 commission's informed voice may be added to the crucial project of improving the knowledge
23 base for criminal-justice decisionmaking. This responsibility remains with the commission after
24 its startup phase, as part of its periodic omnibus review of the sentencing system; see § 6A.09(c).

25 *g. Final report.* All of the commission's work pursuant to this provision is to be
26 memorialized in a published final report made available to the legislature and the public. All
27 reports prepared by a commission under this Section and§ 6A.05 are subject to the requirement
28 in § 6A.01(2)(e) that the "commission shall . . . provide explanations for its actions consistent
29 with the purposes of the sentencing system in § 1.02(2)." While § 6A.04(5) requires a "final"
30 report, nothing in the provision precludes the commission from preparing interim reports as
31 needed.

32 The commission's ongoing duties to report to the legislature and the public following the
33 startup period are set out in § 6A.05(7) and § 6A.09.

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REPORTERS' NOTE [81]

a. Scope. Most American sentencing-commission legislation draws no clear distinction between the initial duties of a sentencing commission and its ongoing responsibilities following completion of a startup phase. Most existing provisions address both initial and continuing duties. See Del. Code tit. 11, § 6581 (2006); Kan. Stat. § 74-9101 (2006); Mass. Gen. Laws ch. 211E, § 2 (2006); Minn. Stat. § 244.09 (2006); Rev. Stat. Mo. § 558.019(6) (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(D) (2006); N.C. Gen. Stat. §§ 164-42.1 & 164-43 (2006); Okla. Stat. tit. 22, § 1508 (2006); Or. Rev. Stat. § 137.656(2), (3) (2006); 42 Pa. Cons. Stat. §§ 2153-2155 (2006); S.C. Code § 24-26-20 (2006); Va. Code § 17.1-803 (2006); Wis. Stat. § 973.30(1) (2006). The revised Code endorses the practice of the minority of sentencing commission jurisdictions, which have made a clear statutory delineation between a commission's startup and ongoing responsibilities. See Ala. Code §§ 12-25-9, 12-25-33, 12-25-34 (2006); Ark. Code § 16-90-802(d)(1) (2006); D.C. Code §§ 3-101(b) & 3-101.01(a) (2006); Ohio Rev. Code §§ 181.23 and 181.24 (2006).

Different routes have been taken by American jurisdictions that have accomplished comprehensive sentencing reform in the past 30 years. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002); David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 27 (2001); Rick Kern, Sentencing Reform in Virginia, 8 Fed. Sent'g Rep. 84 (1995). One approach has been the creation of a temporary sentencing commission, or a study group, to formulate recommendations for permanent changes in a jurisdiction's sentencing laws and institutions. Frequently, the "startup" group has eventually recommended the chartering of a permanent sentencing commission. See William H. Pryor, Jr., Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943 (2005); Report of the District of Columbia Advisory Commission on Sentencing 1-3 (2000); 2003 Report of the District of Columbia Advisory Commission on Sentencing 69-72 (2003); D.C. Code § 3-101(a) (2006) (District of Columbia Council created a Truth in Sentencing Commission in 1997, an Advisory Commission on Sentencing in 1998, and a permanent sentencing commission—following the recommendation of the Advisory Commission—in 2004). The revised Code bypasses any preliminary step of a study group to decide whether the creation of a permanent sentencing commission is a desirable reform. It is the Institute's firm recommendation that a permanent sentencing commission, or equivalent agency, should be chartered in every jurisdiction. See § 6A.01(1) and Comments *a*, *b*.

b. Time period. Rough, workable timelines between the enactment of sentencing commission enabling legislation and the commission's first set of comprehensive recommendations are suggested in state-specific histories of sentencing reform. See William H. Pryor, Jr., Keynote Address, Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943, 951-954 (2005) (3 years from the passage of legislation establishing Alabama Sentencing Commission until commission's first set of recommendations were passed in Alabama Sentencing Reform Act of 2003); Richard S. Frase, Sentencing Guidelines in Minnesota, 1978–2003, in Michael

[81] This Reporters' Note has not been revised since § 6A.04's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005), at 131-132 (2 years between sentencing commission enabling legislation and effective date of sentencing guidelines in 1980); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 39 (2002), at 72-76 (legislation created new commission in 1990 that was given until the summer of 1992 to promulgate guidelines recommendations, which were not finished until 1993); David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 28 (2001), at 82-83, 92 (commission's enabling legislation passed in 1981; commission presented recommendations that legislature enacted in 1983).

c. Guidelines and forecasting model. Many jurisdictions have directed new sentencing commissions to promulgate or propose sentencing guidelines, usually in conjunction with a projections tool to estimate the future impact of the guidelines on correctional resources. See Ala. Code §§ 12-25-33(1), (5); 12-25-34 (2006); Ark. Code § 16-90-802(d)(1)(A) (2006); Del. Code tit. 11, § 6581(a) (2006); Kan. Stat. § 74-9101(b)(1) (2006); Minn. Stat. § 244.09, subds. 5, 12 (2006); Rev. Stat. Mo. § 558.019(6)(3) (2006); N.C. Gen. Stat. § 164-43(a)(1) (2006); Ohio Rev. Code § 181.23(A) (2006); 42 Pa. Cons. Stat. § 2154(a) (2006); Va. Code § 17.1-803(1) (2006); Wis. Stat. § 973.30(1)(c),(d) (2006).

d. Required research agenda. See Ala. Code § 12-25-34(a)(1) (2006); D.C. Code § 3-101(b)(1) (2006); Rev. Stat. Mo. § 558.019(6)(2) (2006); Ohio Rev. Code §181.23 (2006); Wis. Stat. § 973.30(1)(b) (2006). Some sentencing commissions have used research into past sentencing practices to provide benchmarks for penalties in the commission's initial guidelines. See Ala. Code § 12-25-34(b) (2006); D.C. Sentencing Comm'n, 2006 Practice Manual, § 1.1; Va. Code § 17.1-805(A) (2006).

f. Recommendations for change elsewhere in the sentencing system. See Ala. Code §§ 12-25-10, 12-25-33(8) (2006); Ark. Code § 16-90-802(a) (2006); Del. Code tit. 11, § 6581(b), (d) (2006); D.C. Code § 3-101(b)(1) (2006); Minn. Stat. § 244.09, subd. 6 (2006); N.C. Gen. Stat. § 164-42.1(a)(2) (2006); Ohio Rev. Code § 181.23(A)(6), (7) (2006); 42 Pa. Cons. Stat. § 2153(a)(12) (2006).

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§ 6A.05. Ongoing Responsibilities of Sentencing Commission.[82]

(1) This Section sets forth the continuing responsibilities of the sentencing commission following completion of its initial responsibilities under § 6A.04.

(2) The commission shall:

(a) promulgate and periodically revise sentencing guidelines as needed, subject to the provisions of Article 6B;

[82] This Section was originally approved in 2007: see Tentative Draft No. 1.

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(b) prepare correctional-population projections for the sentencing system at least once each year, and whenever new guidelines or laws affecting sentences are proposed, as described in § 6A.07;

(c) develop computerized information systems to track criminal cases entering the court system; the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served; sentencing patterns for the state as a whole and for geographic regions within the state; data on the incidence of and reasons for sentence revocations; and other matters found by the commission to have important bearing on the operation of the sentencing and corrections system;

(d) collect and, where necessary, conduct periodic surveys of the correctional populations and resources of the state;

(e) assemble information on the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

(f) investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities.

(3) The commission should:

(a) make full use of available data and research generated by other state agencies, and cooperate with such agencies in the development of improved information systems;

(b) study the desirability of regulating through statute, guidelines, standards, or rules the charging discretion of prosecutors, the plea-bargaining discretion of the parties, the discretionary decisions of officials with authority to set prison-release dates, and the discretionary decisions of officials with authority to impose sanctions for the violation of sentence conditions; and

(c) remain informed of the experiences of sentencing commissions and guidelines in other jurisdictions, study innovations in other jurisdictions that have possible application in this state, and provide information and reasonable assistance to sentencing commissions in other jurisdictions.

(4) The commission may:

(a) offer recommendations to the legislature on changes in legislation, and recommendations to [the rulemaking authority] on changes in the rules of criminal procedure, needed to best effectuate the operation of the sentencing-guidelines system or of the commission;

(b) conduct or participate in original research to test the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

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1 **(c) collect and, where necessary, conduct research into the subsequent histories of**
2 **offenders who have completed sentences of various types and the effects of sentences**
3 **upon offenders, victims, and their families and communities.**

4 **(5) The commission shall monitor the operation of sentencing guidelines, relevant**
5 **procedural rules, and other laws, rules, or discretionary processes affecting sentencing**
6 **decisions. In performing this function, the commission shall:**

7 **(a) design forms for sentence reports to be completed by sentencing courts at the**
8 **time of sentencing in every case;**

9 **(b) study the use of sentencing guidelines by the courts and other officials charged**
10 **with their application;**

11 **(c) monitor the sentencing decisions of the appellate courts and the impact of**
12 **sentence appeals on the workloads of the courts;**

13 **(d) study the need for revisions to guidelines to better comport with judicial**
14 **sentencing practices and appellate case law; and**

15 **(e) monitor compliance with procedural rules, particularly as applicable to**
16 **administrative and correctional personnel engaged in the collection and verification of**
17 **sentencing data.**

18 **(6) The commission shall take steps to facilitate the implementation of sentencing**
19 **guidelines by responsible actors throughout the sentencing system. In performing this**
20 **function, the commission shall:**

21 **(a) develop manuals, forms, and other controls to attain greater consistency in the**
22 **contents and preparation of presentence reports and sentence reports;**

23 **(b) provide training and assistance to judges, prosecutors, defense attorneys,**
24 **probation officers, and other personnel;**

25 **(c) provide information to government officials, government agencies, the courts,**
26 **the bar, and the public on sentencing guidelines, sentencing policies, and sentencing**
27 **practices; and**

28 **(d) produce, as needed, manuals, users' guides, worksheets, software, summaries**
29 **of case law, Internet resources, and other materials the commission deems useful to**
30 **explain and ease the proper application of the guidelines.**

31 **(7) The commission shall make and publish annual reports to the legislature and the**
32 **public on the commission's activities, including data collection and research, reports of any**
33 **special research undertaken by the commission, and other reports as directed by the**
34 **legislature.**

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(8) The commission shall perform such other functions as may be required by law or as may be necessary to carry out the provisions of this Article.

Comment: [83]

a. Scope. The ongoing responsibilities of a permanent sentencing commission, following completion of the startup tasks in § 6A.04, are addressed in this provision. Although no longer concerned with the creation of an initial set of sentencing guidelines, the commission acquires duties of monitoring and assessing the performance of the guidelines in action, and amending the guidelines as needed in light of accumulating experience or changes of circumstance. In addition, the commission's role as the information center of the sentencing system matures following the startup period. Over time, the legislature and other policymakers should come to rely upon the data and projections regularly produced by the commission's research staff. The commission's duties of reporting, education, training, and guideline implementation also begin in earnest following the startup phase.

Section 6A.05 prioritizes the commission's responsibilities through designation of various tasks as mandatory, encouraged, or discretionary. Subsections (2) through (4), in a descending hierarchy, address the commission's obligations to amend the guidelines and recommend other changes in laws or procedural rules as needed, and to generate data and research concerning the operation of the sentencing system as a whole. Subsections (5), (6), and (7) speak respectively to the commission's specialized duties to monitor the guidelines and other laws affecting sentencing, facilitate proper implementation of the guidelines, and report on its own activities. Subsection (8) grants residual power to the commission to perform other tasks required by law or when necessary to carry out its operations as defined in Article 6A.

b. Mandatory continuing duties. Subsection (2) enumerates an ambitious but realistic program of general activities that must be performed by a sentencing commission.

Subsections (2)(a) and (2)(b) give prominence to the commission's most visible responsibilities: the promulgation of new and amended guidelines, as needed in light of the best available information; and the regular preparation of correctional-population impact projections. Neither responsibility is described fully in this provision. Instead, cross-references are given to the more detailed statutory instructions in Article 6B (Sentencing Guidelines) and § 6A.07 (Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts).

Subsection (2)(c) calls upon the commission to develop computerized information systems to track the flow of cases through the sentencing system. Most of the relevant data will be assembled through sentencing reports completed by trial courts, using forms designed by the commission, see subsection (5)(a) (requiring the commission to design the relevant forms) and § 6A.08(4) (requiring courts to complete a sentencing report in every case and transmit the report

[83] This Comment has not been revised since § 6A.05's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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to the commission). Some of the required data must be collected from other agencies, such as court administrators, probation offices charged with the preparation of presentence reports, and parole boards or other officials with authority over sentence revocations; see § 6A.08(1), (2).

The data incorporated into the commission's information systems should be sensitive enough to inform ongoing policy scrutiny of sentencing practices in the jurisdiction. The optimum level of sensitivity, however, cannot easily be defined in statute. With improvements in knowledge, research methods will not remain static. Only a competent research staff, working with an awareness of what other sentencing commissions are doing, and refining their work over time, can give definition to the mandate in subsection (2)(c). One or two illustrative points bear mention, however.

First, subsection (2)(c)'s injunction that the commission track "the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served" is meant to inspire the search for important and measurable variables. The offender characteristics tracked by the information system should include at a minimum the race, ethnicity, gender, age, class, educational attainment, marital status, employment status, prior record, and substance-abuse history. Characteristics of crime victims should be tracked by the system, as well, together with basic facts about the relationship between the victim and offender. The gathering and reporting of victim-related data is especially important, even though it is typically neglected, because of the robust correlations between victim characteristics and penalty consequences shown repeatedly in death-penalty research.

Second, the commission should seek information about offense types, and their effects on sentences, that go beyond the bare statutory definitions of discrete crimes. In all criminal codes, some offenses cover a wide range of behavior. Some assaultive crimes in some jurisdictions, for example, may be committed without victim injury, with relatively slight injury, or with life-threatening injury—and yet be named and graded as the same substantive offense. If all "aggravated assaults" are coded in the information system as identical events, the system will lack crucial sensitivity concerning the diversity of harms in different cases. Worse yet, if offense types are bunched into heterogeneous sets such as "violent" and "property" crimes, the ability of the information system to help explain punishment consequences will approach zero. Accordingly, the sentencing commission should design tracking systems that search for the significant and measurable offense variables that affect penalty outcomes. These will often include offense-related factors that go beyond formal legal categories.

Subsection (2)(d) requires the commission periodically to "collect" or "conduct" surveys of the state's correctional populations and resources. An accurate cross-sectional portrait of standing correctional capacities is a prerequisite to the commission's correctional forecasting duties, see § 6A.07, and its responsibilities to help the legislature address shortfalls in available resources, see § 6A.09(b). Correctional surveys are also required if the sentencing guidelines are to comprehend the full array of sentencing alternatives available to the courts, see § 6B.05 (to be

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drafted). A full-scale program for the use of intermediate punishments cannot be designed or implemented without knowledge of program availability.

Other state agencies should be able to supply most of the information denoted in subsection (2)(d). Ideally, a commission will be in a position to "collect" rather than expend resources to "conduct" correctional surveys. Existing commissions have not uniformly enjoyed such advantages, however. Particularly in the domain of intermediate punishments, whose availability tends to vary from local government to local government, sentencing commissions have sometimes been called upon to assemble statewide information concerning what programs are available, and where.

Subsection (2)(e) requires the commission to "assemble" information on the effectiveness of sentences of various kinds in meeting the goals of the sentencing and corrections system. This amounts to a command that the commission become a consumer of otherwise available research. Subsection (4)(b), setting forth only a discretionary responsibility, states that the commission "may" choose to "conduct or participate in original research" of this kind. The two subsections, read together, envision a commission that may engage in evaluation research on a selective basis, but is not weighted down with the burden of conducting expensive and time-consuming studies as a comprehensive duty. The revised Code places a high priority on the generation of evaluation research, see § 1.02(2)(b)(viii), but§ 6A.05 reflects the view that the sentencing commission is not the proper agency to do the bulk of this work. The research and development capabilities of the sentencing system will be a subject taken up in Part IV of the revised Code.

Subsection (2)(f) assigns to the commission the ongoing task of investigating the existence of discrimination or inequities in the sentencing system across population groups, and searching for the means to eliminate those problems wherever they are found. This provision helps give effect to the general purpose of the sentencing system in § 1.02(2)(b)(iii) ("to eliminate inequities in sentencing across population groups"). Subsection (2)(f) supplements the commission's related duty, in subsection (2)(b) and§ 6A.07, to routinely make projections of demographic patterns in sentencing expected to result from proposed legislation or guidelines. Correctional projections alert policymakers to expected demographic effects before they occur, so the consequences of new provisions may be visualized and debated in advance. In contrast to demographic projections, subsection (2)(f) creates a demographic audit function applied to the sentencing system already in place.

c. Encouraged general responsibilities. Subsection (3) identifies tasks that most sentencing commissions will find necessary, or should choose to perform, as their experience deepens. Subsection (3)(a) recognizes that the commission may need to consult and make use of data and research generated by other state agencies; see, e.g., Comment *b* above. In return, the subsection contemplates that the commission should cooperate with other agencies in the development of improved information systems. A related provision is § 6A.09(1)(c) (commission required

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periodically to make recommendations to the legislature concerning data and research needs within the system).

Subsection (3)(b) explicitly acknowledges that the prescriptive agenda of a commission might usefully expand as it accumulates knowledge of systemwide issues. The provision invites the commission to study the desirability of introducing new regulation into stages of decisionmaking that occur both before and after the operation of traditional sentencing guidelines. Subsection (3)(b) neither requires nor authorizes the commission to stride into such areas of potential regulation on its own. Rather, it instructs the commission to "study." If this process leads the commission to recommend changes in law, subsection (4)(a) provides means to address the relevant lawmakers.

Data to support the ongoing study responsibilities referenced in subsection (3)(b) should be gathered pursuant to subsection (2)(c).

Among the subjects embraced by subsection (3)(b), the charging discretion of prosecutors and the plea-bargaining discretion of the parties, have undoubted effects upon the punishment consequences of many cases. No current model exists, however, for the direct regulation of charging and bargaining decisions. Most guideline systems, like the revised Code, contain a number of targeted provisions that limit the legal effects of charging decisions or plea agreements; see, e.g., § 6B.06(5) (limits upon the use of sentence agreements as grounds for departure) and § 6B.08 (limits upon the sentencing consequences of charges of multiple counts). Subsection (3)(b) encourages the commission to explore additional possibilities.

The remainder of subsection (3)(b) recognizes that "sentencing," as a subject matter, does not end with the pronouncement of penalties in the courtroom. The final sentencing outcome of a given case typically remains unknown for some time, which may extend over months or years. In prison cases, sentencing courts lack sole authority to determine lengths of stay even in jurisdictions where parole-release authority has been abolished. Some important part of each jurisdiction's sentencing policy is thus made and implemented by officials—usually corrections officials—who hold authority to pass on prison-release dates. These authorities may include prison officials with discretion to grant or withhold good-time or earned-time credit, officials with power to adjust lengths of stay for inmates' disciplinary violations, traditional parole boards (where they exist), and, in some jurisdictions, sentencing courts granted discretion to revisit penalties after their original pronouncement. A comprehensive regulatory approach to sentencing policy and outcomes would include the full chronology of important decision points.

The same may be said of the commission's responsibility to study possible regulation of officials with authority to impose sanctions for the violation of sentence conditions, including the revocation of sentences. These low-visibility decisions, when cumulated, have massive repercussions for the sentencing system as a whole. Nationwide in the early 2000s, for example, roughly 40 percent of all admissions to state prisons were parole revocations rather than new court commitments. In some states, a majority of prison admissions each year flow from

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sentence revocations. A few existing sentencing commissions have concluded that their oversight of the sentencing system must be extended to the sanctioning of sentence violators. Individual commissions have made progress in this domain, but no single best approach to the systemwide regulation of sentence revocations has yet emerged. Subsection (3)(b) thus places the topic on the commission's plate of concerns, but does not command when or how the commission should act.

Subsection (3)(c) encourages reciprocal channels of assistance from and to sentencing commissions in other jurisdictions. The majority of existing commissions have at some point in their life undertaken surveys of commission-guideline structures in other states, either as part of their initial guideline-development process, or to inform the ongoing evaluation and amendment of their guidelines or research practices. Because commission-guideline systems are designed to innovate and remake themselves over time, through collaborative input from the commission and the courts, a commission's curiosity about best practices in other jurisdictions should never expire. Nor should such inquiries be relegated to the "spare time" of staff or commissioners. Subsection (3)(c) legitimizes commission activities that supply assistance to sentencing agencies in other jurisdictions, as well as those that solicit assistance.

d. Discretionary general responsibilities. Three areas of activity, all desirable in some circumstances, are included as discretionary responsibilities in subsection (4). Subsection (4)(a) invites the commission to remain alert to any changes in the criminal code or rules of criminal procedure that would be helpful to the operation of the sentencing guidelines or the commission itself. The subsection provides a formal avenue for transmitting recommendations on these topics to the state's legislature or rulemaking authorities.

Subsection (4)(b) adds to the commission's agenda the possibility of original evaluation research into the effectiveness of criminal sentences; see Comment *b*. Many commissions have performed or participated in such research on an occasional basis, sometimes with the assistance of special appropriations from the legislature, or with funding from other sources, see § 6A.08(5), (6). Good-quality evaluation research is an urgent need of all sentencing systems, but it is typically expensive and can take years to perform. Subsection (4)(b) makes clear that an ambitious commission need not step back from the task on the theory that it is beyond its charter. The drafters of the revised Code, however, concluded that it was unrealistic to require or even encourage a state commission routinely to divert its finite energies to ambitious assessment studies.

Subsection (4)(c) responds to concerns similar to those underlying subsection (4)(b). Some sentencing commissions have mounted the effort of gathering longitudinal recidivism data on offenders who have passed through the sentencing system, usually in a one-time study. No commission has itself sought to gauge the indirect impact of sentences on families and communities, although this is a growing area of research elsewhere, and is an explicit priority within the revised Code's vision of a sentencing and corrections system; see § 1.02(2)(b)(viii).

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As with subsection (4)(b), subsection (4)(c) gives full authority to a commission to pursue such investigations at its own choosing, but draws short of overwhelming the commission with an ongoing obligation to do so. The research areas defined in subsections (4)(b) and (4)(c), which the commission itself cannot fully address, will be subject matters of first importance in Part IV of the revised Code.

e. Duty to monitor the operation of guidelines. Subsection (5) defines a critical subset of the commission's responsibilities to gather information about the sentencing system. It highlights a continuous duty to monitor the operation of sentencing guidelines, relevant procedural rules, and other laws, rules, or discretionary processes affecting sentencing decisions. Subsection (5) does not set the exact parameters of these tasks, which are intended to evolve over time, except to identify several essential duties in subsections (5)(a) through (5)(e).

Subsection (5)(a) requires the commission to design appropriate forms for "sentence reports" to be completed by trial courts in every case that reaches sentencing. The reports are the central mechanism through which the commission will be apprised of actions taken by the courts in light of case characteristics, and the reasons given by courts for departures from guideline presumptions. Section 6A.08(4) requires the trial courts to transmit a copy of the sentencing report to the commission in every sentenced case.

A commission should expect to devote substantial care and attention to the design of the sentence report forms. The forms should not be so cumbersome as to overwhelm busy sentencing courts, yet must be sufficiently sensitive to track the most salient case characteristics affecting sentencing decisions; see Comment *b*, supra. The commission should recognize when preparing sentence report forms that they will define the data stream available to policymakers for years to come, and future revisions to the form cannot capture retrospective information. The commission should design the forms with its research obligations under subsection (2)(c), (2)(f), and (4) in mind, and in anticipation of its needs when conducting periodic omnibus reviews of the sentencing system under § 6A.09.

Subsections (5)(b), (5)(c), and (5)(d) require the commission to study the operation of its guidelines as actually used by courts and other officials. All three subsections omit much detail that might have been included to define how these tasks are to be performed. The most successful and most practical approaches to the monitoring responsibilities under subsections (5)(b) through (5)(d) will undoubtedly change over the years. Particularized strategies should be determined by each commission, aided by its professional research staff, in light of available resources and the best practices followed in other jurisdictions. Ideally, sentencing commissions nationwide could someday develop compatible methodologies for the collection and recording of monitoring information, so that interjurisdictional comparisons may be made with greater ease than is possible today.

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Subsection (5)(b) states the commission's core responsibility to study the use of its sentencing guidelines by courts and other officials. This ongoing work will supply the basis for a large portion of the commission's annual report; see subsection (7).

Subsection (5)(c) directs the commission's attention to the subject of appellate sentence review, and imparts the responsibility to monitor the substantive decisions of the appellate courts in guidelines cases. It also includes a duty to monitor the impact of sentence appeals on the workloads of the courts. While most state guidelines systems that have authorized sentence appeals have not witnessed an unmanageable surge of appellate activity, at least one system (the federal system) experienced dramatic increases in the workloads of the Courts of Appeals following the implementation of sentencing guidelines. The revised Code seeks to enable and encourage appellate sentence review as a law-generative component of the sentencing system, but to do so in a way that emulates the state, and not the federal, experience. See § 7.09. Subsection (5)(c) is intended to produce a red flag if demands upon the appellate bench become overly burdensome. Such dysfunction should cause the commission to consider guideline amendments to address the problem. If necessary, the commission may also recommend legislative change; see subsection (4)(a).

Subsection (5)(d) creates a mechanism to help ensure that the balance of institutional authority in the sentencing system will not become distorted over time. The provision safeguards the intended structural relationship between the commission and the courts, in which the two institutions "collaborate" in the development of a common law of sentencing, but the commission does not hold power to dominate the courts; see §§ 6A.01(2)(b), 6B.02(5). On a continuing basis, the commission is enjoined to study the need for amendments to the guidelines so they can "better comport with judicial sentencing practices and appellate case law."

Subsection (5)(d) codifies the historic behaviors of most state sentencing commissions, but runs contrary to many years of practice of the United States Sentencing Commission, which often amended its guidelines to overrule judicially developed sentencing doctrines. Congress continued the federal practice of unduly marginalizing trial court authority in 2003 when it tightened preexisting limitations on judicial discretion to depart downward from the federal guidelines. In the aftermath of United States v. Booker, there are new rumblings in the federal system that Congress may act once again to tightly rein in judicial sentencing discretion and lawmaking authority.

In contrast to the federal history, most state sentencing commissions have found it desirable, and in their own self-interest, to modify guidelines periodically to better reflect judicial sensibilities and to enhance the courts' acceptance of guideline presumptions. For example, state commissions that have observed high rates of departure from particular presumptive guidelines have often treated this finding as a basis to revise the relevant guidelines so that they fall more closely in sync with judicial decisions. Similarly, state commissions have sometimes added to their enumerations of aggravating or mitigating departure factors in the text of the guidelines, see

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§ 6B.04(4), upon discovering that trial judges have relied upon a given nonenumerated factor with frequency. The historical state, rather than the federal, approach to judicial feedback is codified in subsection (5)(d).

Subsection (5)(e) charges the commission to monitor compliance with procedural rules within the sentencing system. These rules are essential to the maintenance of the commission's information systems and the proper administration of the guidelines.

f. Guideline implementation. Subsection (6) lays down the commission's general responsibility to facilitate the proper implementation of guidelines throughout the sentencing system. Its subsections enumerate several duties that must be performed along these lines. Aside from the required elements of subsections (6)(a) through (6)(d), the commission should shape and continually improve its implementation programs, drawing upon advancing technologies and the innovations of other sentencing commissions.

Subsection (6)(a) directs attention to preparers of presentence reports—the probation office in most jurisdictions. Under a sentencing-guidelines regime, the content of presentence reports will be somewhat different than in an indeterminate sentencing structure. Reports should focus upon factors relevant to guidelines presumptions and departures as determined by the commission and judicial precedent. The accumulation of carefully prepared presentence reports is also critical to accurate reconstruction of offenders' criminal histories. The reports should also be designed to record information useful to the commission in its responsibilities under subsection (2)(c). Section 6A.08(2) contemplates that presentence reports will regularly be transmitted to the commission and will be used by commission research staff as a primary source for data collection. The sentencing commission must assist the realization of all of these objectives through the creation of manuals, forms, and other controls found useful to enhance consistency in the contents of presentence reports.

Subsection (6)(a) also instructs the commission to develop manuals, forms, or other controls as needed to increase consistency in the completion of sentence reports by trial courts, see subsection (5)(a) and Comment *e*, above.

Subsection (6)(b) requires the commission to supply training and assistance in the use of guidelines to judges, prosecutors, defense attorneys, probation officers, and other personnel. The need for training will be especially great in the period immediately following the effective date of an initial set of guidelines. The director of education and training, and the relevant commission staff, see § 6A.03(3), cannot afford to wait, in order to build up their training and implementation capabilities at a leisurely pace. They must be ready for concentrated effort throughout the state, and at all levels of the sentencing system, as the commission nears completion of the "initial" phase of its existence as described in § 6A.04.

The need for training and assistance within an evolving sentencing structure is ongoing. New judges, lawyers, probation officers, and other personnel will continuously enter the system. Changes in legislation, guidelines, or case law will provide grist for continuing education. Large

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alterations in law or process—such as wholesale amendment of the guidelines—may give rise to a training and implementation "bottleneck" comparable to that following first implementation of the guidelines.

The commission's education and training staff should not regard its programming as an exercise in one-way communication, but should view its efforts as an important means to collect feedback from judges and others on the operation of guidelines in the field.

Subsection (6)(c) sets out a responsibility to "provide information" about sentencing guidelines, sentencing policies, and sentencing practices that goes beyond the more focused enterprises of education and training for purposes of proper use of the guidelines. Part of a commission's educational mission includes outreach to increase awareness of the operation of the sentencing system and the activities of the commission. Activities falling within this heading include public-relations initiatives on the part of a commission to increase understanding of and generate support for its guidelines, proposals, and other contributions to the sentencing system. Also included is the commission's responsibility to respond to reasonable requests for information by government officials or agencies, members of the bar, the public, and academic researchers.

Subsection (6)(d) catalogues a number of aids to guideline implementation that a commission may choose to produce. These are borrowed from the most useful creations of past commissions in a number of jurisdictions. The subsection does not require that any or all of the identified aids be prepared by a particular commission, but it does require that some such efforts be undertaken as needs appear.

g. Reporting duties. Subsection (7) states that a commission should make annual reports of its activities. Data collection and dissemination concerning cases entering the system, case processing, sentences imposed, and so on, will be spread too far apart if the regular reporting interval is two or more years. The provision further obliges the commission to prepare specialized reports as requested by the legislature. It does not place responsibility on the commission to prepare formal reports when requested by any other agency or government official.

Subsection (7) provides that all commission reports must be published, including the reports of any special research projects commissioned by the legislature. Publication via the Internet may satisfy the publication requirement.

When making reports of judicial sentencing practices, the commission should define a sentence "in compliance with the guidelines" as a sentence that is consistent with an applicable presumptive sentence, rule, or standard set forth in the guidelines, or a departure from any presumptive provision of the guidelines that is grounded in the purposes of § 1.02(2)(a). To treat departure sentences as "noncompliant" conveys the unwanted connotation that departure sentences are somehow unlawful or erroneous. In fact, departures grounded on proper factors are

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encouraged by the revised Code as essential practice within a well-ordered guideline structure; see §§ 6B.03(4), 7.XX, 7.09.

The definition of "compliance" with sentencing guidelines goes beyond mere semantics. Because data gathered by sentencing commissions is public information, information about the sentencing practices of specific judges will sometimes come to light. This can occur when requested by the press, members of the public, academic researchers, or during the judicial retention process. It is essential in the reporting of judge-specific data that the exercise of proper discretion to individualize sentences not be tarred with the appellation of "noncompliance."

h. Residual responsibilities. Subsection (8) is a catch-all provision acknowledging that static legislation cannot define all responsibilities that should be shouldered by sentencing commissions, now or in the future. As stated in§ 6A.01(2)(f), a commission must do its work "with the expectation that the sentencing system must strive continually to evaluate itself, evolve, and improve." Subsection (8) gives the commission needed leeway to modify its own agenda over time. If further legislation is required to expand a commission's charter, the commission should request new statutory authority pursuant to subsection (4)(a), above.

REPORTERS' NOTE [84]

a. Scope. The outline of § 6A.05 borrows from ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(b) (1994) (listing major responsibilities of a sentencing commission). For provisions speaking to a sentencing commission's ongoing duties, often alongside the commission's initial duties, see Alabama Code §§ 12-25-8 and 12-25-9 (2006); Ark. Code § 16-90-802(d)(2)-(6) (2006); 11 Del. Code § 6581(j) (2006); D.C. Code §§ 3-101(b) and 3-101.01(a) (2006); Kan. Stat. § 74-9101 (2006); Mass. Gen. Laws ch. 211E, § 3(f), (g) (2006); Minn. Stat. § 244.09 (2006); Rev. Stat. Mo. § 558.019(6) (2006); N.M. Stat. § 9-3-10(D) (2006); N.C. Gen. Stat. § 164-43 (2006); Ohio Rev. Code§ 181.25 (2006); Okla. Stat. tit. 22, § 1508 (2006); Or. Rev. Stat.§ 137.656(2), (3) (2006); 42 Pa. Cons. Stat. §§ 2153-2155 (2006); S.C. Code § 24-26-20 (2006); 28 U.S.C. § 994(o)-(r) (2000); Va. Code § 17.1-803 (2006); Wash. Rev. Code § 9.94A.850(2) (2006); Wis. Stat. § 973.30(1) (2006).

b. Mandatory continuing duties

(1) Revision of guidelines. See ABA Sentencing Standard 18-4.2(b)(i). The periodic revision of sentencing guidelines is a near-universal responsibility of all permanent sentencing commissions. See, e.g., Ala. Code § 12-25-33(7) (2006); Ark. Code § 16-90-802(d)(2)(A) (2006) ("[t]he commission shall periodically review and may revise the voluntary sentencing standards"); Kan. Stat. § 74-9101(b)(7) (2006); Minn. Stat. § 244.09, subd. 11 (2006); Va. Code § 17.1-806 (2006); Wash. Rev. Code § 9.94A.850(2)(b) (2006).

(2) Projections of correctional populations. See ABA Sentencing Standard 18-4.2(b)(ii). See Kan. Stat. § 74-9101(b)(8), (15) (2006); Va. Code § 17.1-803(8) (2006); Wis. Stat. § 973.30(1)(h) (2006)

[84] This Reporters' Note has not been revised since § 6A.05's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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(3) Development and maintenance of sentencing information system. See ABA Sentencing Standards 18-4.1(b), 18-4.2(b)(ii). See Ala. Code § 12-25-9(5) (2006); Minn. Stat. § 244.09, subd. 6 (2006); N.C. Gen. Stat. § 164-44(a) (2006); Or. Rev. Stat. § 137.656(3)(b) (2006); 42 Pa. Cons. Stat. § 2153(a)(7), (10) (2006); Wash. Rev. Code § 9.94A.850(2)(d)(1) (2006); Wis. Stat. § 973.30(1)(b) (2006).

(4) Monitoring for racial and other discrimination. See Ala. Code § 12-25-33(8) (2006) (commission's annual report should include "data showing the impact of the initial voluntary standards and the truth-in-sentencing standards by race, gender, and location of the offender"); Wash. Rev. Code § 9.94A.850(2)(h)(i) (2006) (every 2 years commission shall report to legislature on "[r]acial disproportionality in juvenile and adult sentencing, and, if available, the impact that diversions, such as youth courts, have on racial disproportionality in juvenile prosecution, adjudication, and sentencing"); Wis. Stat. § 973.30(1)(g) (2006) (sentencing commission shall "[s]tudy whether race is a basis for imposing sentences in criminal cases and submit a report and recommendations on this issue to the governor, to each house of the legislature under § 13.172(2), and to the supreme court"). See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at iv (recommending that the legislature in each state "conduct racial and ethnic disparity impact analyses, evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation, and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.").

In the assessment of racial and ethnic disparities in sentencing, it is important for commissions, when possible, to control for the race and ethnicity of crime victims. Numerous studies of capital sentencing have shown that the race of the victim in homicide cases can have powerful impact on the probabilities that a defendant will receive a death sentence. Equivalent research in subcapital sentencing, however, has not been performed. For research in the death penalty arena, see U.S. General Accounting Office, Death Penalty Research Indicates Pattern of Racial Disparities (1990); Jon Sorenson, Donald H. Wallace, and Rocky L. Pilgrim, Empirical Studies on Race and Death Penalty Sentencing: A Decade After the GAO Report, 37 Crim. L. Bull. 395 (2001) (meta-analysis of studies of victim-based racial disparities in the use of capital punishment).

c. Encouraged general responsibilities. By Professor Frase's count in 2005, only the United States Sentencing Commission had developed comprehensive guidelines for probation and parole revocations. State sentencing commissions had addressed the subject, if at all, in incomplete ways. Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (sentencing guidelines in Delaware, the District of Columbia, Minnesota, Ohio, Virginia, and Washington attempted "some" regulation of probation revocation decisions, while the guidelines in the District of Columbia, Kansas, North Carolina, Ohio, Oregon, and Utah attempted "some" regulation of parole revocation decisions). See Delaware Sentencing Accountability Commission Benchbook 2006 104-105 (sentencing guidelines include "violation of probation sentence policy;" setting forth presumption that violation of probation will result in offender being moved up only one level in Delaware's five-level continuum of sanctions; presence of aggravating circumstances may justify heavier sanction); id. at 117-28 (Delaware's sentencing guidelines include "bail guidelines"); Kan. Stat. § 74-9101(b)(10) (2006) (commission shall "develop prosecuting standards and guidelines to govern the conduct of prosecutors when charging persons with crimes and when engaging in plea bargaining"); Minn. Stat. § 244.09, subd. 6 (2006) (commission shall conduct ongoing research regarding "plea bargaining, and other matters relating to the

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improvement of the criminal justice system"); Wash. Rev. Code § 9.94A.850(2)(b) (2006) (every 2 years commission shall "[r]ecommend to the legislature revisions or modifications to the . . . prosecuting standards"); id. § 9.94A.850(2)(d)(1) (commission shall "conduct ongoing research regarding . . . plea bargaining").

d. Discretionary general responsibilities

(1) Recommendations of change to legislature. See ABA Sentencing Standard 18-4.2(b)(iv). See Ala. Code §§ 12-25-9(1), (3), 12-25-33(9) (2006); Kan. Stat. § 74-9101(b)(11) (2006); Minn. Stat. § 244.09, subd. 6 (2006); Okla. Stat. tit. 22, § 1501(B) (2006); 42 Pa. Cons. Stat.§ 2153(a)(12) (2006); Wash. Rev. Code § 9.94A.850(2)(c) (2006)

(2) Research on recidivism. At least two states require the sentencing commission to gather recidivism data on an ongoing basis to facilitate the assessment of the effectiveness of in-prison and community treatment programs. See N.C. Gen. Stat. § 164-47 (2006); Wash. Rev. Code § 9.94A.850(2)(h)(iii) (2006); Wis. Stat. § 973.30(1)(j) (2006).

(3) Impact of sentences on families. At least one state requires the sentencing commission to monitor the impact of prison sentences on offenders' families. See N.C. Gen. Stat. § 164-42.1(a)(8) (2006).

e. Duty to monitor the operation of guidelines. See ABA Sentencing Standard 18-4.2(b)(vii). See Ark. Code § 16-90-802(d)(4)(C) (2006); Kan. Stat. § 74-9101(b)(5) (2006); Minn. Stat. § 244.09, subd. 7 (2006); N.C. Gen. Stat. § 164-43(d) (2006); 42 Pa. Cons. Stat. § 2153(a)(14) (2006); Va. Code § 17.1-803(8) (2006).

f. Guideline implementation. See ABA Sentencing Standards 18-4.1(b), 18-4.2(b)(v), (vi), (viii), (ix). See Ala. Code § 12-25-33(2), (3), (4) (2006); Kan. Stat. § 74-9101(b)(3), (4) (2006); Va. Code § 17.1-803(2), (3) (2006); Wis. Stat. § 973.30(1)(e) (2006).

g. Reporting duties. See ABA Sentencing Standard 18-4.2(b)(iii). See Ala. Code § 12-25-33(11) (2006); Ark. Code § 16-90-802(E)(2)(a) (2006) (requiring biennial report); Minn. Stat. § 244.09, subd. 14 (2006); 42 Pa. Cons. Stat. § 2153(b); Va. Code § 17.1-803(10) (2006); Wis. Stat. § 973.30(1)(f),(i) (2006).

h. Residual responsibilities. See Ala. Code § 12-25-33(12) (2006); 11 Del. Code § 6581(j) (2006); Kan. Stat. § 74-9101(b)(12), (16) (2006); 42 Pa. Cons. Stat. § 2153(c) (2006); Va. Code § 17.1-803(11) (2006).

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§ 6A.06. Community Corrections Strategy.[85]

(1) The sentencing commission shall recommend a community corrections strategy for the state, including recommendations for legislation, sentencing guidelines, and legislative appropriations necessary to implement the strategy.

(2) The community corrections strategy shall be based on the following:

[85] This Section was originally approved in 2007; see Tentative Draft No. 1.

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1 **(a) a review of existing community corrections programs throughout the state, the**
2 **numbers of offenders they can accommodate, the level of resources they receive from**
3 **state and local governments, and the available evidence of their effectiveness and**
4 **efficiency in serving the purposes in § 1.02(2);**

5 **(b) the identification of additional community corrections programs needed in the**
6 **state, additional resources needed for existing programs, and other important deficits**
7 **observed by the commission;**

8 **(c) the identification of categories of offenders who would be eligible for**
9 **community corrections sanctions under a new statewide community corrections**
10 **strategy;**

11 **(d) projections of the impact that the implementation of a new community**
12 **corrections strategy would be expected to have on sentencing practices and**
13 **correctional resources throughout the state;**

14 **(e) a study of mechanisms of state oversight and coordination to ensure that**
15 **community corrections programs at the state and local levels are coordinated;**

16 **(f) a study of mechanisms for the equitable distribution of state and local funding**
17 **of community corrections programs; and**

18 **(g) a study of the experience of other jurisdictions that have adopted effective**
19 **innovations in community corrections.**

20 **(3) The development and periodic revision of a community corrections strategy shall be**
21 **part of the commission's initial and ongoing responsibilities.**

22 **Comment:** [86]

23 *a. Scope.* Section 6A.06 gives specific emphasis to the sentencing commission's
24 responsibility to encourage the greater use of intermediate punishments, see § 1.02(2)(b)(iv),
25 while recognizing that meaningful changes in the way criminal sanctions are used cannot be
26 effected by a commission alone. For example, policy-driven diversions of otherwise prison-
27 bound offenders into community sanctions require that the necessary program slots be available.
28 The resources devoted to community corrections, however, have not kept pace with needs in any
29 American jurisdiction. In addition, community corrections programs are funded by local
30 governments in most states. Without statewide coordination and funding assistance from the
31 state legislature, or intergovernmental funding treaties, many local governments can support only
32 the most rudimentary of sanctioning options. As a result, statewide policy in the area is difficult
33 or impossible to implement. A sentencing commission is well situated to assess and make
34 recommendations to ameliorate these compound difficulties.

[86] This Comment has not been revised since § 6A.06's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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Subsection (1) contemplates a comprehensive, statewide community corrections strategy to be recommended by the sentencing commission. The strategy will of necessity include recommendations for statutory amendments and changes in the levels of appropriations made to correctional programs around the state; see also subsection (2)(f). The strategy should also include proposals for appropriate sentencing guidelines within the new environment of expanded intermediate punishments; see § 6B.02(6) (the guidelines shall address the use of all criminal sanctions except, in jurisdictions with capital punishment, the death penalty).

Jurisdictions may take different views on the question of when to ask the commission to undertake the ambitious project of development of a community corrections strategy. The question of timing is left open in subsection (3), making the task a "part of the commission's initial and ongoing responsibilities." Each state should establish a definite time line for the commission's work under § 6A.06.

b. Bases for the community corrections strategy. Subsection (2) gives shape to the underlying work a commission must do when propounding a community corrections strategy. Subsection (2)(a) requires the commission to take stock of existing conditions and available evaluation data. In many states, a study of this kind, by itself, will be a significant contribution to state government and to the courts.

Subsections (2)(b) through (2)(g) provide foundations for the prescriptive content of the commission's community corrections strategy. Subsection (2)(b) requires the commission to produce a statewide vision for community corrections, and a specification of new programming, additional funding, and other sources of support that will be needed to implement the strategy. Subsection (2)(c) requires a specification of categories of offenders eligible for particular community sanctions. Subsection (2)(d) mandates that the commission make projections of financial costs and impacts on sentencing patterns that are anticipated if the strategy is put into place; see § 6A.07.

Subsections (2)(e) and (2)(f) ask the commission to study and recommend mechanisms for improved coordination and funding allocations of community corrections as between state and local governments.

Subsection (2)(g) requires that the commission make an effort to study the innovations of other jurisdictions that have realized success in the creative use of community corrections. See also §§ 6A.01(2)(d); 6A.04(3)(b); 6A.05(3)(c).

REPORTERS' NOTE [87]

This provision is patterned after N.C. Gen. Stat. § 164-42.2 (2006). For other, less detailed provisions that instruct sentencing commission to study available community corrections programs and make recommendations for

[87] This Reporters' Note has not been revised since § 6A.06's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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change to the legislature, see D.C. Code § 3-104(b)(7) (2006); Kan. Stat. § 74-9101(b)(11),(13),(15) (2006); Mo. Rev. Stat.§ 558.019.6(4) (2007); Wash. Rev. Code § 9.94A.850(2)(d),(5) (2006).

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§ 6A.07. Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts.[88]

(1) The commission shall develop a correctional-population forecasting model to project future sentencing outcomes under existing or proposed legislation and sentencing guidelines. The commission shall use the model at least once each year to project sentencing outcomes under existing legislation and guidelines. The commission shall also use the model whenever new legislation affecting criminal punishment is introduced or new or amended sentencing guidelines are formally proposed, and shall generate projections of sentencing outcomes if the proposed legislation of guidelines were to take effect. The commission shall make and publish a report to the legislature and the public with each set of projections generated under this subsection.

(2) Projections under the model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs.

(3) The model shall be designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.

(4) The commission shall refine the model as needed in light of its past performance and the best available information.

Comment: [89]

a. Scope. This Section requires the sentencing commission to develop a correctional-population forecasting model, and imposes certain requirements on the model's characteristics and use. Under the revised Code, the development of a high-quality correctional-population forecasting model is one of the sentencing commission's most important responsibilities; see § 6A.04(1). Experience has shown that a commission's capacity to generate credible impact projections can have profound effects on policy formation, not only within the commission itself, but at the legislative level as well.

[88] This Section was originally approved in 2007; see Tentative Draft No. 1.

[89] This Comment has not been revised since § 6A.07's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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In presumptive-sentencing-guidelines systems, future patterns of judicial sentencing rulings are far more predictable than in traditional indeterminate systems. Indeed, no other American sentencing structure has lent itself to computer modeling of punishment decisions as successfully as the presumptive guidelines jurisdictions. The reasons for this are straightforward. Judges in most guidelines systems elect to follow the recommendations set out in presumptive guidelines in the majority of cases. Even in systems in which trial courts are given wide latitude to depart from the guidelines, as in the revised Code, judicial departures tend to cluster in predictable ways. Over time, especially after a new guidelines system has been implemented, a commission's research staff can refine the projection model in light of its past performance and accumulating information, including the monitoring data collected under § 6A.05(2)(c) and (5). Subsection (4) of this provision insists that this be done.

b. Use of the model. Subsection (1) instructs the commission to develop a forecasting model that may be applied to existing sentencing laws and guidelines—and to proposed legislation and guidelines. Baseline projections are needed for the routine operation of the system, and serve as points of comparison when changes in the system are contemplated. Baseline projections for existing laws and guidelines must be generated at least once each year; see also § 6A.05(2)(b).

Projections concerning the future impacts of proposed legislation or amended guidelines are likely to constitute the commission's major workload under § 6A.07. Existing sentencing commissions have been called upon in single years to generate dozens or even hundreds of impact projections. When new or amended guidelines are on the drawing table, slight adjustments in presumptive sentence severity even for a single-offense category may be associated with large shifts in expected punishment outcomes. This is especially true for offense classifications under which large numbers of cases move through the courts each year. Similarly, incremental adjustments in variables such as criminal-history scoring may have substantial aggregate effects. Accordingly, the guidelines drafting process must be attended by repeated—and virtually continuous—use of the projection model. Subsection (1) requires that, whenever a new or amended set of guidelines is proposed formally, see§ 6B.11 (alternative versions), the proposal must carry with it a report of the impacts projected by the commission.

Subsection (1) also requires that the commission use its impact-modeling technology to project the effects of proposed sentencing legislation. This provision ensures that the legislature's deliberations will benefit from high-quality information about the expected costs of each proposed enactment. Over the past two decades, there have been numerous examples of punishment laws that were not enacted by state legislatures, or were recalibrated before enactment, as a result of information supplied in sentencing commissions' correctional-impact projections. In jurisdictions where commissions have existed for a number of years, the credibility of the commission's impact projections among legislators tends to grow with time.

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The requirement of impact projections should not be understood as a mandate that the total severity of criminal sentences in a jurisdiction may never change. The correctional-impact projections are neutral in themselves—they do not speak to the wisdom or necessity of a contemplated punishment policy. Their role is to arm policymakers with foreknowledge of anticipatable costs before decisions are taken, and the ability to take timely steps to see that needed facilities and personnel are put in place in a timely fashion. These are elementary components of public fiscal responsibility. For example, an impact projection may serve as timely notice that prison construction must be funded alongside the passage of a new punishment statute or a "toughened" set of guidelines.

The sentencing commission's role in generating projections should be assiduously nonpartisan; see § 6A.01(2)(c). A commission should not lobby for or against prospective legislation, but should limit its advocacy to the promotion of informed decisionmaking; see § 6A.01, Comment *g*.

The final sentence of subsection (1) provides that the commission shall publish a report of each set of projections generated under § 6A.07. The report will be of immediate utility to government decisionmakers, and allows the public to hold government officials accountable for their decisions in light of available information; see § 1.02(2)(b)(viii).

c. Impacts on correctional resources. Subsection (2) makes clear that impact projections are to embrace all correctional resources in the state, at all levels of government. This includes prison and jail bedspaces—the most familiar subject matters of correctional forecasting—and also the full range of community sanctions, including programs of drug treatment and postrelease supervision. Assume, for example, that a proposed set of sentencing guidelines is designed to send fewer offenders to the prisons and a greater number into intermediate punishments. Policymakers need to know that these changes will entail savings in prison bedspaces—as well as predictable expenses associated with the provision of new intermediate-punishment slots. This can alert the legislature to the need for intergovernmental funding accommodations, so that local governments are not placed in the position of subsidizing—or finding themselves unable to subsidize—savings at the state level. Many attempted innovations in offender drug treatment and other community sanctions have foundered upon a state's failure to anticipate and support needed programming.

d. Demographic impacts. Subsection (3) requires the commission to produce projections of "demographic patterns" along with correctional-resource projections. The content of demographic-impact projections is left largely to the commission, except that they must always include information concerning the race, ethnicity, and gender of offenders projected to be punished.

Subsection (3) is not based on existing legislation in any jurisdiction. It is, however, grounded in the existing research capacities of contemporary sentencing commissions.

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Demographic projections can be generated by commissions' research staffs using the same computer modeling technology that supports resource projections.

Model legislation must choose carefully those provisions it recommends that are not based on past experience. The drafters of the revised Code concluded that the hard realities of racial and ethnic disparities in criminal punishment are of urgent social importance, and present enormous complexities; see § 1.02(2), Comment *j*. Section 6A.07(3) is but one provision among the Code's recommendations that seeks to bring greater transparency, accountability, and legitimacy to decisions concerning race, ethnicity, and punishment. See also § 1.02(2)(b)(iii) (cross-referenced throughout the Code); § 6A.05(2)(f); § 6B.06(2)(a) and (4); § 6B.07(4).

Subsection (3) requires that the demographic consequences of existing and proposed sentencing laws and guidelines become better understood, studied, and debated. The provision does not dictate the policy decisions that will result. Rather, the provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.

Projected numerical disparities by race or ethnicity will not always supply a sound basis for avoiding an otherwise justified punishment policy. Numerical disparities by gender will seldom supply such a basis.

For example, rates of homicide commission by African Americans in the most disadvantaged urban communities have exceeded those of the general population for many decades. The victims of high rates of inner-city homicide have in the vast majority of cases also been African Americans. While efforts outside the criminal law must surely be turned to the social, economic, and cultural conditions that produce high levels of homicide in specific communities, the criminal-justice system cannot ignore high rates of serious violent offending, or the victims of those offenses, once they have occurred.

The nation's prisons and jails, and an appreciable share of the racial and ethnic disparities in incarceration, are not the product of penalties for homicide or other serious violent offenses, however. As offense gravity decreases, responsible officials may quickly view high levels of minority-group overrepresentations in sentenced populations as intolerable. Indeed, for crimes low on the felony scale, and especially for drug offenses, research suggests that disparities in imprisonment by race are not closely related to comparable disparities in crime commission. Subsection (3) forces these facts—and their debate—into the open.

Disparities in punishment by gender are driven worldwide by the reality that males commit greater numbers of serious crimes than females. Given the nature of human beings and cultures, it is not realistic to think that rates of criminality across gender lines will equalize. Particularly in the most serious offense categories like homicide, armed robbery, and rape, men outnumber women as offenders by overwhelming margins. Absent massive behavioral changes in society,

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no jurisdiction should aspire to a gender-neutral punishment policy that will produce correctional populations of equal male-female balance.

Still, the projected demographic impacts of existing or contemplated punishment policy on men and women, respectively, should be known and considered by policymakers. In recent years, the populations of women's prisons have grown at a much faster rate than the men's prisons. This has been an unplanned and unanticipated phenomenon. Few argue that it represents sensible public policy. Demographic projections as required in subsection (3) will alert decisionmakers to foreseeable gender impacts within the sentencing system as they are occurring and before they occur.

REPORTERS' NOTE [90]

a. Scope. Many sentencing commissions have established a proven capacity to make accurate impact projections of the effects of sentencing guidelines or legislation upon correctional resources in their jurisdictions. Impact projections may be based on current law or proposed changes in law. See Kim Hunt, Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process, 20 Law & Policy 466 (1998); Ronald E. Anderson, Development of a Structured Sentencing Simulation, 11 Social Science Computer Rev. 166 (1993). Professor Frase reported that, as of 2005, the sentencing commissions in at least 10 states were called upon to make correctional-resource projections as recommended in this Section. Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) ("resource impact projections" used on regular basis in Arkansas, Delaware, Kansas, Maryland, Minnesota, Missouri, North Carolina, Ohio, Oregon, Washington; projections sometimes used in the District of Columbia, Pennsylvania, Wisconsin, and the federal system).

See Ala. Code § 12-25-33(10) (2006) (commission shall "[s]tudy bills introduced in the Legislature affecting criminal laws and procedure and prepare impact statements of proposed legislation on Alabama's criminal justice system, including the prison population"); Ark. Code§ 16-90-802(d)(6)(A),(B) (2006) ("The commission shall develop a research and analysis system to determine the feasibility, impact on resources, and budget consequences of any proposed or existing legislation affecting sentence length. . . . The commission shall prepare and submit to the legislature a report on any such legislation prior to its adoption"); 11 Del. Code § 6580(a) (2006) ("A computer-driven model of proposed sentencing criteria shall be created . . . which will be able to project the effect of alternative policy decisions on the Department of Correction resources"); id. § 6581(d) ("The Commission shall estimate to what extent public and private resources are appropriate and available to meet the specifications and supervision standards necessitated by the population of offenders to be assigned to each level"; this provision applies to confinement and community sanctions alike); D.C. Code§ 3-106 (2006) ("Any recommendations by the [Sentencing] Commission for regulatory changes or legislative amendments relating to crime, sentencing, or correctional matters shall take into consideration existing correctional and supervisory resources, including the availability of intermediate sanctions, and shall be accompanied by an assessment of the impact, if any, on the size of the District's correctional and supervised offender population resulting from such change"); Kan. Stat. § 74-

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9101(6)–(7), (15) (2005) (commission must ensure that sentencing guidelines effectively use state correctional resources, must prepare fiscal-impact and correctional-resource statements, and must prepare prison-population projections); Md. Code, Crim. Proc. § 6-212(3) (2006) (requiring commission to analyze fiscal and statistical impact of proposed sentencing and correctional legislation); Md. Code, Crim. Proc.§ 6-213(a) (2006) ("The Commission shall use a correctional population simulation model to help determine the State and local correctional resources that: (1) are required under current laws, policies, and practices relating to sentencing, parole, and mandatory supervision; and (2) would be required to carry out future Commission recommendations for legislation and changes to sentencing guidelines"); Mass. Laws, Ch. 211E, § 2(6), (6)(B) (2006) (sentencing commission shall recommend policies and practices that "ration correctional capacity and other criminal justice resources to sentences imposed, making said rationing explicit, rational and coherent" and "evaluate, on a yearly basis, the performance of said rationing, making appropriate remedial recommendations"); Minn. Stat. § 244.09, subd. 5(2) (2006) ("In establishing and modifying the Sentencing Guidelines . . . [t]he commission shall also consider . . . correctional resources, including but not limited to the capacities of local and state correctional facilities"); N.C. Gen. Stat. § 164-40(a) (2006) ("The Commission shall develop a correctional population simulation model, and shall have first priority to apply the model to a given fact situation, or theoretical change in the sentencing laws"); id. § 164-43(h) (commission shall apply correctional population simulation model to all proposed legislation affecting criminal penalties and report to legislature); Ohio Rev. Code §§ 181.23, 181.24(C), 181.25(A) (2006) (commission must consider the capacities of state correctional facilities and programs and must project the impact its proposals will have on correctional resources); Okla. Stat. tit. 22, § 1516(A),(B) (2006) (sentencing commission "shall monitor, review, analyze and provide impact statements and reports to the Legislature concerning the criminal law of the State of Oklahoma. . . . The [commission] shall review each bill or joint resolution which impacts the Oklahoma criminal justice system introduced in the Oklahoma Legislature"); Va. Code Ann. § 17.1-803(8) (commission must "[m]onitor felony sentence lengths, crime trends, correctional facility population trends and correctional resources and make recommendations regarding projected correctional facilities capacity requirements and related correctional resource needs."); Wash. Rev. Code § 9.94A.850(2)(h)(i),(ii) (2006) (requiring biennial report to legislature on "[r]acial disproportionality in juvenile and adult sentencing" and "[t]he capacity of state and local juvenile and adult facilities and resources").

No American jurisdiction requires a sentencing commission to project demographic impacts of proposed changes in sentencing law as provided in subsection (3), although such projections have long been feasible with the same modeling techniques used for resource projections. See Ronald E. Anderson, Development of a Structured Sentencing Simulation, 11 Social Science Computer Review 166 (1993); Alfred Blumstein, Jacqueline Cohen and Harold D. Miller, Demographically Disaggregated Projections of Prison Populations, 8 J. Crim. Justice 1 (1980). Given the scale of racial and ethnic disparities in criminal punishment in the nation, see § 1.02(2), Reporter's Note to Comment *j*, this is one policy area in which model legislation must reach beyond existing practice.

The recommendation in subsection (3) was inspired by Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995), at 41-42 (arguing that legislators routinely should consider the foreseeable racial impacts of proposed legislation).

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1 **§ 6A.08. Ancillary Powers of Sentencing Commission.**[91]

2 **(1) Upon request from the commission, each agency and department of state and local**
3 **government shall make its services, equipment, personnel, facilities, and information**
4 **available to the greatest practicable extent to the commission in the execution of its**
5 **functions. Information that is legally privileged under state or federal law is excepted from**
6 **this Section.**

7 **(2) Upon request from the commission, law-enforcement agencies in the state shall**
8 **supply arrest and criminal-history records to the commission, and [probation or pretrial**
9 **services departments] shall provide copies of presentence reports to the commission.**

10 **(3) The commission shall take all reasonable steps to preserve the confidentiality of**
11 **offenders about whom the commission receives information under this Section. Wherever**
12 **possible, the commission shall retain information about specific offenders in a coded form**
13 **that obscures their personal identities.**

14 **(4) Sentencing courts shall complete and supply a sentence report to the commission**
15 **following the sentencing decision in every case. The form of the sentence report shall be as**
16 **designed by the commission pursuant to § 6A.05(5)(a).**

17 **(5) The commission shall have the authority to enter partnerships or joint agreements**
18 **with organizations and agencies from this and other jurisdictions, including academic**
19 **departments, private associations, and other sentencing commissions, to perform research**
20 **needed to carry out its duties.**

21 **(6) The commission shall have authority to apply for, accept, and use gifts, grants, or**
22 **financial or other aid, in any form, from the federal government, the state, or other funding**
23 **source including private associations, foundations, or corporations, to accomplish the**
24 **duties set out in this Article.**

25 **Comment:** [92]

26 *a. Scope.* This Section collects a number of provisions that specify the ancillary powers
27 of a sentencing commission during both its initial phase of existence, see § 6A.04, and its
28 ongoing existence after completion of its initial responsibilities, see § 6A.05.

29 *b. Assistance from other state agencies.* Subsections (1) and (2) recognize that the
30 commission cannot perform its assigned tasks under §§ 6A.04 and 6A.05 without the help of
31 other state agencies. Subsection (1), written to apply generically to all state agencies, instructs
32 those entities upon request from the commission in the performance of the commission's duties,
33 to provide their services, equipment, personnel, facilities, and information to the greatest extent

[91] This Section was originally approved in 2007; see Tentative Draft No. 1.

[92] This Comment has not been revised since § 6A.08's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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practicable. Exception is made only for information that is legally privileged under state or federal law. For example, a state public defender's office need not supply privileged attorney–client information to a sentencing commission, and state health-care providers need not supply privileged physician–patient materials.

Subsection (2) addresses two special cases arising under subsection (1). First, all law-enforcement agencies in the state are instructed to supply the commission, upon request, with arrest and criminal-history records of offenders. Second, the provision commands the relevant agency, usually the probation or pretrial-services department, to provide copies of presentence reports to the commission upon request.

Both kinds of materials addressed in subsection (2) are arguably embraced within the general mandate of subsection (1). Special provision is made for them, however, because a number of sentencing commissions have experienced difficulty in obtaining these essential records from law-enforcement or probation agencies. Subsection (2) is also more forceful than subsection (1) in that it contains no caveat that the assistance to the sentencing commission be rendered only "to the greatest practicable extent."

c. Preservation of offender confidentiality. Wherever reasonably feasible, the commission should take steps to protect the confidentiality of individual offenders about whom it amasses personal information from a variety of sources. Subsection (3) speaks to this concern. It should be possible for the commission to erect privacy safeguards without obstructing important data on offender populations, sentencing patterns, crime trends, and recidivism from outside scrutiny. The second sentence of subsection (3) instructs the commission, where possible, to retain information about specific offenders in a coded form that allows examination of individual-level data but obscures offenders' personal identities. This provision is borrowed from the actual practice of existing commissions.

d. Sentence reports. Subsection (4) formalizes the duty of sentencing courts to complete sentence report forms as designed by the commission, see § 6A.05(5)(a), and to supply those forms to the commission. Without reliable and complete transmission of sentence reports, the commission cannot perform its basic function of monitoring sentences imposed within the systems and the correlates of and reasons for those sentences; see § 6A.05, Comment *e*.

e. Research partnerships. Subsection (5) is rooted in the reality that single jurisdictions, or lone agencies, cannot themselves discharge the research responsibilities that should ideally be met within a sentencing and corrections system. Accordingly, means must be found to join forces with other entities. One model for multijurisdiction cooperation is to rely on the federal government as the primary actor. The support of the federal government, however, has proven inadequate to meet all needs in the area. Accordingly, the states should be encouraged to explore partnerships and consortiums that include other state governments or private associations. A number of existing commissions have undertaken such efforts, which have added meaningfully to their knowledge base and ability to improve the working of their sentencing systems.

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f. Fundraising by commission. Subsection (6) gives commissions broad powers to engage in fundraising to support their operations. Particularly when a commission contemplates ambitious research programs or partnerships outside the scope of its normal operations, see subsection (5) above and § 6A.05(4)(b) and (c), its routine appropriation from the legislature may prove inadequate to the task. As with subsection (5), subsection (6) recognizes the critical shortage in criminal justice, and in the field of sentencing, of basic information and essential research. Statutory tools must be given to sentencing commissions to explore creative ways to address these shortfalls.

REPORTERS' NOTE [93]

b. Assistance from other state agencies. See Ala. Code 12-25-11 (2006); Ark. Code § 16-90-802(d)(7)(b) (2006); Del. Code tit. 11, § 6581(h) (2006); D.C. Code § 3-108 (2006); Kan. Stat. § 74-9106 (2005); Md. Code, Crim. Proc. §§ 6-206(a)(2), 6-207 (2006); Mass. Gen. Laws § 211E, § 1(c)(3),(e) (2006); Minn. Stat. § 244.09, subd. 8 (2006); Rev. Stat. Mo. § 558.019(8) (2006); N.M. Stat. § 9-3-10.1(B) (2006); N.C. Gen. Stat. § 164-44 (2006); 42 Pa. Cons. Stat. § 2153(a)(2),(4),(5) (2006); Or. Rev. Stat. § 137.661 (2006); 28 U.S.C. § 995(c) (2006); Utah Code § 63-25a-305(2) (2006); Va. Code § 17.1-804(C) (2006); Wash. Rev. Code § 9.94A.855 (2006).

d. Sentence reports. Most jurisdictions with sentencing commissions and guidelines require in legislation that sentencing courts provide basic information about sentences imposed to the commission on a routine basis, or else grant the commission authority to impose such a requirement. See Ala. Code § 12-25-35(e) (2006); Ark. Code § 16-90-802(d)(7)(A)(i) (2006); Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987); D.C. Code § 3-105 (2006); Kan. Stat. § 22-3439(a) (2005); Md. Code, Crim. Proc. § 6-210(1) (2006); Mass. Gen. Laws ch. 211E, § 3(h) (2006); Minn. R. Crim. P. 27.03, subd. 2(C) (2006); Or. Rev. Stat. § 137.010(9) (2006); 42 Pa. Cons. Stat. § 2153(a)(14) (2006); 28 U.S.C. § 994(w) (2000); Va. Code § 19.2-298.01 (2006); Rev. Code Wash. § 9.94A.480(2) (2006).

e. Research partnerships. There is no known statutory precedent for subsection (5), yet research partnerships have proven essential to some sentencing commissions to pursue projects beyond the scope of their solo capacities.

f. Fundraising by commission. A fundraising power is granted explicitly to commissions in many existing codes. See Kan. Stat. § 74-9105 (2005); Md. Code, Crim. Proc. § 6-206(a)(3) (2006); Mass. Gen. Laws. ch. 211E, § 1(c)(3), (5) (2006); Minn. Stat. § 244.09, subd. 9 (2006); N.M. Stat. § 9-3-10.2 (2006); N.C. Gen. Stat. § 164-44 (2006; Okla. Stat. tit. 22, § 1509(B) (2006); S.C. Code § 24-26-40 (2006).

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[93] This Reporters' Note has not been revised since § 6A.08's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 **§ 6A.09. Omnibus Review of Sentencing System.**[94]

2 **(1) Every [10] years, the sentencing commission shall perform an omnibus review of**
3 **the sentencing system, including:**

4 **(a) a long-term assessment of the operation of the state's sentencing laws and**
5 **guidelines in meeting the purposes in § 1.02(2), and for their effects on the**
6 **administration, efficiency, and resources of the court systems of the state;**

7 **(b) an assessment of the adequacy of correctional resources at the state and local**
8 **levels to meet current and long-term needs, and recommendations to the legislature of**
9 **means to address shortfalls in such resources, or to better coordinate the use of such**
10 **resources as between state and local governments;**

11 **(c) an analysis of areas in which necessary data and research are lacking**
12 **concerning the operation of the sentencing system and the effects of criminal sentences**
13 **on offenders, victims, families, and communities, including a prioritization of data and**
14 **research needs;**

15 **(d) a comparative review of the experiences of other jurisdictions with similar**
16 **sentencing and corrections systems;**

17 **(e) recommendations to the legislature or [the rulemaking authority] concerning**
18 **any changes in statute, levels of appropriations, or rules of procedure considered**
19 **necessary or desirable by the commission in light of the findings of the omnibus**
20 **review; and**

21 **(f) such other subjects as determined by the commission.**

22 **(2) The commission shall make and publish a report to the legislature and the public on**
23 **its activities under this Section.**

24 **Comment:** [95]

25 *a. Scope.* This Section addresses the fundamental need for global self-assessment of the
26 sentencing system at regular intervals. The revised Code takes the strong view that questions of
27 sentencing law, policy, and procedure cannot be resolved at any point in time for all future years.
28 Indeed, the subject area should be seen as one that is continually evolving. Innovations such as
29 various "restorative justice" procedures, improvements in drug-treatment effectiveness, specialty
30 courts, sentencing information systems, more powerful tools of risk and needs assessments,
31 among others, are likely to change best practices in criminal punishment in the coming years. A
32 sound institutional structure must accommodate self-criticism, experimentation, and pathways

[94] This Section was originally approved in 2007; see Tentative Draft No. 1.

[95] This Comment has not been revised since § 6A.09's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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for permanent change. Subsection (1) instructs the sentencing commission, at least once every 10 years (or a similar interval), to conduct an ambitious omnibus review of the sentencing system to inform the commission's own work, and for the benefit of others within and outside the system.

The kind of study contemplated in § 6A.09 will occur infrequently in the absence of legislative command, and legislative support. It cannot be expected that overworked commission members and staffs will have the time or resources to step back and reflect on long-term trends and big-picture goals as part of their workaday routines. Long-range planning or the search for new horizons of possibility can often appear to be luxuries when compared with the press of current business. State sentencing commissions have conducted omnibus reviews of their systems irregularly at best, but the benefits in self-awareness, concrete changes in guidelines, and improvements in the use of resources have been large. Section 6A.09 would set in place a regular cadence for such efforts, so that they are foreseeable within the life-cycle of a commission.

b. Time interval. The 10-year interval suggested in bracketed language in subsection (1) is intended as an outer boundary. A five-year or seven-year review cycle would be more desirable. Resource constraints, however, might inhibit many commissions from undertaking the task with such frequency. Even a conservative 10-year interval would produce whole-system reviews more often than they have been performed by existing sentencing commissions since the 1980s. Section 6A.09 commits the legislature to support such efforts at least once a decade.

c. Content of omnibus review. Subsections (1)(a) through (1)(f) outline the required contents of an omnibus review. The catch-all provision in subsection (1)(f) reflects the general philosophy of the revised Code that important research functions of the commission should not be narrowly defined by legislation. Over the years, the content and manner of presentation of omnibus reviews should be determined to a large degree by the commission and its research staff. Feedback from the consumers of earlier reviews and reports, see subsection (2), should loom large in a commission's planning for the next review cycle.

Subsection (1)(a) describes in general terms, again subject to the commission's best judgment and accumulating experience, the responsibility to make a long-term assessment of the operation of the state's sentencing laws and guidelines in meeting the purposes of § 1.02(2) (general purposes of the sentencing system). Section 1.02(2) focuses the commission's attention on the success of the system in delivering appropriate individual punishments within the strictures of § 1.02(2)(a), and the realization of the systemwide aspirations set forth in § 1.02(2)(b). A major portion of the omnibus review's table of contents may thus be discerned within the purposes provision itself.

To this the provision adds a particular instruction that the commission is to study the effects of sentencing laws and guidelines on the administration, efficiency, and resources of the court systems of the state. A sentencing system cannot be deemed effective, and stands small chance of faithful implementation, if the administration of sentencing laws and procedures in the courts is unduly burdensome. If disproportionate effort is required to discharge routine tasks, for

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example, the courts will have less available time and attention to resolve issues of difficulty and high significance. Accordingly, administrative efficiency is a critical element of the smooth operation of the sentencing system in both the trial courts and the appellate courts.

Subsection (1)(b) directs the commission's attention to long-term resource needs within the sentencing system. The commission is uniquely situated to speak to this subject because of its regular responsibilities for the preparation of correctional impact projections whenever new sentencing laws or guidelines are proposed; see § 6A.07. Subsection (1)(b) is intended to provoke a broader consideration of resource issues within the state, however, and operates on a longer time horizon than the subject-specific reports prepared under § 6A.07. Further, subsection (1)(b) requires the commission to address the difficult problem of coordination in the use of state and local correctional resources.

Subsection (1)(c) requires the commission to comment upon the adequacy of the data and research available within the sentencing system, and to identify areas in which necessary information is lacking. Severe shortages in knowledge and information have been recognized within American criminal-justice systems for more than a century. Progress in addressing these needs has been real, but slow. Subsection (1)(c) anticipates that knowledge and information deficits will persist for some time to come, but asks the commission to prioritize for the legislature and the public those data and research needs that ought to be highest on the agenda for future development. Under subsection (1)(e), the commission may choose to recommend legislation or changes in appropriations required to address the most urgent needs it has identified.

Subsection (1)(d) continues the revised Code's philosophy that state sentencing systems should make ongoing efforts to learn from one another; see also §§ 6A.01(2)(d), 6A.03(1)(c), and 6A.05(3)(c). A commission undertaking a global reassessment of its own operations, and the sentencing system of its home jurisdiction, cannot reach sensible conclusions without a comparative awareness and perspective. Even on the level of particulars, existing sentencing commissions have found that changes within their own systems are frequently inspired by what other states have done.

The omnibus review might identify problems within the sentencing system that the commission is not empowered to rectify. Subsection (1)(e) creates an expectation, and the relevant lines of communication, so that the commission may convey its recommendations of needed changes in law to the legislature or the state's rulemaking authority.

d. Report of omnibus review. As with all of the commission's significant work, a report of the omnibus review is required in subsection (2). Because the omnibus review speaks to issues of the performance of the sentencing system as a whole, reports under subsection (2) should be of interest to a broader audience of policymakers, professionals, and members of the public than the audience for many other reports prepared by the commission. Indeed, this is one document that can be expected to find a wide readership in other jurisdictions. The report following an omnibus

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review should accordingly be prepared with special care and attention to accessibility in communication.

REPORTERS' NOTE [96]

a. Scope. This provision is based on ABA, Criminal Justice Standards, Sentencing, Third Edition, Standard 18-2.7(b) (1994) ("At least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed"). The commentary to this Standard states that the 10-year interval was "intended as an outer boundary" and that "more frequent systemic review would be desirable." Id. at 37. The revised Code delegates the task to the sentencing commission. There is no statutory precedent for § 6A.09, although a number of sentencing commissions have undertaken useful multi-year studies of major issues in their sentencing systems on an ad hoc basis. See, e.g., Minn. Sentencing Guidelines Comm'n, the Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation (1984); Wash. Sentencing Guidelines Comm'n, A Decade of Sentencing Reform: Washington and Its Guidelines 1981-1991 (1992); John Kramer and Cynthia Kempinen, The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines, 8 Fed. Sent. Rep. 74 (1995); U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform (2004); Va. Criminal Sentencing Comm'n., 2004 Annual Report (2004), at 43-65 (assessing previous decade).

The academic research community has generated important multi-year policy evaluations of the sentencing systems in a handful of states. See David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 27 (2001); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002); Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005).

ARTICLE 6B. SENTENCING GUIDELINES

§ 6B.01. Definitions.[97]

In this Article, unless a different meaning is plainly required:

(1) "sentencing commission" or "commission" means the permanent sentencing commission created in § 6A.01;

(2) "sentencing guidelines" or "guidelines" means sentencing guidelines promulgated by the commission and made effective under § 6B.11, which include presumptive sentences, presumptive rules, other guidelines provisions, and commentary;

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[97] This Section was originally approved in 2007; see Tentative Draft No. 1.

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(3) "presumptive sentence" means the penalty, range of penalties, alternative penalties, or combination of penalties indicated in the guidelines as appropriate for an ordinary case within a defined class of cases;

(4) "departure sentence" or "departure" means a sentence that deviates from a presumptive sentence or rule in the guidelines;

(5) "extraordinary-departure sentence" or "extraordinary departure" means a sentence other than that specified in a statutory mandatory-penalty provision, or a sentence that deviates from a heavy presumption created by statute or controlling judicial decision and made applicable to sentencing decisions in a defined class of cases.

Comment: [98]

a. Scope. This provision sets out definitions for the basic terms used throughout Article 6B. It also gives shorthand references for the most frequently used terms (such as "commission" as an alternative to "sentencing commission" or "departure" in lieu of "departure sentence"). The legal forms and concepts catalogued here also have operation outside of Article 6B, for example, in Article 6A and in §§ 7.XX and 7.09. As required in other Articles, the black-letter text or Comment cross-references Article 6B.

The revised Code does not insist upon a particular lexicon to express the concepts and mechanisms at work in a sentencing-guidelines system. See § 6A.01, Comment *a*. Indeed, even the terminology of sentencing "guidelines" might just as easily be replaced by alternatives such as sentencing standards, standard sentences, sentencing presumptions, or structured sentencing provisions.

b. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments to §§ 6B.01(2) through 6B.01(4):

> **(2) "sentencing guidelines" or "guidelines" means sentencing guidelines promulgated by the commission and made effective under § 6B.11, which include ~~presumptive~~ recommended sentences, ~~presumptive rules,~~ other guidelines ~~provisions~~ recommendations, and commentary;**
>
> **(3) "~~presumptive~~ recommended sentence" means the penalty, range of penalties, alternative penalties, or combination of penalties indicated in the guidelines as appropriate for an ordinary case within a defined class of cases;**

[98] This Comment has not been revised since § 6B.01's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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(4) "departure sentence" or "departure" means a sentence that deviates from a ~~presumptive~~ recommended sentence ~~or rule in the guidelines~~ or other guidelines recommendation;

If a legislature wishes to create advisory rather than presumptive guidelines, it is no longer appropriate to speak of "presumptions" in the guidelines that may be overcome by factfinding and legal analysis performed by sentencing courts. A more accurate word choice, that better defines the operation of guidelines that are merely advisory, is that the corpus of guidelines is made up of "recommendations" for sentencing courts.

Care in the definition of terms may be especially important if a jurisdiction has chosen an advisory-guidelines structure in the hope that constitutional jury factfinding requirements at sentencing will not apply to such a system. Legislatively authorized "presumptions" at sentencing might in some instances run afoul of the Sixth Amendment, if judicial factfinding were explicitly required to override guidelines presumptions. Although it is certainly possible in an advisory-guidelines structure to identify sentences that are consistent or inconsistent with the guidelines, the system must avoid placing a quantifiable legal burden on trial courts to adhere to guidelines terms.

Subsections (2) through (4), adapted to an advisory regime, therefore substitute forms of the word "recommendation" wherever "presumption" occurs in the unaltered subsections.

Subsection (4) retains the concept of a "departure" from advisory guidelines. Although there can be no explicit "departure standard" in an advisory regime, see § 7.XX, Comment *i*, infra, a well-designed advisory system should nonetheless place a burden upon sentencing courts to explain the reasons for their departure decisions. This marginal burden provides at least some incentive to adhere to the guidelines in cases where the judge does not feel strongly that a sound basis for departure exists. It also ensures that sentencing courts will engage in transparent, reasoned analysis whenever their decisions do not ratify the policy judgments embedded in the advisory guidelines. Most importantly, the requirement of a statement of reasons is an absolute prerequisite for appellate sentence review as contemplated in § 7.09.

The concept of an "extraordinary departure," as set forth in § 6B.01(5), is retained for jurisdictions that choose to employ the Code's advisory-guidelines structure. The benchmark against which an extraordinary departure is measured is never a guideline created by the sentencing commission, as explained in subsection (5). Rather, this mechanism comes into play only when the legislature itself, or the appellate courts, create a rule that is invested with a "heavy presumption" of correctness in the sentencing process. The policy choice to have an advisory *guidelines* system should not divest the legislature or the courts of their independent lawmaking powers.

In some cases, the factual basis for an extraordinary departure at sentencing may fall subject to Sixth Amendment requirements of jury resolution under the reasonable-doubt standard. Presumably, in such instances, the legislators or appellate judges who created the heavy

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presumption were willing to countenance the procedural cost of a jury factfinding process. Under the Code's advisory-guidelines structure, § 7.07B remains in effect to give the courts flexibility to employ juries as factfinders at sentencing when required by the Constitution.

REPORTERS' NOTE [99]

a. Scope. Definitions provisions exist in a number of sentencing-guidelines jurisdictions, sometimes in statute and sometimes as part of the guidelines. See Ala. Code § 12-25-32 (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 7; Kan. Stat. § 21-4703 (2006); Md. Sentencing Guidelines Manual 2-4 (2007); Michigan Sentencing Guidelines Manual 9-12 (2006); Minnesota Sentencing Guidelines and Commentary 85-86 (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 18-19 (2005); N.C. Gen. Stat. § 15A-1340.11 (2006); Ohio Rev. Code § 2929.01 (2006); Or. Admin. R. 213-003-0001 (2007); Rev. Code Wash. § 9.94A.030 (2006).

b. States choosing an advisory-guidelines system. For a discussion of the Sixth Amendment requirement of jury factfinding at sentencing, as applicable to presumptive-guidelines systems, and as not applicable to advisory-guidelines systems; see § 7.07B, Reporter's Note to Comment *a*.

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§ 6B.02. Framework for Sentencing Guidelines.[100]

(1) The sentencing guidelines shall set forth presumptive sentences for cases in which offenders have been convicted of felonies or misdemeanors, and nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences, subject to § 6B.04.

(2) The guidelines may set forth additional presumptive rules applicable to sentencing decisions as determined by the commission, or when required by law.

(3) The commission shall determine the best formats for expression of presumptive sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression.

(4) The commission shall promulgate guidelines that are as simple in their presentation and use as is feasible.

(5) The guidelines shall include nonbinding commentary to explain the commission's reasoning underlying each guideline provision, and to assist sentencing courts and other actors in the sentencing system in the use of the guidelines.

[99] This Reporters' Note has not been revised since § 6B.01's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

[100] This Section was originally approved in 2007; see Tentative Draft No. 1.

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(6) The guidelines shall address the use of prison, jail, probation, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission. [The guidelines shall not address the death penalty.]

(7) No provision of the guidelines shall have legal force greater than presumptive force as described in this Article in the absence of express authorization in legislation or a decision of the state's highest appellate court. The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court.

(8) No sentence under the guidelines may exceed the maximum authorized penalties for the offense or offenses of conviction as set forth in §§ 6.03 through 6.11A.

(9) In promulgating guidelines or amended guidelines, the commission shall make use of the correctional-population forecasting model in § 6A.07. All guidelines or amended guidelines formally proposed by the commission shall be designed to produce aggregate sentencing outcomes that may be accommodated by the existing or funded correctional resources of state and local governments.

(10) In promulgating guidelines or amended guidelines, the commission shall comply with the provisions of [the state's administrative procedures act].

Comment: [101]

a. Scope. This provision outlines the characteristics of sentencing guidelines under the revised Code. Within the wide range of possible sentencing systems denoted as "guidelines" systems, the Code selects and recommends those features associated with the most successful state guideline systems. At the same time, the Code allows considerable room for variation and experimentation in different states, and for guidelines to evolve in a single jurisdiction over time.

Subsection (1) states that the guidelines shall contain presumptive sentences for both felonies and misdemeanors. Most states have formulated guidelines for felonies alone, while a growing number of guidelines systems embrace both felonies and misdemeanors. Subsection (1) reflects a policy choice in favor of broader coverage of the guidelines. Large numbers of misdemeanor convictions occur in all American criminal-justice systems, considerable resources are invested in the punishment of those offenses, and the most severe misdemeanor sentences can be more punitive than the least severe felony sentences. A comprehensive approach to fairness, effectiveness, and the efficient use of resources in sentencing law should accordingly reach misdemeanors as well as felonies. Limited exceptions to the comprehensive approach of this subsection are set forth in § 6B.10(2).

[101] This Comment has not been revised since § 6B.02's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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b. Presumptive provisions. Subsections (1) and (2) delineate the commission's powers to author "presumptive" guideline provisions. Subsection (7) expressly limits the commission's authority through use of the same concept: No sentencing recommendation, rule, standard, or other guideline provision promulgated by the commission itself can carry legal authority greater than "presumptive" authority.

The word "presumptive" is not wholly self-defining. On its face, it rules out the extremes of a mandatory guidelines system or one in which guidelines are purely advisory. Many possibilities exist in between these two extremes, however, and all of them could potentially be labeled "presumptive." In order to grasp the quantum of legal force assigned to presumptive guidelines in the revised Code, it is necessary to review the interlocking provisions of §§ 6B.04 (Presumptive Guidelines and Departures); 7.XX (Judicial Authority to Individualize Sentences); and 7.09 (Appellate Review of Sentences). As explained in the Comments following those Sections, the revised Code places heavy emphasis on the preservation of judicial sentencing discretion within a framework of sentencing law. When adequate reasons can be given in specific cases, in light of the purposes of punishment set out in § 1.02(2), the courts hold ultimate discretion to deviate from guideline presumptions.

Subsection (2) permits the commission to draft presumptive-guidelines provisions in addition to the statements of presumptive sentences and the enumerations of aggravating and mitigating factors expressly required in subsection (1). This reflects a general theme in § 6B.02 that the exact form and means of expression of guidelines should not be dictated by the legislature, but should be within the remit of the commission, see subsection (3). Many conceivable guideline provisions fall within the scope of subsection (2). A commission, for example, will find it necessary to promulgate presumptive rules that address the choice between concurrent and consecutive sentences in particular categories of cases; see § 6B.08. Section 6B.03(5) invites the commission to develop principles for prioritization of the utilitarian purposes of sentencing as applied to identified categories of cases. A commission might decide that offenders' criminal histories shall not be considered in the derivation of presumptive sentences, but choose instead to create other rules or principles on the subject; see§ 6B.07(1). The revised Code authorizes the commission to produce standards to assist courts in weighing a defendant's cooperation with the government as a factor at sentencing; see § 6B.06(6). Beyond these examples, commissions may find it desirable to address many other recurring subject matters not specified by statute.

c. Flexibility in means of expression. Subsection (3) gives the commission wide latitude to determine the best means of expression of presumptive sentences and other guidelines provisions. Although most American guidelines jurisdictions have favored a two-dimensional grid (or "chart" or "matrix"), with axes for crime severity and criminal history, the revised Code does not insist upon such a format. A handful of states have experimented with narrative guidelines, or guidelines reduced to offense-specific worksheets. These innovations and others are allowed and encouraged under the Code.

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The two-dimensional grid carries certain advantages that a commission should consider. Most guidelines grids are simple to use. A grid also displays at a single glance numerous policy choices of critical importance to the system as a whole. With modest study, for example, it is easy to discern comparative levels of sentence severity across crime categories. The visual aid of a one-page grid, with its wealth of reference points, can assist the commission in the goal of furthering proportionality in punishment across different offenses; see § 1.02(2)(a)(i). Indeed, the physical layout of a guidelines grid makes it difficult to avoid thinking about proportionality relationships. Suppose for example, in a proposed set of guidelines, a property offender with a prior record of property offending is slated to receive a heavier penalty than a serious violent offender with past convictions for violent crimes. This kind of anomaly can appear glaring in the pictorial layout of a guidelines grid. Similarly, the grid format may be useful for the efficient display of data about the operation of the sentencing system, such as the numbers of cases expected to arise in each "grid box," or the rate of guideline departures in one zone of the guidelines as opposed to another. Ultimately, these visual tools can facilitate thought and promote insights about sentencing practices in a jurisdiction.

A disadvantage of the two-dimensional grid is that it gives primacy to the sentencing factors charted on its x and y axes. Further, the configuration of the grid can impose a logic upon policy decisions that ought to be called into question. See, e.g., § 6B.07, Comment *b* (existing guideline grids assume a linear relationship between offenders' lengthening criminal histories and severity in punishment). In evaluating these shortcomings, it is important to understand that no American guidelines system is limited to consideration only of the factors represented on the twin axes of the grid. All guidelines systems allow sentencing judges to weigh "non-grid" factors, which add dimension to the operation of the guidelines. The number and significance of non-grid factors varies across jurisdictions. Virtually all American guidelines systems, for example, include enumerated aggravating and mitigating factors within the guidelines that may be used as reasons for deviation from presumptive sentence recommendations. These factors typically represent considerations that cannot be quantified in advance for whole categories of cases; see § 6B.04(4) and Comment *e*. Most systems also allow room for judge-made departure factors, which can add greatly to the substantive concerns that play a role in sentencing decisions. See § 7.XX(2)(a) (expressly authorizing the creation of judge-made departure factors grounded in the purposes of § 1.02(2)(a)). The commission and the courts can also develop principles for the application of sentencing purposes to individual cases. Some commissions have indicated that different goals of punishment should operate, or should be considered in different orders of priority, depending on the type of offense before the court. This approach is encouraged in § 6B.03(5) of the revised Code. The appellate courts in a number of jurisdictions have also created substantial bodies of case law devoted to the consideration of sentencing purposes by trial courts within the guideline system. See § 7.09, Comment and Reporters' Note. All of these added dimensions of analysis allow the simple device of a grid to work as a starting point for punishment determinations, while still permitting a wide range of subjective or case-specific factors to assume a formal role in case decisions.

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Despite decades of experience with guidelines grids across a number of state guideline systems, the drafters of the revised Code concluded that it was neither a timeless nor perfected instrument of sentencing policy. The pros and cons of the grid format should remain open to study and debate as further innovations in sentencing reform are pioneered in the coming years. A small number of states have used narrative sentencing guidelines with success. Other jurisdictions have experimented with guideline worksheets for specific offenses or categories of offenses. Fully computerized iterations of guidelines may be closely at hand. The ability of guidelines to contribute to the operation of the system bears no necessary relation to their means of expression. Indeed, the decision to avoid "numerical" guidelines has in some jurisdictions proven to be popular with judges and practitioners, and has perhaps been an important element of the political acceptability of guidelines reform in those states.

d. Simplicity in guidelines. Subsection (4) states the qualified principle that simplicity in guideline drafting is desirable when it is feasible. Some sentencing commissions have produced byzantine guidelines. In the federal system, for example, the operation of the "relevant conduct" provision and the criminal-history rules are often quite difficult for the parties to anticipate in advance. Even calculations of offense severity require numerous steps, and cases involving multiple counts of conviction encounter formidable complexities. Most state systems, in contrast, have produced sentencing guidelines that are relatively easy to apply. Other things being equal, a simple system facilitates guidelines compliance more readily than a complex system, and is less likely to stir resentment among officials who must work with the guidelines on a daily basis.

e. Nonbinding guideline commentary. Subsection (5) requires the commission to append nonbinding commentaries to its guideline provisions. The commentary serves a dual function. First, it ensures that the commission has adequately explained its reasoning in promulgating guidelines; see § 6A.01(2)(e). Second, it may assist actors in the sentencing system in the proper application of the guidelines.

Under the revised Code, the guidelines commentary carries no force of law. This reflects the Code's general approach of limiting the authority of the commission in relation to the judicial branch. The courts may, of course, choose to endorse specific commentaries as a matter of judicial lawmaking.

f. Array of sanctions. Subsection (6) requires the commission to address the full range of criminal sanctions in guidelines provisions, with the exception of the death penalty. The exception applies only in jurisdictions that authorize capital punishment, and is accordingly set forth in brackets.

Some sentencing commissions have produced guidelines that speak only to the questions of whether prison sanctions should be imposed, and the length of prison terms. Several state commissions, in contrast, have formulated guidelines that address the full range of community sanctions, from the most to least restrictive. A number of these states have had success in giving

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structure to nonprison sanctioning decisions, and in encouraging the greater use of intermediate punishments; see § 1.02(2)(b)(iv).

The inclusion of the full menu of criminal sanctions within the ambit of guidelines is also needed for planning purposes. The ability of a commission to project future needs in community-based programs, see § 6A.07(2), is greatly increased when the demands on those programs are channeled through guidelines. The commission, for example, when proposing new guidelines to divert some proportion of prison-bound offenders into drug treatment, can alert the legislature to anticipated needs for additional program slots if the new guidelines were to take effect. Among American jurisdictions without sentencing commissions and guidelines, experience has shown that desired changes in sentencing policy can be frustrated by the lack of high-quality projections of resource needs, and advance planning for meeting those needs.

g. Limitation on commission authority. The primary limitation on the power of the sentencing commission under the revised Code is the institutional choice that the commission can author no affirmative recommendation, principle of limitation, or prohibitive standard that carries legal authority greater than presumptive force. Subsection (7) makes this limitation express and unmistakable. As defined in the Code, the legally binding character of guideline presumptions is relatively modest, allowing considerable latitude for judicial sentencing discretion in particular cases. See Comment *b*, above.

The Code does contemplate that some rules applicable to sentencing decisions will carry greater weight than presumptive-guidelines provisions. These must be laid down by official decisionmakers other than the commission, however. Subsection (7) provides that the legislature or the state's highest court may create and enforce rules that are more forceful than guidelines presumptions.

h. Guidelines to operate within statutory maximum penalties. Subsection (8) sets forth a rule, all but universal among American guidelines systems, that no sentence recommended by the guidelines may exceed the statutory maximum penalty for the offense or offenses of conviction. These maxima are set out in §§ 6.03 through 6.11A of the Code.

i. Resource management under the guidelines. When promulgating sentencing guidelines, subsection (9) requires that the commission make use of the correctional-population forecasting model described more fully in § 6A.07. The second sentence of subsection (9) instructs the commission that any guidelines it formally proposes must not be designed to produce sentences that will exceed the existing or funded correctional resources of state and local governments. The commission may not by itself commit state and local governments to new expenditures, nor may it seek to implement sentencing policy without assurance that the required facilities and personnel will be made available.

Subsection (9) does not foreclose a commission from propounding guidelines that would require new correctional resources in the state. All existing sentencing commissions have done so. Some have written guidelines that have contributed to planned incarceration growth; some

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have produced guidelines that have expanded the need for intermediate punishment programming. What subsection (9) does require is that requisite facilities and personnel be funded in conjunction with the adoption of guidelines that are expected to call upon those resources. If the legislature, or local governments, will not or cannot provide what is needed, the commission's freedom of action must be limited by those realities. The commission's guidelines may of course introduce new priorities for the efficient and effective use of existing resources. But the commission may not produce guidelines to fit an imaginary correctional system.

j. Compliance with administrative procedure act. The notice, hearing, and explanation requirements of each state's administrative procedure act should supply the template for procedural requirements visited upon sentencing commissions. Subsection (10) so provides. An open and visible lawmaking process is especially valuable in the field of criminal sentencing, where broad input from diverse constituencies is needed for the best operation and legitimacy of the system as a whole.

k. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (1), (2), (3), and (7), as follows:

(1) The sentencing guidelines shall set forth ~~presumptive~~ recommended sentences for cases in which offenders have been convicted of felonies or misdemeanors, and nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences, subject to § 6B.04.

(2) The guidelines may set forth additional ~~presumptive rules~~ recommendations applicable to sentencing decisions as determined by the commission, or when required by law.

(3) The commission shall determine the best formats for expression of ~~presumptive~~ recommended sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression. . . .

(7) No provision of the guidelines shall have legal force ~~greater than presumptive force as described in this Article~~ in the absence of express authorization in legislation or a decision of the state's highest appellate court. The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court.

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Most of the alterations suggested above are needed to carry forward the substitution of the concept of "recommendations" about sentencing where the stronger term "presumption" occurs in the unaltered provision; see § 6B.01, Comment *b*.

Subsection (7) recognizes, however, that the guidelines may incorporate legally enforceable rules or proscriptions created by the legislature or controlling court decision. Thus, for example, advisory guidelines in any American system could state with authority that criminal punishment may not be increased based on a defendant's race or religious beliefs. This would merely incorporate constitutional law. In each jurisdiction, however, it is open to the legislature or courts to impose additional, subconstitutional rules on the sentencing process; see § 6B.06. For instance, a jurisdiction might choose to provide through statute or appellate-court opinion that a defendant's decision to plead guilty cannot lawfully supply a basis, without more, for a sentence markedly more lenient than the judge would have imposed in the absence of a guilty plea. If such a rule were to be formulated by the legislature or the courts in an advisory-guidelines jurisdiction, the sentencing commission can be expected to incorporate into "advisory" guidelines the legally binding rule created by an authority external to itself.

REPORTERS' NOTE [102]

a. Scope. Several American sentencing-guidelines schemes regulate both felony and misdemeanor sentencing, as recommended in subsection (1). See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (sentencing guidelines in Delaware, Maryland, North Carolina, Pennsylvania and Tennessee cover misdemeanors as well as felonies; guidelines in Utah and the federal system cover selected misdemeanors). Ohio may be added to this list. See Ohio Rev. Code §§ 2929.11—2929.22 (2006). See also Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research, vol. 32 (2005), at 210 ("Misdemeanor sentences overlap substantially with felony intermediate sanctions; regulating the latter but not the former would produce serious proportionality problems").

The majority of existing guidelines schemes extend only to felonies, or to selected felonies. See Ala. Code § 12-25-31.1(a)(1) (2006); Ark. Code § 16-90-803(a)(2) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.3; Kansas Sentencing Commission Website (last visited February 12, 2007); Michigan Sentencing Guidelines Manual 1 (2006); Minnesota Sentencing Guidelines and Commentary § I (2006); Mo. Rev. Stat. § 558.019.6(3) (2007); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 7 (2006); Va. Code Ann. § 17.1-803(1) (2006); Rev. Code Wash.§ 9.94A.905 (2006).

b. Presumptive provisions. On the continuum of stopping points between a purely advisory sentencing-guidelines system and one that is wholly mandatory, see Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155-173 (2005).

[102] This Reporters' Note has not been revised since § 6B.02's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 *c. Flexibility in means of expression*. The "grid" (sometimes called "matrix" or "chart") format has been a
2 popular but not universal means of expression for American sentencing guidelines. In a sentencing guidelines grid,
3 the severity of the current conviction is arrayed on one axis of the grid (usually, as a matter of arbitrary convention,
4 on the vertical axis) and the offender's criminal history is arrayed on the other axis. Guidelines sentences, or ranges
5 of sentences, are displayed in a "cell" or "grid box" at the intersection of the appropriate rows and columns in each
6 case. See Ark. Code § 16-90-802(d)(1)(A) (2006); District of Columbia Sentencing Commission, 2006 Practice
7 Manual, § 1.2.2; Kan. Stat. §§ 21-4704 & 21-4705 (2006); Md. Code, Crim. Proc. § 2-210(2); Mich. Comp. Laws
8 §§ 777.61-.69 (2006); Minnesota Sentencing Guidelines and Commentary § II.C (2006); N.C. Gen. Stat. § 15A-
9 1340.13(b) (2006); 204 Pa. Code §§ 303.16—303.18 (2005); Mo. Sentencing Advisory Comm'n, Report and
10 Implementation Update 22-23, 26-27, 37-38, 41 (2005); Or. Admin. R. 213-004-0001 (2007); Tenn. Code § 40-35-
11 101 Commentary (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 10, 13-14;
12 Rev. Code Wash. §§ 9.94A.510, 9.94A.517 (2006). The use of a guidelines grid is rarely insisted upon in legislation
13 directing a sentencing commission to formulate guidelines. See, e.g., 11 Del. Code § 6581(c)(1) (2006); D.C. Code
14 § 3-101(b)(1), (4) (2006); Kan. Stat. § 74-9101(b)(1) (2006); N.C. Gen. Stat. § 164-42 (2006).

15 Alabama, Delaware, Ohio, Virginia, and Wisconsin have created sentencing guidelines that use formats other
16 than the two-dimensional guidelines grid. See Alabama Sentencing Commission: Initial Voluntary Sentencing
17 Standards & Worksheets (2006), at 22; Delaware Sentencing Accountability Commission Benchbook 2006, at 26-90
18 (series of tables displaying "presumptive sentences" for offenses by category); Virginia Criminal Sentencing
19 Commission, Virginia Sentencing Guidelines, Offense Worksheets (9th ed. 2006); Wisconsin Sentencing
20 Commission, Wisconsin Sentencing Guidelines Notes (2006) (worksheets). In Ohio, the framers of the state's
21 guidelines felt it important to avoid the perceived inflexibility of a numerical grid system. The Ohio guidelines are
22 set forth in narrative, statutory form. See Ohio Criminal Sentencing Commission, Judicial Decision Making after
23 *Booker* (2005), at 12; Burt W. Griffin and Lewis R. Katz, Sentencing Consistency: Basic Principles Instead of
24 Numerical Grids: The Ohio Plan, 53 Case Western Reserve L. Rev. 1 (2002).

25 *d. Simplicity in guidelines.* On the relative simplicity of most state sentencing-guidelines systems, and the
26 relative complexity of the federal system, see Kevin R. Reitz, The Federal Role in Sentencing Law and Policy, 543
27 The Annals of the American Academy of Political and Social Science 116 (1996); Marc Miller, True Grid:
28 Revealing Sentencing Policy, 25 U.C. Davis L. Rev. 587 (1992).

29 *f. Array of sanctions.* Many existing guidelines schemes extend to the full range of available criminal
30 sanctions, with the exception of the death penalty. Sometimes this is required in legislation. See Ala. Code§ 12-25-
31 33(5) (2006); 11 Del. Code § 6581(c)(1) (2006); N.C. Gen. Stat.§ 164-42(a) (2006); 42 Pa. Cons. Stat. § 2154.1-
32 2154.2 (2006); Va. Code § 17.1-803(4) (2006). For an overview of state practices, see Richard S. Frase, State
33 Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1
34 (2005) (sentencing guidelines included intermediate sanctions in Arkansas, Delaware, North Carolina, Oregon,
35 Pennsylvania, and Tennessee; guidelines covered "some" intermediate sanctions in Michigan, Missouri, Utah,
36 Virginia, Washington, Wisconsin, and the federal system).

37 Some existing codes do not require, but merely permit, the sentencing commission to create guidelines for the
38 broad menu of criminal punishments, including prison, jail, and community penalties of varying intensity. The

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legislature's failure to make this responsibility mandatory can result in a guidelines scheme that does not speak to the full array of subcapital sanctions. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research 134 (2005) (although authorized to create guidelines for jail and community sanctions, "the [Minnesota sentencing] commission chose not to regulate any of these decisions").

h. Guidelines to operate within statutory maximum penalties. See, e.g., Rev. Code Wash. § 9.94A.599 (2006) ("If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence"). See also Ark. Code § 16-90-803(b)(3)(C) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 3.8; Md. Code, Crim. Proc. § 6-216(b)(1) (2006); Minnesota Sentencing Guidelines and Commentary § II.H (2006); Mo. Rev. Stat. § 558.019.6(3) (2007); Or. Admin. R. 213-008-0003(2) (2007); 204 Pa. Code § 303.9(g) (2005).

i. Resource management under the guidelines. Most sentencing-guidelines legislation requires or encourages the sentencing commission to formulate guidelines that are projected to operate within the jurisdiction's correctional resources. See, e.g., N.C. Gen. Stat. § 164-42(d) (2006), which provides in part:

> The Commission shall include with each set of sentencing structures a statement of its estimate of the effect of the sentencing structures on the Department of Correction and local facilities, both in terms of fiscal impact and on inmate population. If the Commission finds that the proposed sentencing structures will result in inmate populations in the Department of Correction and local confinement facilities that exceed the standard operating capacity, then the Commission shall present an additional set of structures that are consistent with that capacity.

See also Ala. Code § 12-25-2(a)(4) (2006) (commission instructed to promulgate sentencing recommendations to "[p]revent prison overcrowding and the premature release of prisoners."); 11 Del. Code § 6580(c) (2006) ("The Commission shall develop sentencing guidelines consistent with the overall goals of ensuring certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost"); D.C. Code § 3-104(b)(4), (7) (2006) (The commission must project the impact of its proposals on offender populations and must estimate the cost for proposed alternatives to incarceration.); id. § 3-106 (In making recommendations, the Commission must consider "existing correctional and supervisory resources, including the availability of intermediate sanctions"); Kan. Stat. § 74-9101(b)(6) (2006) (commission shall "advise and consult with the secretary of corrections and members of the legislature in developing a mechanism to link guidelines sentence practices with correctional resources and policies, including but not limited to the capacities of local and state correctional facilities. Such linkage shall include a review and determination of the impact of the sentencing guidelines on the state's prison population, review of corrections programs and a study of ways to more effectively utilize correction dollars and to reduce prison population"); Md. Code, Crim. Proc. § 6-213(b) (2006) ("If the recommendations of the Commission for changes in legislation would result in State and local inmate populations exceeding the operating capacities of available facilities, the Commission shall present additional sentencing model alternatives consistent with these capacities."); Mass. Laws, Ch. 211E, § 2(6), (6)(C) (2006) (sentencing commission shall recommend policies and practices that "ration correctional capacity and other criminal justice resources to sentences imposed, making said rationing explicit, rational and coherent" and "prevent the

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1 prison population in the commonwealth from exceeding the capacity of the prisons"); Minn. Stat. § 244.09, subd.
2 5(2) (2006) (in establishing or modifying sentencing guidelines, commission shall consider "correctional resources,
3 including but not limited to the capacities of local and state correctional facilities"); Mo. Rev. Stat.
4 § 558.019.6(3)(d) (2007) ("The recommended sentence for each crime shall take into account . . . [t]he resources of
5 the department of corrections and other authorities to carry out the punishments that are imposed."); N.C. Gen. Stat.
6 § 164-42(b)(5) (2006) (when formulating sentencing structures, commission shall consider "[t]he available resources
7 and constitutional capacity of the Department of Correction, local confinement facilities, and community-based
8 sanctions"); Ohio Rev. Code § 181.24(B)(4) (2006) (commission shall develop new comprehensive sentencing
9 structure for state that includes "[p]rocedures for matching criminal penalties with the available correctional
10 facilities, programs, and services"); Or. Admin. R. 213-002-0001(3)(a) (2007) (included among "[t]he basic
11 principles which underlie these guidelines" is: "The response of the corrections system to crime, and to violation of
12 post-prison and probation supervision, must reflect the resources available for that response"); 28 U.S.C. § 994(g)
13 (2000) (commission, in promulgating guidelines "shall take into account the nature and capacity of the penal,
14 correctional, and other facilities and services available, and shall make recommendations concerning any change or
15 expansion in the nature or capacity of such facilities and services that might become necessary as a result of the
16 guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this
17 chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of
18 the Federal prisons, as determined by the Commission"); Utah Code § 63-25a-304(2) (2006) ("The purpose of the
19 commission shall be to develop guidelines . . . in order to . . . relate sentencing practices and correctional
20 resources."); Rev. Code Wash. § 9.94A.850(2)(b) (2007) ("If implementation of . . . revisions or modifications
21 would result in exceeding the capacity of correctional facilities, then the commission shall accompany its
22 recommendation with an additional list of standard sentencing ranges which are consistent with correction
23 capacity").

24 Some jurisdictions mobilize the commission's resource-matching capabilities to respond to crises of prison
25 crowding through amendments to the guidelines. See Kan. Stat. § 21-4725 ("The secretary of corrections shall notify
26 the commission at any time when it is determined that prisons in the state have been filled to 90% or more of their
27 overall capacity. The commission shall then propose modifications which amend the sentencing guidelines grid,
28 including severity levels, criminal history scores or other factors which would result in the reduction of any
29 sentence, as deemed necessary to maintain the prison population within the reasonable management capacity of the
30 prisons"); Rev. Code Wash. § 9.94A.870(1) (2007) ("If the governor finds that an emergency exists in that the
31 population of a state residential correctional facility exceeds its reasonable, maximum capacity, then the governor
32 may . . . [c]all the sentencing guidelines commission into an emergency meeting for the purpose of evaluating the
33 standard ranges and other standards. The commission may adopt any revision or amendment to the standard ranges
34 or other standards that it believes appropriate to deal with the emergency situation."); id. § 9.94A.875 (2007)
35 (analogous provision for county jail crowding).

36 *j. Compliance with administrative procedure act.* For provisions similar to subsection (10), see Ark. Code
37 § 16-90-802(d)(2)(B),(C) (2006); Md. Code, Crim. Proc. § 6-211(a) (2006); Or. Admin. R. 213-001-0005(1) (2007);
38 Utah Code Ann. § 63-25a-301(1) (2006); Rev. Code Wash. § 9.94A.850(6) (2006). See also ABA, Standards for
39 Criminal Justice, Sentencing, Third Edition, Standard 18-4.3(d) (1994); Ronald F. Wright, Amendments in the

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Route to Sentencing Reform, 13 Crim. Justice Ethics 58 (2004) (observing that sentencing commissions "have found the greatest success" when they have followed APA processes); Rachel F. Barkow, Administering Crime, 52 UCLA L. Rev. 715 (2005). In some codes, the Administrative Procedure Act is not made formally applicable to the promulgation of sentencing guidelines by the sentencing commission, but alternative procedures for notice and comment are nevertheless mandated. See, e.g., Minn. Stat. § 244.09, subd. 5(2) (2006); 42 Pa. Cons. Stat. § 2155 (2006).

k. States choosing an advisory-guidelines system. Sentencing guidelines in an advisory system do not share the measured degree of enforceability of the presumptive guidelines in the revised Code. Various terminology in statute or guidelines is used to express the "advisory" or "voluntary" or "discretionary" character of the guidelines. See Ala. Code § 12-25-33(1) (2006) ("voluntary sentencing standards"); Ark. Code § 16-90-803 (2006) ("Voluntary presumptive standards"); Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987) ("sentencing standards" are "voluntary and nonbinding"); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.1 ("guidelines are voluntary"); Md. Code, Crim. Proc. § 6-211(b) (2006) ("voluntary sentencing guidelines"); Mo. Rev. Stat.§ 558.019.6(3) (2007) ("system of recommended sentences"); Pa. Sentencing Guidelines Standards (2005), at 137 ("sentencing recommendations"); Tenn. Code Ann. § 40-35-210(c) (2006) ("advisory sentencing guidelines"); Va. Code § 17.1-801 (2006) ("discretionary sentencing guidelines"); Wis. Stat. § 971.30(1)(c) (2006) ("advisory sentencing guidelines").

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§ 6B.03. Purposes of Sentencing and Sentencing Guidelines.[103]

(1) In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2).

(2) The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.

(3) Within the boundaries of severity permitted in subsection (2), the commission may tailor presumptive sentences for defined classes of cases to effectuate one or more of the utilitarian purposes in § 1.02(2)(a)(ii), provided there is realistic prospect for success in the realization of those purposes in ordinary cases of the kind governed by each presumptive sentence.

(4) The commission shall recognize that the best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes

[103] This Section was originally approved in 2007; see Tentative Draft No. 1.

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in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.

(5) The guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes.

(6) The guidelines shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission consistent with this Section.

Comment: [104]

a. Scope. This provision underscores and gives content to the commission's obligation to produce sentencing guidelines that are based in the legislative purposes of sentencing and corrections set forth in § 1.02(2). This is part of the Code's general strategy to give prominence and effect to the purposes provision as applied throughout the sentencing system. In addition, § 6B.03 is needed because some sentencing commissions—most famously the United States Sentencing Commission—have elected to produce guidelines with no articulated connection to the fundamental goals of the system.

Subsection (1) states the general import of the provision as a whole, with elaborations to follow in the ensuing subsections.

b. Proportionality and guidelines. Subsection (2) explicitly links the Code's proportionality principle, see § 1.02(2)(a)(i), to the commission's collective task of fixing presumptive sentences for "ordinary cases," see § 6B.04(2). Under the Code, utilitarian objectives are never sufficient to justify a penalty that is disproportionately lenient or severe in light of the gravity of the offense, the harm done to the crime victim, and the blameworthiness of the offender. Because these retributive anchor points do not translate mathematically into sentencing outcomes, however, the Code views proportionality constraints as flexible in nature. In a given case, they can accommodate a "range" of possible penalties that are not disproportionate; see § 1.02(2)(a)(i).

Against this backdrop, subsection (2) requires the commission to apply its best collective judgment to modal or "ordinary" cases expected to arise under presumptive guideline provisions. The experience of commission members is called upon in the first instance to identify those scenarios most often presented in run-of-the-mill cases. Commissioners must then apply their collective moral judgment to the visualized cases. The goal of the process is not to reach a definitive statement of proportionality, nor should the commission attempt to capture in guidelines the full spectrum of potentially just sentences. Neither task is realistic in the abstract, nor can one expect commission members of diverse perspectives to agree with one another to the point of deontological exactitude. What may be expected, however, is that commission members

[104] This Comment has not been revised since § 6B.03's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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will find agreement that a defined presumptive sentencing range for each category of case is safely within the outer limits of undue lenity or severity.

So understood, the guidelines can play a meaningful role in the furtherance of just sentences without overstating the commission's powers of moral discernment, and without unrealistic expectations of moral consensus among commissioners. Just as importantly, guidelines that are helpful but modest in their proportionality claims do not purport to tie the hands of sentencing courts in individualized decisionmaking.

c. Utilitarian purposes under guidelines. Presumptive guideline provisions may incorporate utilitarian goals of sentencing, as recognized in subsection (3). This provision reflects an important development in the conception of sentencing-guidelines reform since the 1970s and 1980s, when these reforms were widely associated with a singular emphasis on the philosophy of just deserts. With increasing frequency over the years, American sentencing commissions have produced guidelines that respond to risk and needs assessments of particular offenders, see § 6B.09 (to be drafted). Particularly in the areas of drug treatment and other intermediate punishments, the best commissions have searched for ways to identify those offenders most likely to benefit from specific programs. Most guidelines systems to some degree have attempted to reserve the longest prison sentences for those offenders who present the gravest dangers of serious reoffending. Commissions in some jurisdictions have also revised their guidelines to accommodate the fact that judges frequently decide to tailor penalties to best serve utilitarian objectives, see subsection (4). Indeed, the shift toward a hybrid approach of retributive and utilitarian goals in sentencing reform has become all but universal. There is no guidelines system in the nation that currently operates solely on bases of retribution or just deserts.

Subsection (3) endorses and encourages these preexisting trends. It contemplates whole categories of cases in which "ordinary" scenarios will lend themselves to pursuit of a defined utilitarian result. The commission is authorized to pursue those goals provided there is "realistic prospect for success," see also § 1.02(2)(a)(ii).

Illustration:

1. Based on research undertaken or reviewed by the sentencing commission, it appears that the ordinary offender convicted of certain classes of drug offenses will stand a good chance of treatment success if enrolled in an intensive substance-abuse program. There is a realistic basis to believe that such offenders will learn to control their substance dependency and return to a law-abiding lifestyle. The commission may promulgate presumptive guideline provisions that recommend the sanction of intensive drug treatment for such offenders, provided this sanction would not, in the collective judgment of commissioners, be disproportionately lenient or severe.

d. Individualized sentences under guidelines. One overarching goal in the revised Code's sentencing structure is to preserve room for judicial discretion to individualize punishments.

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1 Subsection (4) articulates this goal as part of the express legislative instructions given the
2 commission for formulation of sentencing guidelines.

3 Judicial discretion, in light of the underlying purposes of sentencing and corrections, is not
4 antithetical to the legal framework of criminal punishment. It is necessary and desirable when
5 justified by the circumstances of individual cases. Subsection (4) instructs the commission to
6 adopt such a view when crafting guidelines. Under no circumstances may the guidelines
7 foreclose the individualization of sentences; rather, they should invite the exercise of trial-court
8 discretion in those many instances when the guidelines' conception of an "ordinary case" does
9 not fit the particular circumstances before the court.

10 *e. Prioritization of the purposes of sentencing within guidelines.* It is a commonplace
11 observation in sentencing theory that utilitarian goals often conflict with one another, or may
12 conflict with retributive goals. Some theoreticians, in answer to this difficulty, have posited
13 systems that respond primarily or exclusively to retributive purposes, or to particular utilitarian
14 objectives. These approaches carry advantages of philosophical coherence, but the drafters of the
15 revised Code concluded that they are too narrow to reflect the complexities and ambiguities of
16 human response to criminal behavior. Section 1.02(2)(a) instead adopts a mixed or hybrid
17 approach to sentencing purposes that allows different goals to operate in different settings. The
18 organizing principle in § 1.02(2)(a) is that proportionality constraints always act as outer limits
19 upon utilitarian impulses. Within the boundaries of proportionality, however, § 1.02(2)(a) gives
20 no basis to prefer one utilitarian objective over another. See § 1.02(2), Comment *e*.

21 Subsection (5) invites the sentencing commission to provide further guidance to sentencing
22 courts than is contained in § 1.02(2)(a) on questions of multiple and conflicting purposes. It
23 posits that there will be no single best hierarchy of considerations applicable in all criminal
24 cases, but that the commission may usefully craft provisions that speak to discrete categories of
25 cases. For example, a commission might promulgate a guideline stating that, for serious violent
26 offenses, the primary purposes to be weighed by sentencing courts should be retribution and
27 incapacitation of the offender. Another guideline might provide that, for certain kinds of property
28 crime, the leading considerations ought to be restitution to the crime victim and specific
29 deterrence of the offender through the application of economic sanctions. For categories of cases
30 at the lowest end of the gravity scale, the guidelines may direct the courts chiefly to sentences
31 that address the needs of victims, offenders, and their families and communities.

32 There is no reason to suppose that the operative goals of punishment should be the same
33 from top to bottom of the criminal-justice system, and much experience that dictates otherwise.
34 Authority to make categorical pronouncements in this difficult area should be conferred with
35 caution. The commission under subsection (5) is empowered to make only presumptive
36 statements of preference among sentencing purposes. If good reasons exist in particular cases to
37 privilege other goals, the courts enjoy substantial discretion to override the guidelines.

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f. Mandatory penalties and guidelines. Subsection (6) provides that the commission must always produce guidelines that are best designed to serve the goals of the system, and should not base its judgments about appropriate sentences upon any mandatory-penalty provisions that may exist in the jurisdiction. The effect of this subsection is to limit the distortion introduced by mandatory penalties within the overall sentencing structure. The 1962 Code and the revised Code both disapprove of mandatory-penalty laws, see § 6.06. Where mandatory penalties exist alongside sentencing guidelines, they frequently introduce punishments that are disproportionate, not subject to the exercise of judicial discretion, and cut free from the prioritization of the use of correctional resources built into the guidelines schemes.

All of these problems are compounded, however, if a commission treats mandatory penalties as benchmarks for penalty levels within the guidelines. For example, suppose that a state legislature has recently enacted a mandatory penalty for a specific drug offense so that the minimum sentence must be a prison term of 10 years. Imagine also that the sentencing guidelines in effect, before the mandatory penalty was enacted, recommended much shorter prison terms for this and equivalent drug offenses, including some drug crimes arguably more serious than the offense covered by the mandatory penalty. In response to the new mandatory provision, the commission decides to amend its guidelines so that all offenses closely comparable to the crime subject to the 10-year minimum sentence will now also be assigned presumptive sentences under the guidelines of at least 10 years. Drug offenses of somewhat lesser gravity are assigned presumptive punishments of nearly 10 years in prison, and so on. Ultimately, many of the guidelines' provisions for drug crimes will be realigned due to the gravitational pull of the mandatory penalty.

Subsection (6) forecloses the above scenario. It preserves to the greatest extent possible the commission's unique function of reaching collective judgments about appropriate penalties in light of the experience, expertise, and moral sensibilities of the commission's membership. The deliberative process demanded of the commission would be trivialized if guideline drafting were allowed to become merely a process of interpolation within external reference points.

g. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) through (5), as follows:

(2) The commission shall set ~~presumptive~~ recommended sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.

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(3) Within the boundaries of severity permitted in subsection (2), the commission may tailor ~~presumptive~~ recommended sentences for defined classes of cases to effectuate one or more of the utilitarian purposes in§ 1.02(2)(a)(ii), provided there is realistic prospect for success in the realization of those purposes in ordinary cases of the kind governed by each presumptive sentence.

~~(4) The commission shall recognize that the best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.~~

(5) The guidelines may include ~~presumptive provisions~~ recommendations that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes.

Most of the changes suggested above are needed to carry forward the substitution of the concept of "recommendations" about sentencing where the stronger term "presumption" occurs in the unaltered provision, see§ 6B.01, Comment *b*.

Subsection (4) is deleted in its entirety because it is unnecessary, and a non sequitur, in an advisory-guidelines structure. In a presumptive-guidelines system, subsection (4) plays the important role of exhorting the commission to be respectful of trial courts' authority to individualize sentences, and to fashion guidelines that assist in rather than trammel upon the individualization process. These exhortations are not required in an advisory system because the sentencing commission holds no formal power to suppress proper (or improper) exercises of discretion by sentencing courts. Further, subsection (4) expressly bans all attempts by a sentencing commission to "foreclose" the individualization of sentences on grounds relevant to the purposes stated in § 1.02(2). This provision serves no purpose when the commission holds no power to author legally effective guidelines of any kind.

REPORTERS' NOTE [105]

a. Scope. Statements that sentencing commissions must formulate guidelines based on statutory purposes of sentencing are common in existing codes. See Ala. Code § 12-25-2 (2006); 11 Del. Code § 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Code, Crim. Proc. § 6-202 (2006); N.C. Gen. Stat. § 164-42(b) (2006); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Va. Code Ann. § 17.1-801 (2006); Rev. Code Wash. § 9.94A.850(2)(a) (2007); Wis. Stat. § 973.30(1)(c) (2006).

The chief alternative to "prescriptive," or purpose-driven, guidelines is the "descriptive" approach, in which guidelines are designed to replicate typical pre-guidelines punishments. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.3(b) (1994) (endorsing the prescriptive and rejecting the descriptive

[105] This Reporters' Note has not been revised since § 6B.03's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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approach). Of course, knowledge of past judicial sentencing patterns can be important to the formulation of purposes-driven guidelines. For example, the distribution of judicial sentences sheds light on what penalties have been thought proportionate for particular crimes in the jurisdiction, and helps identify "outlier" sentences that are disproportionate by mainstream judicial standards. It is also possible to investigate the considerations and policy rationales used regularly by sentencing judges even in a discretionary system. See, e.g., Supreme Court of Va., Voluntary Sentencing Guidelines: Pilot Program Evaluation (1989), at 21-38; Stanton Wheeler, Kenneth Mann, and Austin Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals (1988).

For criticisms of a sentencing-guidelines system constructed without explicit reference to underlying purposes, see Andrew von Hirsch, Federal Sentencing Guidelines: Do They Provide Principled Guidance?, 27 Am. Crim. L. Rev. 367, 371 (1989); Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 419 (1992).

b. Proportionality and guidelines. Nearly all existing guidelines systems incorporate proportionality in sentencing as one important aim of the guidelines, usually stated alongside a number of utilitarian goals. See Ark. Code § 16-90-801(b)(1) (2006); 11 Del. Code § 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Crim. Proc. Code § 6-202 (2006); Minnesota Sentencing Guidelines and Commentary (2006), at 1; Ohio Rev. Code § 181.24 (2006); Or. Admin. R. 213-002-0001(3)(d) (2007); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 4 (2006); Rev. Code Wash. § 9.94A.010(1) (2007). For scholarly discussions of the interaction between proportionality limits and other objectives of sentencing, see John Monahan, The Case for Prediction in the Modified Desert Model of Criminal Sentencing, 5 Internat'l J. Law & Psych. 103, 109-110 (1982); Richard S. Frase, Limiting Retributivism, in Michael Tonry ed., The Future of Imprisonment (2004).

c. Utilitarian purposes under guidelines. Some of the pioneering state sentencing-guidelines systems, designed in the late 1970s and early 1980s, made retribution or just deserts the dominant philosophy of the guidelines. See Andrew von Hirsch et al., The Sentencing Commission and Its Guidelines (1987), at 84-93; Model Penal Code and Commentaries: Part I, §§ 6.01 to 7.09 (1985). Today, the vast majority of American sentencing-guidelines systems expressly incorporate crime-reductive utilitarian goals. See Ala. Code § 12-25-31(b) (2006); 11 Del. Code§ 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Code, Crim. Proc. § 6-202 (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 4 (2005); N.C. Gen. Stat. § 164-41(b) (2006); Or. Admin. R. 213-002-0001(1) (2007); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Determinations: A Philosophical Approach (2006), at 1; Va. Code Ann. § 17.1-801 (2006); Rev. Code Wash.§ 9.94A.850(2)(a) (2007); Wis. Stat. § 973.30(1)(c) (2006).

For a discussion of the evolution of the Minnesota sentencing-guidelines system from its just-deserts origins to include a broader palate of utilitarian purposes, see Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005). One of the "newer" guidelines systems, designed in Virginia in the 1990s, places heavy emphasis on incapacitation theory—and the identification of high-risk and low-risk offenders through the use of criminological research and individualized risk-assessment instruments. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002) (evaluating program to identify especially low-risk property and drug offenders; guidelines recommend nonprison sanctions); Va. Crim. Sentencing Comm'n, Annual Report 2005 (2006),

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at 67-70 (reporting on use of actuarial tools to predict high risk of recidivism among sex offenders; guidelines recommend extended prison sentences).

Illustration 1 is based on Sentencing Accountability Commission of Delaware, Sentencing Trends and Correctional Treatment in Delaware (2002) (discussing research sponsored by commission to evaluate drug-treatment programs in the state, and efforts to make adaptations in sentencing system in light of research findings); Kansas Sentencing Commission and Kansas Department of Corrections, 2003—Senate Bill 123: Alternative Sentencing Policy for Non-Violent Drug Possession Offenders (2006) (reporting on initiative to overhaul the state's drug-sentencing scheme including the broader use of assessments of risk of recidivism for drug-involved offenders).

d. Individualized sentences under guidelines. Many state codes or guidelines stress the importance of judicial sentencing discretion to fashion individualized penalties under a sentencing-guidelines system. See Ala. Code § 12-25-2(a)(2) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.3; Kansas State Sentencing Guidelines Desk Reference Manual (2006), at 79; Md. Crim. Proc. Code § 6-202(3) (2006); Mass. Laws, Ch. 211E, § 2(4) (2006); Md. Crim. Proc. Code § 6-202(3) (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 11; Ohio Rev. Code § 181.24 (2006); Pa. Sentencing Guidelines Standards 49 (2005) (Commentary to 204 Pa. Code § 303.1(b) (2005)); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 1; Rev. Code Wash § 9.94A.010 (2007); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 2. See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 37 ("The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored. But judicial discretion is necessary to assure that sentences reflect the totality of circumstances regarding an offender and offense").

e. Prioritization of the purposes of sentencing within guidelines. Although § 1.02(2)(a) imposes some ordering of the purposes of sentencing in individual cases, see id., Comment *b*, § 6B.03(5) contemplates that further prioritization among goals may sometimes be desirable. Subsection (5) was inspired by the Pennsylvania Sentencing Guidelines, which are subdivided into five "levels," with a different statement of operative sentencing purposes applicable to each level. See 204 Pa. Code § 303.11(a),(b) (2005). As one moves upward within the sentencing guidelines grid, from the least to most serious crimes, and from lesser to greater criminal histories, the "primary purposes" of sentencing change as follows: (1) "minimal control necessary to fulfill court-ordered obligations"; (2) "control over the offender and restitution to victims"; (3) "retribution and control over the offender"; (4) "punishment and incapacitation"; and (5) "punishment commensurate with the seriousness of the criminal behavior and incapacitation to protect the public." The valuable insight of this approach—whatever the merits of the stratification of goals as formulated in Pennsylvania—is that no single statement of sentencing purposes need operate uniformly for all offenses and offenders.

For a related proposal, see Robin L. Lubitz and Thomas W. Ross, National Institute of Justice, Sentencing Guidelines: Reflections on the Future (2001), at 4-5 (suggesting that one part of sentencing-guidelines grid, at the low level of crime seriousness, could include presumption in favor of "restorative-justice" goals and processes).

f. Mandatory penalties and guidelines. Where legislatively enacted mandatory minimum penalties exist, and where they conflict with sentencing guidelines, the statutory penalties typically supersede the guidelines. See Ark. Code § 16-90-803(b)(3)(C) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 3.9; Md.

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Code, Crim. Proc. § 6-216(b)(2) (2006); Md. Code Regs. 14.22.01.14 (2007); Mich. Comp. Laws § 769.34(2)(a) (2006); Minn. Stat. § 244.101, subd. 4 (2006); N.C. Gen. Stat. § 15A-1340.13(b) (2006); Or. Admin. R. 213-009-0001(1) (2007); 204 Pa. Code § 303.9(h) (2005); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 8 (2006); Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines (9th ed. 2006), at 5.

Almost universally, state sentencing commissions have not calibrated their sentencing guidelines to reflect the terms of statutory mandatory penalties. Instead, the commissions have made independent policy judgments about appropriate punishment levels to be reflected in guidelines. See Michael Tonry, Sentencing Matters (1995), at 96-97 (as of 1995, no state sentencing commission had chosen "to incorporate the statutory minimums into the guidelines and scale all other penalties around the mandatories"); Minnesota Sentencing Guidelines and Commentary, Comment II.E.02 (2006) (explaining that some guidelines sentences are less severe than those specified in statutory mandatory minimum provisions due to commission's independent judgment of proportionality of sentence in relation to severity of crime).

The United States Sentencing Commission was for a time the only American sentencing commission that elected to scale all guidelines sentences against the benchmarks set by statutory mandatory penalties. See Tonry, Sentencing Matters, at 97-98. Sentencing guidelines effective in Alabama in 2006 followed suit. See Ala. Code § 12-25-34(c) (2006) ("Voluntary sentencing standards shall take into account and include statewide historically based sentence ranges, including all applicable statutory minimums and sentence enhancement provisions").

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§ 6B.04. Presumptive Guidelines and Departures.[106]

(1) The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts.

(2) The commission shall fashion presumptive sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. Presumptive sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the presumptive sentence shall specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed

[106] This Section was originally approved in 2007; see Tentative Draft No. 1.

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1 **and served, and to facilitate reliable projections of correctional populations using the**
2 **correctional-population forecasting model in § 6A.07.**

3 **(b) The guidelines shall include presumptive provisions for determinations of the**
4 **severity of probation, economic sanctions, and postrelease supervision.**

5 **(c) Where the guidelines permit the imposition of a combination of sanctions upon**
6 **offenders, the guidelines shall include presumptive provisions for determining the total**
7 **severity of the combined sanctions.**

8 **[(d) The guidelines shall include presumptive provisions for the determination of**
9 **the severity of sanctions upon findings that offenders have violated conditions of**
10 **probation or postrelease supervision.]**

11 **(4) The guidelines shall include nonexclusive lists of aggravating and mitigating factors**
12 **that may be used as grounds for departure from presumptive sentences in individual cases.**
13 **The commission may not quantify the effect given to specific aggravating or mitigating**
14 **factors.**

15 **Comment:** [107]

16 *a. Scope.* Section 6B.04 is one of three cornerstone provisions that frame the relative
17 discretionary powers of the sentencing commission, the trial courts, and the appellate courts
18 under the sentencing structure of the revised Code. This Section, § 7.XX (Judicial Authority to
19 Individualize Sentences), and § 7.09 (Appellate Review of Sentences) read as an interlocking
20 whole, define the limited extent to which the sentencing commission's "presumptive" guidelines
21 are legally binding upon the judiciary, and are enforceable through the appellate process.

22 Section 6B.04 addresses the legal force of presumptive guidelines provisions as a general
23 matter, the role of presumptive sentences in the governance of punishment severity, and the
24 commission's responsibilities to assist courts in the exercise of their departure power.

25 *b. Legal force of the guidelines.* It is possible to design a sentencing system in which
26 guidelines are mandatory, wholly advisory, or carry a quantum of legal force at any point along
27 the continuum between those extremes. The revised Code recommends neither polar position.

28 Mandatory guidelines are unsound as a matter of public policy. Since the 1962 Code, the
29 Institute has expressed its strong condemnation of mandatory-minimum penalty provisions. The
30 policies supportive of this view are in no way affected when mandatory punishments are enacted
31 under the rubric of guidelines.

32 The revised Code recommends that guidelines carry a modest measure of legal force and
33 enforceability. When afforded presumptive weight, guidelines supply an authoritative "rough

[107] This Comment has not been revised since § 6B.04's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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draft" of proportionate penalties across categories of cases. Presumptive guidelines articulate starting points for reasoned judicial analysis in cases of departure from their benchmarks. A moderate degree of enforceability thus facilitates the task of developing a departure "jurisprudence" through the common-law process. Indeed, the practice of appellate sentence review is best founded upon principles of law, and not mere advisements, to be applied at the trial level.

As "presumptive legal force" is defined throughout the revised Code, the judiciary possesses greater control over sentencing decisions in individual cases than does the commission. The revised Code does not construct a system in which the relative authorities of the courts and commission are in equipoise, exactly halfway between the mandatory (commission-driven) and advisory (full-judicial-discretion) alternatives. Instead, the Code gives the judicial branch ultimate decisional power over every issue arising in the guidelines, with the exception of specific subject areas where the legislature itself—or the judiciary itself, by decision of the state's highest appellate court—has removed or limited such judicial authority. See §§ 6B.02(7); 6B.06; 7.XX(2).

For a full discussion of the sentencing courts' departure power, see § 7.XX, Comment *c*. A sentencing court may depart from any presumptive-guidelines provision upon finding "substantial circumstances" in an individual case that the guidelines "will not best effectuate the purposes in § 1.02(2)(a)" (general purposes of the sentencing system for decisions affecting individual offenders). The commission may not proscribe the factors upon which sentencing courts may base departures, nor may the commission quantify the effects of particular factors; see § 7.XX(2)(a) and subsection (4), this provision. On appeal, the general standard of review applicable to departure standards is meaningful yet deferential to the trial court; see § 7.09(5)(d) ("When based on a legally permissible departure consideration, the appellate courts shall uphold sentencing courts' decisions to depart from sentencing guidelines and the appropriate degree of departures unless such decisions lack a substantial basis in the record demonstrating defensible grounds for departure.").

Judicial discretion to deviate from the guidelines is substantially more confined than described above only in the case of "heavy presumptions." A heavy presumption may not be elided by courts except through the exercise of their "extraordinary departure" power. See § 6B.01(5); § 7.XX(3), Comment *d*. The commission itself holds no power to create heavy presumptions, however. These must be authored by the legislature or the courts themselves.

Subsection (1) lays down the general rule that sentencing guidelines will carry "presumptive legal force," to be understood in light of the trial courts' departure power as defined in § 7.XX. The subsection further provides that the commission may choose to designate certain provisions of the guidelines as merely advisory to the courts. The commission may encounter circumstances in which it wishes to provide some guidance to judges, but lacks the degree of confidence that would support a presumptive provision; see, e.g., § 6B.08(1)(d) (for some categories of cases, the

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1 commission may decline to state a presumptive rule on whether a concurrent or consecutive
2 sentence should be imposed, leaving the matter to the discretion of the sentencing court).

3 *c. Ordinary cases as the bases for guidelines presumptions.* Subsection (2) states the
4 operational philosophy of presumptive sentence provisions. By virtue of its collective
5 membership, see § 6A.02, a well-constituted commission may speak with credibility to the
6 appropriate sentencing benchmarks in categories of "ordinary cases." In arriving at such
7 judgments, the commission must hew to the purposes of the sentencing system; see § 6B.03(1).
8 The commission should arrive at its conceptions of "ordinary cases," and should assign guideline
9 penalties to categories of those cases, in light of the varied experience of the membership, the
10 best available information, and the members' deliberative efforts to represent the moral
11 sentiments of the whole community. The task is not easy. No set of guidelines will be defensible
12 from all lines of attack. The legitimacy of the guidelines does not flow from the commission's
13 ability to arrive at incontestable conclusions, however. It flows directly from the quality and
14 diversity of the commission membership, and the roundtable process of commission
15 deliberations—as well as from the fact that the guidelines must be crafted in a manner expected
16 to win high rates of judicial acceptance. The guidelines are not ukases but a framework for
17 decisionmaking to be tested, and checked if necessary, in their application to individual cases.

18 *d. Presumptive guidelines and sentence severity.* The primary subject of subsection (3) is the
19 guidelines' role in the determination of the severity of punishments in several particular contexts.
20 The first sentence of the provision speaks broadly to the selection of sanctions as well as the
21 question of their severity. The guidelines must be concerned with both matters. The issue of
22 dispositional choice, including legislative guidance to the commission on the proper use of
23 confinement sanctions in guideline presumptions, is treated in § 7.02.

24 The second sentence of subsection (3) continues the theme of flexibility concerning the
25 means of expression of guidelines established in § 6B.02(1). Depending on the type of case,
26 presumptive sentences might best be expressed as a single penalty, a range of penalties,
27 alternative penalties, or a combination of penalties. The commission may select different means
28 of expression for different categories of offenses. For example, statements of presumptive
29 penalties for misdemeanors might be considerably simpler than those for felonies. Within felony
30 guidelines, some commissions have identified borderline cases where they have chosen to
31 recommend either an incarceration term or a restrictive community punishment within a single
32 presumptive provision. Subsection (3) is intended to allow for and encourage exactly this kind of
33 flexibility in the communication of the commission's preferences.

34 The severity of prison and jail sentences are traditionally denoted by their lengths of term (or
35 the amount of time of freedom that they subtract). American guideline systems have, to date,
36 focused on this feature of total confinement in their formulations of presumptive penalties.
37 Subsection (3)(a) anticipates that this will continue to be a central concern of any scheme of
38 presumptive incarcerative terms in the future. However, subsection (3)(a) is not intended to rule

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out presumptive guideline provisions of the future that might address the conditions of confinement as well as duration.

Subsection (3)(a) speaks to the desirable breadth of guideline ranges for sentences of total confinement. Existing American guidelines systems vary markedly in their approaches to this question. At a far extreme, guideline ranges may be so broad that they approximate the expansive statutory ranges found in traditional indeterminate sentencing systems. Where this is the case, the guidelines add little value to the preexisting sentencing regime in the encouragement of proportionate sentences, consistency of thought process across individual cases, or reasonably accurate forecasting of the foreseeable effects of changes in the sentencing system.

The revised Code adopts the view that guidelines ranges for incarceration terms should be fairly narrow, with the understanding that a generous departure power resides in the sentencing courts to move beyond those narrow constraints when necessary to tailor appropriate punishments to the facts of individual cases.

Some existing guideline systems employ an algebraic formula to describe the boundaries of guideline ranges for prison and jail sentences. For example, if x is the midpoint of the range; the upper boundary of the range cannot exceed $1.15\ x$, and the lower boundary must be at least $0.85\ x$. There is no magic in such formulas, but they convey unmistakably to the commission that reasonably narrow guidelines are wanted.

Subsection (3)(a) eschews algebra, and seeks to communicate the need for reasonably narrow guideline ranges in functional terms. The provision is intended to produce results comparable to those achieved with algebraic boundaries, while avoiding arbitrary numerical cutoffs. One benefit of the functional approach is that it does not lock the commission into the same formula for incarceration sentences of varying lengths. The primary disadvantage of the functional approach is its fuzziness. If the legislature envisions guideline ranges of a certain amplitude, it may be unwise to grant the commission discretion to determine otherwise.

Subsection (3)(b) instructs the commission to develop guidelines for the severity of community punishments, which must be crafted in light of the principles for selection among sanctions in § 6B.05 (to be drafted). Of particular importance is the inclusion of postrelease supervision as a stand-alone "community punishment" in subsection (3)(b). This continues the 1962 Code's policy determination that the time period of "parole" supervision—now "postrelease" supervision—should not turn on the residuum of an offender's prison sentence unserved on the date of release, but should be fixed independently based on the underlying purposes of postrelease interventions. See 1962 Model Penal Code § 6.10(2).

Subsection (3)(c) extends the principles stated in (3)(a) and (3)(b) to cases, which are expected to arise with frequency, in which an offender is sentenced to more than one sanction. Combinations of sanctions can be overlapping, as where a defendant sentenced to community supervision is also sentenced to make restitution to the crime victim. Indeed, economic sanctions

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of numerous types and rationales are often imposed upon single offenders, with limited sense of priority or overall proportionality, see § 6.04, Comment *a*. Combinations of sanctions may also be sequential, as when a prison sentence is followed by a period of postrelease supervision. In any of these circumstances, some mechanism is required to govern the total severity of all penalties rendered, or else the requirement of proportionate punishments in § 1.02(2)(a)(i) becomes meaningless.

Subsection (3)(c) could be interpreted to embrace the complex but increasingly important subject of collateral consequences that attend criminal convictions, to varying effects, in all jurisdictions. Convicted felons, for example, may lose eligibility for government housing, welfare, and educational assistance, and may be barred from employment in numerous fields. Property—including cash, automobiles, entire residences—may be forfeited to the government in civil proceedings. Noncitizens may be subject to deportation or other immigration-law consequences. In some states, convicted felons lose their rights to vote, for a defined or indefinite period. In most states, at least some felons forfeit their right to own a firearm.

Although most collateral sanctions are defined as *civil* disqualifications rather than criminal punishments—and therefore escape constitutional proportionality review—they are inarguably painful visitations upon persons convicted of crime, with heavy potential impacts on offenders' life chances. Any comprehensive program to effect the revised Code's fundamental concerns for proportionality in crime response and the furtherance of forward-looking, crime-reductive, and reintegrative goals, cannot ignore the expanding domain of collateral consequences of criminal convictions.

Subsection (3)(d), a bracketed provision, would extend the commission's prescriptive rulemaking powers into the realm of sentence revocations. Nationwide, roughly 40 percent of prison admissions result from revocation decisions rather than new court commitments. A small number of American commissions have experimented with the creation of "revocation guidelines." No one approach to this matter has yet emerged as definitive.

Independent of this subsection, the revised Code has already taken the view that sentencing commissions should explore the desirability of greater regulation of revocation decision-points, see § 6A.05(3)(b) (commission should "study the desirability of regulating through statute, guidelines, standards, or rules . . . the discretionary decisions of officials with authority to impose sanctions for the violation of sentence conditions"). Bracketed subsection (3)(d), if adopted by a legislature, would preempt the commission's responsibility to study and make recommendations on this subject, and would cede immediate responsibility to the commission to produce revocation guidelines. Under § 6A.04(1), unless some other timeline were specified by the legislature, bracketed subsection (3)(d) would be a component of the commission's initial responsibilities to be discharged in the first two years of its existence. See § 6A.04(1). A jurisdiction with high volumes of sentence revocations, especially when there is a perceived crisis in the area, may prefer the accelerated time frame set forth in bracketed subsection (3)(d).

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e. Departure factors within the guidelines. Subsection (4) codifies the practice of most American sentencing commissions. First, the provision instructs the commission to provide guidance to sentencing courts, voiced from the collective wisdom of the commission membership, concerning those case-specific factors that should appropriately be considered as grounds for departure from presumptive penalties. As with all other guidelines provisions drafted by the commission, the enumerated grounds for departure may carry presumptive legal force, but no more. Aggravating and mitigating factors may be responsive to proportionality concerns, or they may speak to utilitarian purposes within the boundaries of proportionate punishment, see § 1.02(2)(a)(i), (ii).

Illustrations:

1. A sentencing commission may include as enumerated grounds for departure (1) the aggravating factor that the harm done by the offender was greater than in an ordinary case because the crime victim was a person of unusual vulnerability, or (2) the mitigating factor that defendant was less blameworthy than in an ordinary case because the crime victim was at fault in provoking the commission of the offense in a manner not rising to a defense at trial. Both factors speak directly to proportionality concerns in § 1.02(2)(a)(i).

2. A sentencing commission may include a provision that designated offenders are to be assessed for drug and alcohol dependency and for their amenability to different programs of substance-abuse treatment in and out of confinement. So long as the resulting penalty does not violate the proportionality constraints in § 1.02(2)(a)(i), the commission may authorize sentencing courts to impose sanctions of greater or lesser severity than the presumptive sentence, as needed to best address the treatment needs of individual offenders. Such an enumerated departure provision would speak to the utilitarian goal of offender rehabilitation in § 1.02(2)(a)(ii).

Subsection (4) stresses that the catalogue of departure factors enumerated in guidelines must be nonexclusive. This is consistent with the general approach of the revised Code to preserve judicial sentencing discretion within the framework of sentencing guidelines. The commission may neither mandate nor proscribe the consideration of any departure factor supported by the purposes of sentencing and corrections in § 1.02(2), see § 6B.02(7). Further, it is no part of the commission's institutional role to police the use of judge-made departure factors for their fidelity to legislative purposes. That task is assigned to the appellate courts in the revised Code, see § 7.09.

Finally, and consistent with the Code's theory of precedence of judicial discretion within a guidelines system, the second sentence of subsection (4) forbids the commission to quantify the effect to be given to specific departure factors. Presumptive penalties in guidelines must often be given quantitative expression. The revised Code, however, takes the strong view that individualization of sentences is frequently needed in response to case-specific factors that are

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subjective, unforeseeable in advance, and interactive with one another in subtle ways. The departure power is designed to address a wide universe of special circumstances, which may call for small deviations from presumptive penalties in some cases, and dramatic changes in others. In the Code's structure, a commission's guidelines supply starting points for the courts' individualization process. The commission through its guidelines may not attempt mechanistically to control that process.

f. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments throughout § 6B.04:

§ 6B.04. ~~Presumptive~~ Guidelines Recommendations and Departures.

(1) The guidelines shall ~~have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts~~ be advisory to sentencing courts, subject to the requirements of consultation, analysis, and articulation of the sentencing court's reasoning when imposing sentence as set forth in § 7.XX.

(2) The commission shall fashion ~~presumptive~~ recommended sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. ~~Presumptive~~ Recommended sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the ~~presumptive~~ recommended sentence shall specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.

(b) The guidelines shall include ~~presumptive~~ recommended provisions for determinations of the severity of community punishments, including postrelease supervision.

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(c) Where the guidelines ~~permit~~ contemplate the imposition of a combination of sanctions upon offenders, the guidelines shall include ~~presumptive provisions~~ recommendations for determining the total severity of the combined sanctions.

[(d) The guidelines shall include ~~presumptive provisions~~ recommendations for the determination of the severity of sanctions upon findings that offenders have violated conditions of community punishments.]

(4) The guidelines shall include nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences in individual cases. ~~The commission may not quantify the effect given to specific aggravating or mitigating factors.~~

Section 6B.04 as a whole must be modified in jurisdictions that choose to implement guidelines as advisory recommendations. Nearly all of the amendments suggested above merely convert language of "presumptions" into alternative formulations using the word "recommendations."

The meaning of § 6B.04 cannot be grasped without a close understanding of § 7.XX (Judicial Authority to Individualize Sentences). The cross-reference remains explicit in the altered version of § 6B.04(1).

The amended subsection (1) also declares the status of the guidelines as "advisory," yet frames this characterization against the procedural requirements of consideration, analysis, and explanation that are the core of § 7.XX (as modified for an advisory-guidelines structure). See § 7.XX, Comment *i*, infra.

REPORTERS' NOTE [108]

b. Legal force of the guidelines. In existing guidelines systems, the most common formulation of the departure standard is that there must be a "substantial and compelling" reason or circumstance to justify a departure sentence. This language was first used in Minnesota. See Minnesota Sentencing Guidelines and Commentary § II.D (2006) ("the judge shall pronounce a sentence within the applicable [guidelines] range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 94; Kan. Stat. § 21-4716 (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.1; Mich. Comp. Laws§ 769.34(3); Or. Admin. R. 213-008-0001 (2007); Rev. Code Wash.§ 9.94A.535 (2006).

The revised Code adopts a less stringent "substantial circumstances" departure standard, see § 7.XX(3). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(iv) (1994) (recommending "substantial reasons" standard). A requirement of "compelling" reasons suggests that few departure penalties should

[108] This Reporters' Note has not been revised since § 6B.03's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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1 be affirmed on appeal, which is contrary to the intent of the revised Code. No state guidelines system has produced
2 high rates of reversal of sentences on appeal. One survey of appellate-court decisions under state sentencing
3 guidelines observed that trial-court departures are generally upheld on the basis of "substantial" reasons, even when
4 "substantial and compelling" reasons are required by the literal terms of the state's guidelines. See Kevin R. Reitz,
5 Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91
6 Northwestern L. Rev. 1441 (1997).

7 *c. Ordinary cases as the bases for guidelines presumptions.* For a policy discussion, see Kay A. Knapp,
8 Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 691-695 (1993).
9 For state-specific accounts, see Kansas State Sentencing Guidelines Desk Reference Manual (2006), at 38
10 (guidelines address "typical case scenarios"; departures are permitted in "atypical cases"). See also Minnesota
11 Sentencing Guidelines and Commentary (2006), at 1; Mo. Sentencing Advisory Comm'n, Report and
12 Implementation Update (2005), at 11; Pa. Sentencing Guidelines Standards (2005), at 65; Utah Sentencing Comm'n,
13 Adult Sentencing and Release Guidelines (2006), at 7; Virginia Criminal Sentencing Commission, Virginia Sen-
14 tencing Guidelines, (9th ed. 2006), at 3; Washington Adult Sentencing Guidelines Manual (2006), at II-147. Accord,
15 ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(i) (1994).

16 *d. Presumptive guidelines and sentence severity.* For an example of a code that uses algebraic formulae to
17 specify the breadth of sentencing guidelines ranges, see Minn. Stat. § 244.09, subd. 5(2) (2006) (guidelines shall
18 establish "[a] presumptive, fixed sentence for offenders for whom imprisonment is proper . . . . The guidelines shall
19 provide for an increase of 20 percent and a decrease of 15 percent in the presumptive, fixed sentence"). See also Va.
20 Code Ann. § 17.1-805(A) (2006); Rev. Code Wash. § 9.94A.850(4) (2006). In support of the functional approach in
21 subsection (3)(a), see ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-2.5(a), 18-
22 4.4(b)(ii) (1994).

23 *e. Departure factors within the guidelines.* Most existing sentencing guidelines schemes enumerate aggravating
24 and mitigating factors that may be used when departing from the guidelines, and most such provisions state that the
25 enumerated factors are nonexclusive—or else include catch-all factors to the same effect. Sentencing codes
26 sometimes require that the sentencing commission include such enumerations in the guidelines. See Ark. Code § 16-
27 90-804(c) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia
28 Sentencing Commission, 2006 Practice Manual, §§ 5.2.2–5.2.3; Kan. Stat. § 21-4716 (c)(1), (2) (2006); Md.
29 Sentencing Guidelines Manual (2007), at 45; Minnesota Sentencing Guidelines and Commentary § II.D.2 (2006);
30 Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 23, 27, 31, 38, 41; N.C. Gen. Stat.
31 § 15A-1340.16(d), (e) (2006); Or. Admin. R. 213-008-0002(1) (2007); Utah Sentencing Comm'n, Adult Sentencing
32 and Release Guidelines (2006), at 15, 16; Wis. Stat. Ann. § 973.017(3)–(8) (2006).

33 Washington State takes a different approach. While the enumerated mitigating factors in the guidelines are
34 nonexclusive, the enumeration of aggravating departure factors is expressly an "exclusive list." Rev. Code Wash.
35 § 9.94A.535(1),(2),(3) (2006). At least one state sentencing commission elected to include no enumeration of
36 departure criteria in guidelines. See Pa. Sentencing Guidelines Standards (2005), at 188.

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For statements against the policy advisability of assigning specific weights to guidelines departure factors, see ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.3(d) (1994); The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), at 34.

f. States choosing an advisory-guidelines system. Although it remains linguistically appropriate to speak of "departures" from advisory guidelines—and departure thresholds and criteria may even be recommended to sentencing courts—in an advisory system there is no formal, legally enforceable departure standard such as those catalogued in the Reporter's Note to Comment *a*, above. Instead, in advisory structures, judges are admonished or encouraged to adhere to guidelines recommendations. The mere provision of information—about condign penalties in the view of a sentencing commission, or the collective practices of other judges—may hold substantial persuasive force in itself. Judges may also perceive that costs attach to flouting the guidelines, particularly if records of individual judges' sentencing practices are put in the public domain. Through such means, the advisory systems' designers aim toward voluntary compliance in meaningful numbers of cases. For illustrations of encouragements and admonitions, see Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987) ("The Court is satisfied that it is in the best interests of the administration of justice to encourage Delaware's trial courts to implement, insofar as possible, the Commission's sentencing standards."); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.1 ("In order to eliminate unwarranted disparities in sentencing, the Commission hopes for and expects a high degree of compliance [with voluntary guidelines]."); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 2-3 (2006) ("Judges are encouraged to sentence within the guidelines unless they find aggravating or mitigating circumstances justifying departure.").

Advisory-guidelines systems can impose much structure upon judicial sentencing discretion through mechanisms other than a formally enforceable departure standard. Three such mechanisms are discussed below.

First, the majority of advisory systems require that judges "consider" the guidelines before pronouncing sentence. See Ala. Code § 12-25-35(b) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Md. Code, Crim. Proc. § 6-216(a)(1) (2006); Ohio v. Mathis, 846 N.E.2d 1, 8 (Ohio 2006); 42 Pa. Cons. Stat. § 9721 (2006); Tenn. Code § 40-35-210(c) (2006); Va. Code Ann. § 19.2-298.01(A) (2006); Wis. Stat. § 973.017 (2), (10) (2006). In some jurisdictions this is a pro forma requirement that may be satisfied by as little as a statement that the court has indeed consulted the guidelines. See, e.g., Ala. Code § 12-25-35(b),(c) (2006). In its strongest form, however, meaningful "consideration" may be premised on a number of sub-requirements: that courts engage in factfinding necessary to perform guidelines classifications or calculations; that pertinent guidelines be interpreted correctly and applied appropriately to the facts; that courts weigh any aggravating or mitigating factors relevant under the guidelines to the specific case; and that courts assess whether a departure would be proper under the terms of the guidelines. See, e.g., U.S. v. Crosby, 397 F.3d 103 (2d Cir. 2005). In other words, the strongest form of "consideration" mandates a great deal of structured thought process, even though the substantive endpoint of the process is styled as a recommendation.

Second, most advisory-guidelines systems require that courts provide a statement of reasons, in writing or on the record, whenever a sentence departs from guidelines recommendations. See Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Md. Code Regs. 14.22.01.05(A) (2007); 204 Pa. Code § 303.1(d) (2005); Tenn. Code § 40-35-210 (2006); Va. Code

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§ 19.2-298.01(B) (2006). But see Ark. Code § 16-90-804(a) (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 2. If no statement of reasons is needed for a sentence within the guidelines, a modest incentive is generated in favor of recommended penalties. Further, the discipline of an articulated reasoning requirement may be assumed, at least on occasion, to spur courts to think through the bases of a departure sentence more carefully than they otherwise would have done.

Finally, although it has rarely occurred, it is in theory possible for a meaningful process of appellate sentence review to operate in a system of advisory guidelines. See United States v. Booker, 543 U.S. 220 (2005); Kim S. Hunt & Michael Connelly, Advisory Guidelines in the Post-*Blakely* Era, 17 Fed. Sent'g Rep. 233 (2005). At a minimum, appellate courts can enforce whatever requirements are in place that guidelines be considered and trial courts give reasons for departures. Advisory guidelines can even attain quasi-enforceability, if appellate courts create standards of review that are deferential to lower-court sentences that comport with guidelines recommendations, but give closer scrutiny to departures. See § 7.09, Comment *i* See also U.S. v. Clairborne, 439 F.3d 479 (8th Cir. 2006), cert. granted in part sub nom. Claiborne v. U.S., 127 S. Ct. 551 (2006); U.S. v. Rita, 2006 WL 1144508 (4th Cir., May 1, 2006) (unpublished opinion), cert. granted in part sub nom. Rita v. U.S., 127 S. Ct. 551 (2006). Taken far enough, affirmance and reversal patterns in an advisory system may give de facto enforceability to advisory guidelines that is indistinguishable from the de jure enforceability of presumptive guidelines. See Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2005).

Policymakers should take note that the achievement of de facto enforceability of advisory guidelines, as described above, may render the sentencing system subject to Sixth Amendment jury factfinding requirements at sentencing. See Cunningham v. California, 127 S. Ct. 856, 875-876 (2007) (Alito, J., dissenting).

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§ 6B.06. Eligible Sentencing Considerations.[109]

(1) The commission when promulgating guidelines shall have authority to consider all factors relevant to the purposes of sentencing in § 1.02(2), with the exception of factors whose consideration has been prohibited or limited by constitutional law, express statutory provision, or controlling judicial precedent.

(2) Except as provided in this Section, the commission shall give no weight to the following factors when formulating any guidelines provision that affects the severity of sentences:

(a) an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief; and

(b) alleged criminal conduct on the part of the offender other than the current offenses of conviction and, consistent with § 6B.07, the offender's prior convictions and juvenile adjudications, or criminal conduct admitted by the offender at sentencing.

[109] This Section was originally approved in 2007; see Tentative Draft No. 1.

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(3) The guidelines shall provide that a departure sentence or an extraordinary-departure sentence may not be based on any factor necessarily comprehended in the elements of the offenses of which the offender has been convicted, and no finding of fact may be used more than once as a ground for departure or extraordinary departure.

(4) Notwithstanding the provisions of subsection (2)(a):

(a) the personal characteristics of offenders may be included as considerations within the guidelines when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be recommended;

(b) the commission may include an offender's gender as a factor in guideline provisions designed to assess the risks of future criminality or the treatment needs of classes of offenders, or designed to assist the courts in making such assessments in individual cases, provided there is a reasonable basis in research or experience for doing so; and

(c) the guidelines may include offenders' financial circumstances as sentencing considerations for the purpose of determination of the amounts and terms of fines or other economic sanctions.

(5) The commission may include provisions in the guidelines that address whether, under what circumstances, and to what extent, a plea agreement or sentence agreement by the parties may supply an independent basis for a departure sentence or an extraordinary-departure sentence.

(6) The commission may include presumptive provisions in the guidelines to assist the courts in their consideration of evidence of an offender's substantial assistance to the government in a criminal investigation or prosecution.

Comment: [110]

a. Scope. This provision speaks to those considerations that may be weighed by the sentencing commission when creating sentencing guidelines. Parallel provisions speak to other decisionmakers in the sentencing system. Considerations eligible to sentencing courts are addressed in Article 7. In Part III, similar questions of permission and limitation must be posed for official actors empowered to make prison-release decisions, and for courts or other actors authorized to set penalties for sentence violations.

Under the revised Code, the commission has no power to forbid or require the consideration of any sentencing factor. Only the legislature and the courts possess that authority, see § 6B.02(7). The legislature should use its authority sparingly when addressing the commission

[110] This Comment has not been revised since § 6B.06's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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and the courts—the actors closest to the complex and mutable issues of sentencing law and policy. Fixed legislative directives preempt dialogue between commission and courts, and hinder the evolution of a common law of sentencing.

The legislature should forbid the judiciary and the commission to weigh specific sentencing factors only when strong public-policy or constitutional concerns are present. Section 6B.06, read together with the parallel provision in Article 7 addressed to the courts [to be drafted], set forth those few areas in which considerations relevant to the purposes in § 1.02(2) should nonetheless be declared ineligible by legislative command.

b. General authority and limitations. Many jurisdictions through statute or case law grant sweeping authority to decisionmakers to weigh virtually all conceivable factors concerning the offense or the offender when making sentencing determinations. Section 6B.06(1) refines the typical approach in two ways. First, subsection (1) requires that sentencing considerations must be relevant to the purposes of sentencing and corrections in § 1.02(2). This is intended to be a meaningful and enforceable substantive limitation upon the reach of the general permission extended in subsection (1), and is part of the revised Code's thoroughgoing program to elevate the importance of the statement of purposes in § 1.02(2).

Second, subsection (1) expressly recognizes that its general grant of authority may be qualified by constitutional command, statutory provision, or controlling judicial precedent. The remainder of § 6B.06 sets out the most important legislative limitations recommended in the Code. It is equally important, however, to highlight the permissibility of judge-made limitations. Without explicit statutory authorization, the courts may not recognize their own discretion to carve out exceptions to the general grant of permission in subsection (1).

c. Prohibited personal characteristics of offenders. Many jurisdictions have provisions in statute or guidelines similar in spirit to subsection (2)(a), addressed to the commission or other decisionmakers in the sentencing system. In part, subsection (2)(a) restates federal constitutional law under the First Amendment, Due Process, and Equal Protection Clauses, and analogous state constitutional guarantees. Yet the subsection in no way depends upon constitutional foundations. Its provisions represent good public policy in an egalitarian society even if not demanded by constitutional strictures.

Some jurisdictions go further than subsection (2)(a) in prohibiting the consideration of the personal characteristics of offenders, and have removed from consideration such things as age, family circumstances, community ties, educational attainment, and employment history. At the extreme, the federal guidelines in the past foreclosed consideration of a defendant's amenability to drug treatment or other rehabilitative programming. Such expansive restrictions were founded on good intentions (in particular, the concern that many of the factors on the extended list correlate with race, ethnicity, or class), but have drawn much criticism because they disadvantage defendants who might otherwise have made justifiable claims of mitigation. Indeed, charges have been leveled that an overlong list of prohibited sentencing factors works to

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increase the severity of punishments imposed upon racial and other minority groups. Given the uncertainties, this is not an area in which model legislation can pronounce a firm recommendation. The relatively streamlined catalogue of prohibitions in subsection (2)(a) invites further study of these issues in each jurisdiction.

d. Exceptions to subsection (2)(a). Subsection (4)(a) states a general proposition that operates as an exception to subsection (2)(a), but also carries independent force. Subsection (2)(a) may not be read to prohibit consideration of an offender's race, ethnicity, sexual orientation or identity, natural origin, religion or creed, or political affiliation or belief, if such factors are part of a showing that the defendant presents circumstances of hardship, deprivation, vulnerability, or handicap that ought to be weighed in mitigation of sentence. Such circumstances, for example, might affect judgments of personal blameworthiness under § 1.02(2)(a)(i), or individualized treatment needs under § 6B.09 (to be drafted).

Subsection (4)(b) states an important but limited exception to the prohibition in subsection (2)(a) of consideration of an offender's gender. This exception is based on powerful statistical and social-science evidence that gender is a robust predictive factor, at least in some settings, of the future criminality of persons who have a prior record of offending. The legislature should not prohibit the commission, or other decisionmakers in the sentencing system, from weighing this knowledge when making or facilitating actuarial predictions of future criminal behavior. An unqualified bar to gender-based criteria, if left to stand in subsection (2)(a), would discriminate against women as a group when measured against their observed propensity for criminal behavior.

Subsection (4)(b) further recognizes that women offenders as a group may present treatment needs relevant to rehabilitative sentencing that are distinct from the needs of male offenders as a group. Again, the commission should not be foreclosed from responding to such knowledge, where it exists.

The exceptions stated in subsection (4)(b) operate only when the commission has "a reasonable basis in research or experience" to incorporate the consideration of gender into guidelines. Further, the exceptions are limited to risk and needs assessments, and thus go only to such sentencing purposes as incapacitation and rehabilitation in § 1.02(2)(a)(ii). Subsection (4)(b) has no effect on considerations of proportionality in punishment in § 1.02(2)(a)(i). As stated explicitly in § 1.02(2)(a)(ii), any adjustment of penalties due to the outcome of a risk or needs assessment as applied to an individual offender cannot exceed "the boundaries of proportionality in [§ 1.02(2)(a)(i)]."

Subsection (4)(c) ensures that the amounts of fines and other economic sanctions, and conditions of payment such as installment schedules, may be allowed to vary with the wealth and income stream of particular offenders. A "day fine" system, for example, encouraged elsewhere in the Code revision (provision to be drafted), could not be incorporated into guidelines without the qualification stated in subsection (4)(c).

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e. Alleged nonconviction offenses. Subsection (2)(b) reflects the policy view that, if criminal penalties are to be assessed for crimes government officials believe a defendant has committed, those crimes must first be charged and proven at trial beyond a reasonable doubt or admitted by the defendant. The provision embraces the "conviction-offense" philosophy of a number of state sentencing guideline systems and the American Bar Association's Criminal Justice Standards for Sentencing. It rejects the modified "real-offense" approach of the federal sentencing guidelines.

Subsection (2)(b) bars consideration at sentencing of alleged criminal offenses that have never been charged, that have been charged but dismissed (perhaps as part of a plea agreement), or that have been charged and tried resulting in acquittals. These rules respond to the concern that determinations of guilt of statutorily defined offenses are attended by numerous constitutional and subconstitutional safeguards at trial that often evaporate in the relative informality and brevity of sentence proceedings. These trial protections include a defendant's right to a jury trial, the presumption of innocence, the requirement of proof of all constituent elements of offenses beyond a reasonable doubt, the right to confront adverse witnesses, the availability of the exclusionary-rule remedy for unconstitutionally acquired evidence, the Double Jeopardy guarantee barring relitigation of an acquittal, and the rules of evidence. These protections have not traditionally been available at sentencing proceedings.

In addition to differences in formal procedure, subsection (2)(b) also responds to the practical reality that, while there may be occasional exceptions, sentence proceedings typically command far less time, care, and attention on the part of the court and the parties than a full-blown criminal trial. The total "procedural differential" between trial and sentencing is a chasm rather than a crevice. Even if the Constitution is not offended, it is nonetheless an anomaly with grave impacts upon fairness and process regularity to allow the litigation of criminal guilt for the first time at sentencing, or to permit the relitigation of charges that could not be sustained at trial. The anomaly is all the more serious—as often occurs under "real-offense" sentencing—when the penalty consequences attending a finding of "guilt" at sentencing are identical to those that would have resulted from a formal conviction at trial.

Subsection (2)(b) does not adopt an idealized conviction-offense philosophy that would disallow all sentencing considerations other than the bare facts of conviction as established in the elements of the conviction offenses. No American jurisdiction has gone to this extreme. Instead, the provision adopts a modified conviction-offense philosophy that permits expansive consideration of extra-offense facts. Subsection (2)(b) does not forbid sentencing consideration of any aggravating or mitigating circumstances surrounding offenses of conviction, or any personal characteristic of the offender, or any consideration of the impact of an offense on its victim, or any other factor relevant to the purposes of sentencing under § 1.02(2)(a)—with the exception of factual considerations that have been defined by the legislature as crimes separate or different from the conviction offenses. Even in the case of separately defined crimes, of course, punishment for the additional offenses is not barred by subsection (2)(b). Rather, a burden is

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placed on the prosecution to charge and obtain convictions for additional or more serious offenses before punishment for those offenses may be imposed.

Illustration:

1. A sentencing commission may not promulgate guideline provisions that increase the presumptive penalty following a drug conviction if it is established at sentencing proceedings that the defendant committed additional drug crimes that were never charged, were charged and dismissed, or were charged but resulted in acquittals at trial. Nor may the commission enumerate aggravating factors, based on similar alleged nonconviction offenses, as grounds for departure from presumptive sentences under the guidelines. The commission may, however, incorporate into the guidelines factors such as: the defendant played a leadership role in a drug crime involving more than one offender, drugs sold by the defendant were of unusually poor and dangerous quality, drugs were sold to an underage or otherwise vulnerable buyer, and the like—so long as those factors do not replicate elements of separate offenses as defined by the legislature.

Subsection (2)(b) does not attempt a full resolution of the difficult policy question of which facts may appropriately be resolved at sentencing and which facts are sufficiently "elemental" to determinations of guilt or statutory grading that they should be reserved for adjudication at trial. Subsection (2)(b) does supply a partial answer to the question, however. A legislative judgment that designated facts are of sufficient importance to be included in statutory elements of offenses is the clearest possible signal that those facts are major markers of guilt, innocence, or grading distinctions. The legislature, commission, and courts may develop additional rules or presumptions concerning the division of factfinding labor as between trial and sentencing. Under the philosophy of the Code revision and this subsection, such further explorations of best policy are encouraged, but they should build upon and not subtract from the foundational rule stated here.

f. Double counting of offense elements. Subsection (3) ensures that a fact already established as part of the determination of a defendant's guilt cannot be counted a second time as a departure factor in aggravation of sentence. Similarly, it prevents any single factor from counting more than once as a ground for departure or extraordinary departure, even when not an offense element. While the commission cannot on its own authority lay down prohibitions of sentencing considerations in the guidelines, subsection (3) authorizes and requires the commission to do so in these instances.

g. Plea agreement as a mitigating factor. Subsection (5) proceeds from the assumption that, as a general rule, a plea agreement or sentence agreement standing alone should provide no grounds for a departure or extraordinary departure from applicable guidelines or statutory sentencing law. Once again, the commission itself would not be free to author such a prohibition. The legislature here, and in Article 7 (addressed to sentencing courts), should address the effect

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of bargaining by the parties, which otherwise might function as a limitless avenue of deviation from sentencing presumptions. Section 7.03(5) the revised Code provides that:

> **A plea agreement or sentence agreement standing alone shall not be sufficient ground to support a departure or extraordinary departure, even if agreed upon by the parties. Departure and extraordinary departure sentences following such agreements must be supported by facts sufficient to meet the relevant legal standard for departure.**

As indicated by the above-quoted language, subsection (5) does not carve an absolute prohibition in stone. It does, however, grant exclusive authority to the commission to design and calibrate relevant provisions if needed.

h. Cooperation as a mitigating factor. Subsection (6) must be understood in relation to its parallel provision, § 7.03(6) ("Following a motion by the government or defense, or on the court's own motion, the sentencing court may consider offenders' substantial assistance to the government in criminal investigations or prosecutions as grounds to reduce the severity of sentences that would otherwise be imposed. The courts shall consider any relevant sentencing guidelines in making such determinations."). The two subsections together will ensure that sentencing courts always have authority to consider a defendant's cooperation with the government as a factor in mitigation of sentence. The commission in subsection (6) is granted authority to author presumptive-guidelines provisions on this subject, but no restrictions more forceful than presumptions, subject to the departure power in § 7.XX, may be placed on sentencing courts' discretion.

REPORTERS' NOTE [111]

b. General authority and limitations. The common-law rule, still applied in many jurisdictions, places almost no limitations on the information the court is permitted to consider at sentencing. See People v. Arbuckle, 587 P.2d 220, 223 (Cal. 1978); People v. Newman, 91 P.3d 369, 371-372 (Colo. 2004); State v. Bletsch, 912 A.2d 992, 1003 (Conn. 2007); State v. Malone, 694 S.W.2d 723, 727 (Mo. banc 1985); State v. Aldaco, 710 N.W.2d 101, 110-111 (Neb. 2006); State v. McKinney, 699 N.W.2d 460, 466 (S.D. 2005). For a codification of the rule, see 18 U.S.C. § 3661 (2006) ("Use of information for sentencing"):

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

c. Prohibited personal characteristics of offenders. For provisions similar to subsection (2)(a), see Ala. Code § 12-25-2(a)(2) (2006) ("geography, race, or judicial assignment."); Ark. Code § 16-90-801(b)(3) (2006) ("race, gender, social, and economic status"); District of Columbia Code § 24-112(d) (2006) ("race, sex, marital status, ethnic origin, religious affiliation, national origin, creed, socioeconomic status, and sexual orientation of

[111] This Reporters' Note has not been revised since § 6B.06's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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offenders"); Mich. Comp. Laws § 769.34(3)(a) (2006) ("gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion"); Minnesota Sentencing Guidelines and Commentary § II.D.1 (2006) (race, sex, employment or employment history, impact of sentence on profession or occupation, educational attainment, living arrangements, length of residence, and marital status); Ohio Rev. Code § 2929.11(C) (2006) ("race, ethnic background, gender, or religion of the offender"); Tenn. Code § 40-35-102(4) (2006) ("race, gender, creed, religion, national origin and social status of the individual").

A few jurisdictions rule out consideration of the defendant's personal characteristics or circumstances more expansively than subsection (2)(a). The broadest prohibitions exist in Washington and Kansas. The Washington Sentencing Guidelines proscribe "discrimination as to any element that does not relate to the crime or the previous record of the defendant." Rev. Code Wash. § 9.94A.340 (2006). As explained by the sentencing commission:

> [T]he Legislature considered enumerating specific factors which could *not* be considered in sentencing the offender, including race, creed and gender. However, the Legislature decided that to list such factors could narrow the scope of their intent, which was to prohibit discrimination as to any element that does not relate to the crime or the previous record of the defendant.

Washington Adult Sentencing Guidelines Manual (2006), at II-23–24. Kansas law is the same. See Kan. Stat. § 21-4702 (2006). The Kansas provision was expressly aimed at the elimination of unconscious racial and ethnic discrimination in sentencing. See Kansas Sentencing Commission, Final Recommendations (1991), at 4. The federal sentencing guidelines likewise contain expansive prohibitions, or strong discouragements, of consideration of defendants' personal characteristics or circumstances at sentencing. See U.S.S.G. §§ 5H1.1—5H1.6, 5H1.10—5H1.12 (2006) (factors "not relevant" to sentence include "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status" and "Lack of Guidance as a Youth and Similar Circumstances"; factors "not ordinarily relevant" include "Age," "Education and Vocational Skills," "Mental and Emotional Conditions," "Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction," "Employment Record," "Family Ties and Responsibilities," and "Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works"). For criticism of such sweeping rules, and an argument that they disadvantage minority defendants, see Charles J. Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938 (1988).

Some guidelines systems do not broadly prohibit the consideration of an offender's personal characteristics or circumstances as sentencing factors, and some even invite the consideration of specified personal circumstances. North Carolina, for example, counts among the factors supportive of a mitigated sentence that the defendant has been honorably discharged from the armed services, has a positive employment history or is gainfully employed, or has a "support system in the community." N.C. Gen. Stat. § 15A-1340.16(e)(14), (18), (19) (2006). See also Mo. Sentencing Authority Comm'n, Report and Implementation Update (2005), at 73 (offender's education level and employment status should be considered in measuring risk of recidivism); Virginia Sentencing Guidelines, 9th Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet used by judges at sentencing includes age and sex of offender, whether offender was regularly employed, and whether offender was ever married); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 5, 7 (guidelines encourage

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the consideration of the offender's age, education, employment history, and whether the defendant has "strong and stable ties" to family and community).

d. Exceptions to subsection (2)(a)

(1) Hardship or deprivation. Subsection (4)(a) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(c) (1994). See Tenn. Code § 40-35-113(7) (2006) (mitigating factors include: "The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self.").

(2) Gender. A pronounced gender gap in rates of serious criminality is found in all societies, and is stable across time. See Michael R. Gottfredson and Travis Hirschi, A General Theory of Crime (1990), at 144-149. For example, in 2005, police departments nationwide reported that males were 89 percent of those arrested for murder, 99 percent for rape, 89 percent for robbery, and 79 percent for aggravated assault. Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports (2006), tbl. 33.

At least one American sentencing commission uses a defendant's sex as one important variable in a risk-assessment instrument that identifies low-risk offenders who may safely be diverted from prison under the state's guidelines. See Virginia Sentencing Guidelines, 9th Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet based on current offense type, single or multiple counts, prior record, age, and sex of offender, whether offender regularly employed, and whether offender was ever married). The instrument was based on a multi-year recidivism study of Virginia offenders. It was validated in an independent evaluation, and has been used by Virginia judges as a basis for the diversion of thousands of offenders, who would otherwise have been recommended for a prison sentence under the guidelines, into community sanctions. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Virginia Sentencing Commission, 2005 Annual Report, at 29-31. The research base for Virginia's program satisfies the requirement in subsection (4)(b) that the use of gender as a sentencing factor must have "a reasonable basis in research or experience."

(3) Financial circumstances. Subsection (4)(c) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(b) (1994). See, e.g., Ohio Rev. Code § 2929.18(E) (2006) ("A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it").

e. Alleged nonconviction offenses. Subsection (2)(b) follows the approach endorsed in ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.6 (1994) ("Sentence should not be based upon the so-called 'real offense,' where different from the crime of conviction"). Most state sentencing-guidelines systems adopt a "conviction offense" philosophy to the following extent: Guidelines presumptions or recommendations are based on offenses for which defendants have been convicted (including current offenses and criminal history), and take no account of different or additional "nonconviction" offenses defendants are alleged during sentencing proceedings to have committed. See Michael Tonry, Sentencing Matters (1996), at 94 ("sentencing commissions in Arkansas, Canada, Delaware, Kansas, Florida, Louisiana, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin unanimously rejected real offense sentencing and based guidelines on conviction offenses").

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A handful of states affirmatively forbid consideration at sentencing of alleged offenses or offense elements beyond those for which there have been formal convictions. See Minnesota Sentencing Guidelines and Commentary § II.A.02 (2006):

> Offense severity is determined by the offense of conviction. The Commission thought that serious legal and ethical questions would be raised if punishment were to be determined on the basis of alleged, but unproven, behavior, and prosecutors and defenders would be less accountable in plea negotiation. It follows that if the offense of conviction is the standard from which to determine severity, departures from the guidelines should not be permitted for elements of offender behavior not within the statutory definition of the offense of conviction. Thus, if an offender is convicted of simple robbery, a departure from the guidelines to increase the severity of the sentence should not be permitted because the offender possessed a firearm or used another dangerous weapon.

The Minnesota proscription has been enforced by the appellate courts. See, e.g., State v. Womack, 319 N.W.2d 17 (Minn. 1982). See also Rev. Code Wash. §§ 9.94A.520 & 9.94A.530(2) (2006); Washington Adult Sentencing Guidelines Manual (2006), at II-138 ("The Commission believed that defendants should be sentenced on the basis of facts which are acknowledged, proven, or pleaded to. Concerns were raised about facts which were not proven as an element of the conviction or the plea being used as a basis for sentence decisions, including decisions to depart from the sentence range."); State v. McAlpin, 740 P.2d 824 (Wash. 1987).

Despite the general "conviction offense" orientation of most state sentencing-guidelines systems, some states make exceptions, and include specified "nonconviction" crimes or other misconduct among the aggravating factors enumerated in guidelines. See, e.g., Rev. Code Wash. § 9.94A.535(3)(g) (2006) (aggravating factors include: "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 99; N.C. Gen. Stat. § 15A-1340.16(d)(18) (2006) (grounds for aggravated sentence include a finding that "[t]he defendant does not support the defendant's family"); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 4; Rev. Code Wash. § 9.94A.535(3)(h)(i).

Three state guidelines systems—all of them advisory systems—explicitly permit the consideration of nonconviction conduct of any kind. See Md. Code Regs. 14.22.01.09(A) (2007); State v. Winfield, 23 S.W.3d 279 (Tenn. 2000); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

The federal sentencing-guidelines system is the only system in the United States to *require* sentencing courts to base guidelines sentences upon both conviction and nonconviction offenses. See U.S.S.G. § 1B1.3 (2006) (the "Relevant Conduct" provision). The Supreme Court has held that the "real conduct" approach was central to Congress's intent in authorizing creation of the federal guidelines. See United States v. Booker, 543 U.S. 220, 250 (2005) (Breyer, J., Opinion of the Court) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction"). For criticisms of the relevant conduct rules, see David Yellen, Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing, 58 Stan. L. Rev. 267 (2005); Michael Tonry, Sentencing Matters (1996), at 93-95; Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), at 148-150.

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1 For a discussion of different approaches to these issues nationwide, see Kevin R. Reitz, Sentencing Facts:
2 Travesties of Real-Offense Sentencing, 45 Stan. L. Rev. 523 (1993).

3 *f. Double counting of offense elements.* Provisions similar to subsection (3) are found in a number of guidelines
4 jurisdictions. See Alaska Stat. § 12.55.155(e) (2006); Delaware Sentencing Accountability Commission Benchbook
5 2006, at 94; Pa. Sentencing Guidelines Standards (2005), at 160; Tenn. Code § 40-35-114 (2006); Utah Sentencing
6 Comm'n, Adult Sentencing and Release Guidelines (2006), at 16; Rev. Code Wash. § 9.94A.537 (2006). A close
7 variation on this theme is found in Kan. Stat. § 21-4716(c)(3) (2006) ("If a factual aspect of a crime is a statutory
8 element of the crime or is used to subclassify the crime on the crime severity scale, that aspect of the current crime
9 of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect
10 of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of
11 the crime"). See also Mich. Comp. Laws § 769.34(3)(b) (2006).

12 *g. Plea agreement as a mitigating factor.* Numerous approaches to the effects of plea bargains on sentences
13 have been taken in American guidelines jurisdictions, see below, although no one in any jurisdiction claims to have
14 successfully addressed the issue. In the absence of a proven model, subsection (5) allows sentencing commissions to
15 experiment, and grants commissions authority to promulgate authoritative regulations on the subject.

16 The federal sentencing-guidelines system offers a fixed sentencing discount applicable to most defendants who
17 plead guilty. U.S.S.G.§ 3E1.1 (2006) (two-level reduction in offense level on guidelines grid for a defendant who
18 "clearly demonstrates acceptance of responsibility for his offense"). A handful of states emulate the "acceptance of
19 responsibility" approach, although no state follows the federal example of quantifying the precise degree of
20 mitigation to be awarded defendants. See N.C. Gen. Stat. § 15A-1340.16(e)(15) (2006); Wisconsin Sentencing
21 Commission, Wisconsin Sentencing Guidelines Notes, at 7.

22 Some sentencing-guidelines jurisdictions have introduced rules, procedures, or admonitions in the attempt to
23 regulate or mute the effect of plea bargains upon sentences. See Ark. Code § 16-90-804(b) (2006) ("If both sides
24 agree on a recommended sentence, the judge may choose to accept or reject the agreement based upon the facts of
25 the case and whether those facts support the presumptive sentence or a departure different from any
26 recommendation."); Kan. Stat. § 21-4713 (2006) (limiting concessions prosecutors may make in plea negotiations,
27 e.g., prosecutor may "recommend a particular sentence outside of the sentencing range only when departure factors
28 exist and shall be stated on the record," but may not "make any agreement to exclude any prior conviction from the
29 criminal history of the defendant"); Minnesota Sentencing Guidelines and Commentary, Comment II.D.04 (2006)
30 ("When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the
31 reasons that underlie the plea agreement or explain the reasons the negotiation was accepted"); Mo. Sentencing
32 Advisory Comm'n, Report and Implementation Update 12 (2005) ("The commission is aware that, in many cases,
33 the sentence is the result of a plea agreement. The information in the [sentencing recommendations] will be useful in
34 determining appropriate dispositions in plea-agreed cases. Counsel and courts should be aware that, although a plea
35 agreement is done before entry of a plea and preparation of a Sentencing Assessment Report, a probation and parole
36 officer or prison official would prepare a report in any event."); Virginia Sentencing Guidelines (9th ed. 2006),
37 General Instructions at 1 ("Reasons for departure should be specific. 'Plea agreement' as a reason for departure does
38 not provide information on why the plea agreement was accepted"); Rev. Code Wash. § 9.94A.535(2)(a) (2006) (it

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is an enumerated aggravating factor, supportive of a sentence above the standard guidelines range, if "[t]he defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act"); id. § 9.94A.431(2) (providing that the "sentencing judge is not bound by any recommendations contained in an allowed plea agreement," and "[i]f the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement").

Other jurisdictions make no attempt to limit the dispositive effect of plea agreements upon sentence. See District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.1 (Plea agreements that are accepted by the sentencing court control the applicable sentence and displace the guidelines); Md. Code Regs. 14.22.01.05(B)(1) (2007) ("Common reasons for departure under the guidelines range include . . . [t]he parties reached a plea agreement that called for a reduced sentence").

h. Cooperation as a mitigating factor. Most sentencing-guidelines jurisdictions recognize a defendant's cooperation with an ongoing government investigation as a mitigating factor at sentencing. See Ark. Code § 16-90-804(c)(1)(H),(I) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 94, 98; District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.3(7); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 23; N.C. Gen. Stat. § 15A-1340.16(e)(7) (2006); Pa. Sentencing Guidelines Standards (2005), at 188; Tenn. Code § 40-35-113(9)-(10) (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 15-16; Rev. Code Wash. § 9.94A.450(2)(b) (2006); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

Two guidelines jurisdictions require a government motion before the defendant's cooperation may be considered as a ground for mitigated sentence. See Kan. Stat. § 21-4716(e) (2007) ("Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist"); U.S.S.G. § 5K1.1 (2006) (same). Subsection (6) is not so qualified. See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.10(b) (2004) (rejecting government motion requirement, but stating that prosecutor's views should be "considered" by the sentencing court); Cynthia K.Y. Lee, Prosecutorial Discretion, Substantial Assistance and the Federal Sentencing Guidelines, 42 UCLA L. Rev. 105 (1994) (criticizing government motion requirement in federal law).

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§ 6B.07. Use of Criminal History.[112]

(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as grounds for departures from presumptive sentences, or in other provisions of the guidelines. The

[112] This Section was originally approved in 2007; see Tentative Draft No. 1. Amendments recommended by the Reporters were approved in 2016; see Tentative Draft No. 4.

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commission shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2).

(a) If criminal history is used for purposes of assessing offenders' blameworthiness for their current offenses, the commission shall consider that offenders have already been punished for their prior convictions.

(b) If criminal history is used for purposes of assessing an offender's risk of reoffending, the commission shall consider that the use of criminal history by itself may over-predict those risks.

(c) The commission shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.

(2) The commission may include consideration of prior juvenile adjudications as criminal history in the guidelines, but only when the procedural safeguards attending the adjudications were comparable to those of a criminal trial. If prior juvenile adjudications are used as criminal history for purposes of assessing an offender's blameworthiness for the current offense, the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages.

(3) The commission shall fix clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence. The limitations periods may vary depending upon the current and prior offenses, but shall not exceed [10] years. The commission should create presumptive rules that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.

(4) The commission shall monitor the effects of guidelines provisions concerning criminal history, any legislation incorporating offenders' criminal history as a factor relevant to sentencing, and the consideration of criminal history by sentencing courts. The commission shall study the experiences of other jurisdictions that have incorporated criminal history into sentencing guidelines. The commission shall give particular attention to the question of whether the use of criminal history as a sentencing factor contributes to punishment disparities among racial and ethnic minorities, or other disadvantaged groups.

Comment: [113]

a. Scope. This provision speaks generally to the sentencing commission's use of criminal history as a sentencing factor in its guidelines. Section 6B.07 is related to § 6B.09 ("Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending") (Tentative Draft No. 2,

[113] Much of this Comment has not been revised since § 6B.07's original approval in 2007. New material in the Comment was added to accompany the 2016 amendments. All Comments will be updated for the Code's hardbound volumes.

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2011), which addresses the use of criminal history, along with other factors, in support of predictions of recidivism and the selection of correctional interventions for individual offenders.

Sentencing commissions across America have crafted their approaches to criminal history with little guidance from legislation, without much internal deliberation, and with scant reference to the purposes of sentencing operative in their jurisdictions. No best practice has emerged—and it is difficult to speak even in terms of common practice. Guidelines jurisdictions vary dramatically in their use of criminal history as a sentencing factor. In some states, a maximum criminal-history score might double the length of prison stays prescribed by guidelines, while in other states it increases prison terms by more than a factor of 10. Section 6B.07 underscores that the treatment of criminal history is of vital importance to the design of a sentencing system. It is a powerful guidelines component—often overshadowing the current offense—that merits greater examination by every American sentencing commission than in the past.

b. Broad discretion to the commission. Section 6B.07(1) does not require or encourage a commission to build into guidelines the consideration of offenders' criminal histories, but it does require the commission to "consider" whether and in what circumstances it may be desirable to do so. The provision opens the door to a number of possible vehicles for guidelines provisions on criminal history: as part of the determination of presumptive sentences in the first instance (this is the majority approach of American guidelines systems today), as an aggravating factor in support of departure (the present minority approach), or as a component of another kind of presumptive provision or recommendation in the guidelines (allowing for future experimentation). The commission may develop different approaches to the use of criminal history for specified classes of offenders, current offenses, and prior offenses.

Section 6B.07(1) expressly raises the possibility that, for some or all categories of cases, the commission may decide that prior criminal record should not influence sentence severity. The subsection requires commissions to consider "whether" defendants' criminal histories should be included in guidelines at all.

Section 6B.07(1) also calls into question the use of the "grid" format for the architecture of sentencing guidelines. The revised Code is agnostic on the packaging of sentencing guidelines recommendations. See § 6B.02(3) ("The commission shall determine the best formats for expression of presumptive sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression."). Most American guidelines systems since 1980 have employed two-dimensional grids (or "matrices" or "charts"), with the gravity of current offenses scored on one axis and the offender's criminal history scored on the other. Of course, such grid calculations are not the beginning and end of the decisional process. All systems allow extra-grid factors to influence penalties in the form of departure factors or other adjustments. In some systems the full catalog of extra-grid factors that must or may be considered by sentencing courts is quite expansive. Even so, the grid concentrates attention on its twin elements. Moreover, the grid—whether intentionally or unconsciously—

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defines a way of thinking about prior offending. It suggests, by its very configuration, a linear relationship between criminal history and appropriate punishment severity.

The revised Code also recognizes that grids have proven advantages. See § 6B.02(3) and Comment *c*. At least a handful of states, however, have elected to assemble their guidelines in other forms, such as narrative statements, offense-specific worksheets, or computer software. The Sentencing Council for England and Wales has also rejected the grid format for its sentencing guidelines, instead using a three-step analytic approach. In at least some of the non-grid systems, the impact of offenders' criminal history on punishment is not reducible to the mechanical, additive enhancements often found in grid-based guidelines.

c. The commission's deliberations; required considerations. Subsection (1) outlines a multi-faceted thought process that all sentencing commissions must work through when considering whether and how criminal history will be incorporated into sentencing guidelines. Without dictating any particular result, subsection (1)'s requirements add up to a legislative directive that the question must be taken seriously, and that commissions should pause to reflect on a number of unintended consequences that may follow from a "common sense" or overly simplistic approach.

The introductory paragraph of subsection (1) provides that any use of criminal history as a factor in the guidelines must be driven by the underlying purposes of sentencing and corrections in § 1.02(2). This echoes broader mandates that apply to the creation all guidelines provisions. See § 6B.03(1) ("In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2)"); § 6A.01(2)(e) (the commission shall "perform its work and provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2)"). Repetition in the context of criminal history is warranted because, in the brief history of American sentencing guidelines, most commissions have not engaged in such analysis, or have done so quickly and casually. Although not a statutory requirement under the Code, the thought processes described in subsection (1) are commended to the trial and appellate courts of each state, when applicable, as factors that may be relevant to the development of a sentencing jurisprudence.

Subsections (1)(a) through (c) set forth three especially important subjects that commissions must consider when promulgating criminal-history provisions:

(1) *Considerations of blameworthiness and proportionality.* Subsection (1)(a) provides that, "[i]f criminal history is used for purposes of assessing offenders' blameworthiness for their current offenses, the commission shall consider that offenders have already been punished for their prior convictions." By some lights, criminal-history enhancements amount to double punishment for prior offenses, which violates basic principles of fairness, rationality, and proportionality. If prior crimes have been met with proportionate penalties in the past, some argue that the offender has "paid his debt to society," and that government and the public should regard fulfillment of the earlier sentence as a process that "wipes the slate clean." On some

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version of this reasoning, retributivist scholars have argued that criminal-history enhancements are wholly unjustified or, at most, should be allowed to have only a marginal effect on current sentencings.

The "balance sheet" perspective on past crimes and punishments is not reflected in the laws of any American jurisdiction. Many people believe intuitively that offenders' prior convictions remain relevant to their blameworthiness for new offenses, and state codes and sentencing guidelines often codify that viewpoint. While the Code would not disallow such moral intuitions, it does require that, when sentencing authorities weigh blameworthiness, proportionality, and past offending, they should keep in mind that the offender has already been punished for his prior convictions.

(2) *Criminal history as risk assessment.* Subsection (1)(b) provides that, "[i]f criminal history is used for purposes of assessing an offenders' risk of reoffending, the commission shall consider that the use of criminal history by itself may over-predict those risks." In most guidelines systems, especially those that rely on two-axis grids, computations based on current offense and criminal-history score determine which defendants should be incarcerated and for how long (subject to the sentencing courts' departure power). As the number of prior offenses increases, defendants move in regular, linear increments to penalties of growing severity. While this produces an arrangement with the appearance of rationality and evenhandedness, almost no American commissions have examined whether the incremental march across the guidelines grid coincides with increased risk that defendants will recidivate.

To the extent that guidelines policy is based on a rationale of incapacitation of dangerous offenders, as authorized in § 1.02(2)(a)(ii), that policy is frustrated when prison sentences are used on offenders who would not have recidivated if they had received a nonprison sanction. "False positives" represent policy failure, needless expenditures, and great and avoidable unfairess; see § 6B.09, Comment *d*. Experience in some guidelines jurisdictions using a linear approach to criminal history has shown that it can result in the incarceration of offenders who present little danger to public safety—especially drug and property offenders with no record of violent crime.

For a jurisdiction that finds an incapacitation-based prison policy ethical and desirable, and wishes to distinguish among defendants on this ground, empirically validated tools should be preferred to crude approximations. Elsewhere, the revised Code endorses the use of sophisticated risk-assessment tools that typically include criminal history along with a number of other predictive factors. When such instruments are well-constructed, they are statistically superior to criminal-history scoring by itself—and often detect surprising numbers of low-risk offenders. See § 6B.09(3), which recommends that actuarial risk-assessment instruments or processes should be developed and used at sentencing to identify otherwise prison-bound offenders who present low-risk profiles, in order to encourage judges to divert those offenders to nonprison sanctions.

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Because of problems of overprediction, and because criminal-history scores are highly correlated with race (see Comment *c(3)* below), subsection (1)(b) requires that all sentencing commissions carefully "consider" the limitations of criminal history as a predictive measurement. The provision does not mandate the outcome of that thought process, but requires all commissions to inquire into whether crime-preventive goals are being well served, resources expended responsibly, and avoidable injustices in the system minimized.

(3) *Criminal history and racial disparities* An accumulating body of research indicates that criminal-history formulas in sentencing guidelines are responsible for much of the "unexplained" disparities in black and white incarceration rates—that is, disparities that cannnot be "accounted for" by differential rates of crime commission, arrest, and conviction. One study of the Minnesota Sentencing Guidelines estimated that 63 percent of the state's unexplained black-white disparity in the "in-out" decision (whether to incarcerate) was attributable to the operation of the guidelines' criminal-history scoring system.

In the Institute's view, it is imperative that the sentencing system do nothing to exacerbate preexisting racial disparities arising from life conditions in segregated and disadvantaged communities, or disparities introduced in earlier stages of the criminal justice process. See § 1.02(2)(b)(iii) (one purpose of the sentencing system as a whole is "to eliminate inequities in sentencing across population groups"), § 6A.05(2)(f) (among its continuing duties, a sentencing commission is required to "investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities."); § 6A.07(3) (sentencing commission must create correctional projection forecasting model that is "designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.").

Subsection (1)(c) provides that "[t]he commission shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups"). Again, the decisions taken by the commission in light of that consideration are not dictated by the Code. Subsection (1)(c) supplements subsection (4), which requires that sentencing commissions, on an ongoing basis, must be alert to the danger that criminal-history scoring can exacerbate racial and ethnic disparities in punishment. While subsection (4) requires commissions to "monitor" the operation of the sentencing system as a whole, subsection (1)(c) requires commissions to "consider" the danger of racial and ethnic disparities in punishment when formulating criminal-history provisions in the first instance.

d. Juvenile adjudications. Section 6B.07(2) authorizes the sentencing commission to include juvenile adjudications as part of defendants' criminal histories under the guidelines but does not require that it do so. The question of whether juvenile adjudications should be included in criminal history is a policy decision for each state. The vast majority of American guidelines

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systems give weight, usually in proscribed circumstances, to past juvenile offending. There are cogent arguments against such consideration—that adult offenders should not be held responsible for their misconduct while underage, and that procedural safeguards in juvenile courts do not typically match those in criminal courts. On the other hand, some behavior during a person's juvenile years is highly predictive of adult criminality, such as the age of onset of criminal activity. Also, the peak activity of criminal careers—measured in rates of arrests, offending, or convictions—occurs on average in the age group of 16- to 20-year-olds.

A commission's choices about the incorporation of juvenile records into adult criminal history must be informed by the analytic framework of § 1.02(2); see § 6B.03(1) ("In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2)"). Section 1.02(2)(a) endorses the furtherance of utilitarian goals at sentencing, while also insisting that sentences may not be disproportionate; this mix of theories is called "utilitarianism within limits of proportionality." Working within this framework, a commission might view adult offenders as more "blameworthy" because of their prior juvenile offending, and deserving of increased punishment under § 1.02(2)(a)(i) (all sentences must fall "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). On such reasoning, the entire range of proportionate penalties in a given case—both the ceiling and floor of sentence severity—might be elevated. Alternatively, a commission may conclude on ethical grounds that an adult defendant's juvenile record should have no bearing on present blameworthiness, yet should be considered solely for predictive purposes. See § 6B.09. Within the range of proportionate penalties for the adult offense—without changing the floor or ceiling, as in the first example—the goal of incapacitation of dangerous offenders may push sentence severity toward the maximum still-proportionate sentence.

To meet the concern that juvenile court processes in some states are significantly less protective than the procedural guarantees in adult criminal court, subsection (2) adds the important proviso that juvenile adjudications may be counted in criminal history "only when the procedural safeguards attending the adjudications were comparable to those of a criminal trial." This standard is not optional; it is a statutory prerequisite for the consideration of a juvenile record. If juvenile adjudications are to be used as a desideratum of "criminal" history, subsection (2) makes this permissible only when a true "criminal" process has been employed for the establishment of that history.

The final sentence of subsection (2) adds another proviso: "If prior juvenile adjudications are used as criminal history for purposes of assessing an offender's blameworthiness for the current offense, the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages." The required mitigation is activated only in guidelines that incorporate juvenile records, entirely or in part, as indicia of current blameworthiness. To the extent that is the rationale, the legislature should not repose questions of mitigation entirely in the sentencing commission. Both the developmental sciences and

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constitutional decisions of the U.S. Supreme Court have shown that significant mitigation for youth is appropriate as a general rule. The commission should be required to take account of the jurisprudence and neurological studies recognizing that brain development in adolescents is not complete, and they are less able to govern their actions or resist peer pressures via moral inhibitions.

Under subsection (2), ultimate questions of blameworthiness arising from prior juvenile adjudications are by no means resolved statutorily: The matter of *whether* there should be mitigation is disposed by statute; individualized judgments of *how much* mitigation should be afforded in specific cases are left in to the commission and courts, with the qualification that subsection (2) requires that the force of mitigation should increase as the age of the offender at the time of the juvenile offense diminishes.

e. Limitation periods. Subsection (3) expresses a legislative judgment that the justifications for consideration of offenders' prior convictions generally diminish with time. This is true under retributive and utilitarian theories of punishment: We tend to attribute reduced blame to someone for misconduct in their distant past. Also, behavior from long ago may tell us little about a defendant's present or future propensities. A growing body of longitudinal research shows that, after seven to nine years from past criminal conduct (varying by type of offense), the likelihood that a person will commit a new crime is the same as for a person with a spotless record.

Accordingly, the commission should designate limitation periods (often called "decay rules") after which offenders' prior records will no longer be considered. Nearly all American sentencing guidelines include such a provision. Limitation periods may vary by type of past criminal conduct and its relationship to current offenses, but should in no case reach back more than 10 years. Subsection (3) places the maximum recommended period in brackets, to indicate that its precise duration should be a matter of legislative discretion, and may be informed by future criminological research. Given current knowledge of the fading predictive value of prior offenses over time, shorter cutoff periods would be consistent with the Code's recommendation.

Subsection (3) also encourages a commission to create a sliding scale in its criminal-history guidelines, to incrementally depreciate the weight assigned to prior offenses as they become more remote in time, before their legal significance expires entirely. Such a rule would reflect the diminishing significance of prior convictions over time on both retributive and utilitarian grounds, rather than adopting a rigid all-or-nothing approach that is out of sync with such changes. In light of the relatively long cutoff periods in most states, a progressive discount could also extend the benefit of "decay" rules to far more defendants throughout the system, thus muting the effects of criminal history scoring on an aggregate, systemic level. No current American system follows subsection (3)'s recommendation to reduce the weight given to prior offenses incrementally with the passage of time, although it has received academic support.

f. Monitoring criminal history's impact. Subsection (4) underscores the commission's ongoing duty to monitor the operation and effects of the criminal-history provisions of the

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guidelines, legislation that incorporates criminal history as a factor relevant to punishment, and sentencing courts' consideration of criminal history (which may reflect guideline terms, legislation, judicial discretion, or judge-made law). Rules of criminal history scoring, applied in the courtroom, can have important ripple effects on other decision points in the sentencing system. For example, there is a danger that prosecutorial power will be enhanced unintentionally by a system of formal criminal-history scoring. In the exercise of charging and plea-bargaining discretion, for example, prosecutors may structure the resolution in a current proceeding to have maximum impact when counted as criminal history in a later case. If this becomes a common practice, the legal quotient of criminal history within the system could rise significantly, without any real change in the state's crime patterns. Also, criminal-history provisions can have unforeseen impacts on the proportionality of sentences imposed across the state, the size and expense of prison populations, prioritization in the use of prison bed spaces (as when property offenders with prior records take up a greater share of prison populations, and violent offenders a smaller share), and the age, composition, and risk level of inmates.

Subsection (4) gives particular emphasis to the question of whether the operation of criminal history in the guidelines system creates or exacerbates disproportionate sentencing outcomes among disadvantaged groups. Research has shown that such unwanted effects are commonplace, and can have large impacts on racial disparities in the use of incarceration. Indeed, changes in criminal-history calculations may be the most easily identifiable and powerful tool available to sentencing-commission states that wish to reduce their overall racial disparities in punishment.

Finally, subsection (4) mandates that "[t] he commission shall study the experiences of other jurisdictions that have incorporated criminal history into sentencing guidelines." Sentencing commissions are already encouraged under the Code, as part of their ongoing duties, to "remain informed of the experiences of sentencing commissions and guidelines in other jurisdictions, study innovations in other jurisdictions that have possible application in this state, and provide information and reasonable assistance to sentencing commissions in other jurisdictions." See § 6A.05(3)(c) (stating that commissions "should" remain so informed). The new language in subsection (4) makes such comparative examination a required exercise on questions of the use of criminal history.

Arguably, all of the responsibilities stated in subsection (4) are already included in the more general duties contained in § 6A.05(2) and (5) (provisions laying out the ongoing duties of a permanent sentencing commission). The drafters of the revised Code, however, took the view that criminal history is a pivotal variable in the sentencing process that has not been studied adequately by sentencing commissions—or by researchers in other walks of professional life. General commands such as those in § 6A.05 have not proven sufficient to ensure that a commission devotes adequate time, attention, and critical scrutiny to the subject of criminal history.

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g. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (1) and (3) as follows:

> **(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of ~~presumptive~~ recommended sentences, as grounds for departures from ~~presumptive~~ recommended sentences, or in other provisions of the guidelines. . . . .**

> **(3) The commission shall ~~fix~~ suggest clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance sentence. The limitations periods may vary depending upon the current and prior offenses, but shall not exceed [10] years. The commission should create ~~presumptive rules~~ recommendations that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.**

The suggested revisions substitute terminology appropriate to sentence "recommendations" where language of "presumptions" occurs in the unaltered provision. See § 6B.01, Comment *b*.

REPORTERS' NOTE [114]

a. Scope. For a comprehensive legal survey of the treatment of prior convictions in American sentencing-guidelines systems, see Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Criminal History Enhancements Sourcebook (Robina Institute of Criminal Law and Criminal Justice, 2015) (hereinafter "Criminal History Sourcebook"). This report also documents the lack of deliberation among American sentencing commissions when building criminal history into sentencing guidelines. For a collection of scholarly viewpoints on the uses of criminal history, including perspectives from a number of countries, see Julian V. Roberts and Andrew von Hirsch eds., Previous Convictions: Theoretical and Applied Perspectives (2010).

For examples of state guidelines that increase prison sentences by about 100 percent for maximum criminal-history scores—and others that increase incarceration terms by as much as as 1400 percent, see Criminal History Sourcebook, at 23-24 (reporting average "sentence length multipliers" due to highest criminal-history score across sentencing guidelines grids in 12 states). Julian Roberts has observed that "[f]or almost all state guideline systems, at the highest criminal history levels at least, the offender's criminal record is a more powerful determinant of sentence severity than the seriousness of the offense." Julian V. Roberts, The Role of Criminal History in the Sentencing Process, in Michael Tonry ed., Crime and Justice, vol. 22 (1997), at 345.

[114] Much of this Reporters' Note has not been revised since § 6B.07's original approval in 2007. New material in the Note was added to accompany the 2016 amendments; see Tentative Draft No. 4. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Criminal history is not barred or discouraged as a sentencing factor in any U.S. jurisdiction. In state systems without sentencing guidelines, judges typically have discretion to weigh the importance of defendants' prior convictions, with no substantive limits on the influence criminal history may have on sentence severity other than the statutory maximum penalties for the offenses of conviction. For an example of a guidelines state that has sought to mute the impact of criminal history, at least marginally, see Minnesota Sentencing Guidelines and Commentary, § II.B, Comment II.B.01 (2015), at 10-11 ("The sentencing guidelines reduce the emphasis given to criminal history in sentencing decisions. Under past judicial practice, criminal history was the primary factor in dispositional decisions. Under sentencing guidelines, the offense of conviction is the primary factor, and criminal history is a secondary factor in dispositional decisions").

b. Broad discretion to the commission. Subsection (1) recognizes that the treatment of prior convictions is a complex and policy-laden question that should be resolved by the sentencing commission in each jurisdiction. Existing codes often instruct sentencing commissions to include offenders' criminal histories in sentencing guidelines but, like subsection (1), give free rein to the commission to decide how this should be done. See 11 Del. Code § 6581(c)(1); D.C. Code § 3-101(b)(2); Md. Code, Crim. Proc. § 6-208(6)(b)(2); Mo. Rev. Stat. § 558.019.6(3)(b); N.C. Gen. Stat. § 164-42(b)(4); Rev. Code. Wash. § 9.94A.010(1). But see Va. Code § 17.1-805 (detailing treatment to be given criminal history in specific instances).

Sentencing commissions have produced a wide variety of formulas for the weighting of prior convictions. Variables include the offense types of current and prior convictions, the degree of similarity between current and prior offenses, the sentence served for the prior offense, whether the offender was serving a sentence when the current crime was committed, the offender's age when the prior offense was committed, whether prior convictions grew out of a single or separate episodes, and the amount of time between the prior and current conviction. See Ark. Code § 16-90-803(b)(2); District of Columbia Sentencing and Criminal Code Revision Commission, Voluntary Sentencing Guidelines Manual (2014), at 6-20; Minnesota Sentencing Guidelines and Commentary § II.B(1) (2015); N.C. Gen. Stat. § 15A-1340.14; Or. Admin. R. 213-004-0007; 204 Pa. Code § 303.4(a); Tenn. Code §§ 40-35-106, 40-35-107, 40-35-108, 40-35-109; Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2014), at 4-5, 11; Rev. Code Wash. § 9.94A.650(2).

In a minority of guidelines states, commissions have allowed trial judges to treat the presence or absence of a defendant's prior criminal history as a departure factor, justifying punishment above or below the guidelines sentence. In such systems, criminal history is not assigned quantifiable weight in sentencing guidelines calculations. See Tenn. Code § 40-35-114 and Commentary; Rev. Code Wash. § 9.94A.535(2)(b),(d); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6. See also Ohio Rev. Code § 2929.12(D) (sentencing courts have discretion to consider prior convictions in assessing likelihood that offender will commit future crimes). In England and Wales's current sentencing guidelines, the weight afforded to an offender's prior record is entirely in the trial court's discretion; there is not even a requirement that the judge explain how criminal history has affected a given sentence. See Sentencing Council for England and Wales, Assault: Definitive Guideline (2011); Kevin R. Reitz, Comparing Sentencing Guidelines: Do U.S. Systems Have Anything Worthwhile to Offer England and Wales?, in Andrew Ashworth and Julian V. Roberts eds., Sentencing Guidelines: Exploring the English Model (2013).

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1 *c. The commission's deliberations; required considerations*. For a survey of American sentencing
2 commission's policy statements on criminal history, see Criminal History Sourcebook (2015), at 13-16.

3 (1) *Considerations of blameworthiness and proportionality.* For scholarly viewpoints that criminal history
4 should not be considered at all when sentencing for a current offense, or should have only a small effect, see George
5 Fletcher, Rethinking Criminal Law (1978), at 466 ("There are serious ethical issues in punishing a person more
6 severely on the basis of past crimes already once punished); Andrew von Hirsch, Past or Future Crimes:
7 Deservedness and Dangerousness in the Sentencing of Criminals (1985), at 77-91 (arguing that only a modest
8 increment of additional punishment for prior offenses is permissible under just-deserts theory); Michael Tonry, The
9 Questionable Relevance of Previous Convictions to Punishments for Later Crimes, in Julian V. Roberts and Andrew
10 von Hirsch eds., Previous Convictions: Theoretical and Applied Perspectives (2010).

11 Theoretical bases for the treatment of criminal history in sentencing guidelines have sometimes been
12 articulated by sentencing commissions or legislatures. The most common justification is deontological: repeat
13 offenders are seen as more culpable than first-time offenders; proportionality in sentencing demands harsher
14 punishment. Some authorities give utilitarian reasons: that criminal history signals a pronounced risk of future
15 offending. See Ark. Code § 16-90-801(c)(1) (2006) (proportionality); Kansas Sentencing Commission, Final
16 Recommendations (1991), at 53 (culpability); Minnesota Sentencing Guidelines and Commentary, § II.B, Comment
17 II.B.101 (2006) (culpability); Ohio Rev. Code § 2929.12(D) (2006) (risk of future criminality); Or. Admin. R. 213-
18 002-0001(3)(d) (2007) (proportionality); 204 Pa. Code § 303.11(a) (2005) (proportionality); Tenn. Code § 40-35-
19 103 and Commentary (2006) (risk of future criminality); Rev. Code. Wash. § 9.94A.010(1) (2007) (proportionality).

20 (2) *Criminal history as risk assessment.* It is well established in criminology that criminal record is a useful
21 predictor of future criminality, perhaps the most powerful of all variables, but is not as good as actuarial, multi-
22 factor risk-assessment instruments that incorporate criminal history along with other predictive factors. See Georgia
23 Zara and David P. Farrington, Criminal Recidivism: Explanation, Prediction and Prevention (2016); Richard S.
24 Frase, The Relationship Between Criminal History Scores and Risk Assessment, in Richard S. Frase, Julian V.
25 Roberts, Rhys Hester, and Kelly Lyn Mitchell, Criminal History Enhancements Sourcebook (Robina Institute of
26 Criminal Law and Criminal Justice, 2015); John Monahan et al., Rethinking Risk Assessment: The MacArthur
27 Study of Mental Disorder and Violence (2001); Paul Gendreau, Tracy Little, and Claire Goggin, A Meta-Analysis of
28 the Predictors of Adult Offender Recidivism: What Works!, 34 Criminology 575 (1996); Dean Champion,
29 Measuring Offender Risk: A Criminal Justice Sourcebook (1994).

30 On risk assessment as a prison-diversion tool, Virginia has been the leading innovator among American states.
31 The Virginia Criminal Sentencing Commission developed and has used such a system for more than 10 years. Over
32 time, the Commission's research has revealed that roughly one-half of nonviolent offenders, who are otherwise
33 prison-bound under the state's guidelines, also qualify as low-risk offenders who can safely be diverted from
34 incarceration. See Virginia Criminal Sentencing Commission, 2014 Annual Report (2015), at 36-38; Emily Bazelon,
35 Sentencing by the Numbers, New York Times Magazine, January 2, 2005; Brian J. Ostrom et al., Offender Risk
36 Assessment in Virginia: A Three-Stage Evaluation (National Center of State Courts, 2002).

37 (3) *Criminal history and racial disparities.* See generally Richard S. Frase, Julian V. Roberts, Rhys Hester,
38 and Kelly Lyn Mitchell, Criminal History Enhancements Sourcebook (Robina Institute of Criminal Law and

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Criminal Justice 2015), at 105-117; Lisa Stolzenberg, Stewart J. D'Alessio, and David Eitle, Race and Cumulative Discrimination in the Prosecution of Criminal Defendants, 3 Race & Just. 275 (2013); Xia Wang, Daniel P. Mears, Cassia Spohn, and Lisa Dario, Assessing the Differential Effects of Race and Ethnicity on Sentence Outcomes under Different Sentencing Systems, 59 Crime & Delinquency 87 (2009). For the best in-depth analysis of "unexplained" racial disparities in the use of prison sanctions in one state, see Richard S. Frase, What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations? 38 Crime and Just. 201 (2009).

The degree to which racial disparities in confinement populations are "unexplained" is large and appears to have grown significantly from the 1970s into the 2000s. Based on 2004 national prison and arrest statistics, Michael Tonry and Matthew Melewski found that 38.9 percent of the difference between white and black imprisonment rates in the United States could not be traced back to higher rates of arrest in black communities. See Michael Tonry and Matthew Melewski, The Malign Effects of Drugs and Crime Control Policies on Black Americans, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 37 (2008). An earlier study using 1978 data had found that the "unexplained" portion of black prisoners was 20.1 percent; see Alfred Blumstein, On Racial Disproportionality of the United States' Prison Populations, 73 J. of Crim. L. & Criminology 1259 (1982).

d. Juvenile adjudications. Most sentencing commissions include at least some juvenile adjudications in an offender's criminal history under sentencing guidelines, although these are often given less weight than adult convictions. See Ark. Code § 16-90-803(b)(2); Delaware Sentencing Accountability Commission Benchbook 2006, at 21; Minnesota Sentencing Guidelines and Commentary § II.B(4) (2015); District of Columbia Sentencing Commission, 2006 Practice Manual, § 2.2.2; Kan. Stat. § 21-4710; Md. Code Regs. 14.22.01.10(B)(2)(a); N.C. Gen. Stat. § 15A-1340.16(d)(18a); Ohio Rev. Code § 2929.12(D); Or. Admin. R. 213-004-0006(2); 204 Pa. Code § 303.6(a); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 5; Va. Code § 17.1-805(B); Rev. Code Wash. § 9.94A.525(2)(f) (2006); Washington Adult Sentencing Guidelines Manual (2006), at II-49; Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6. The primary justification for consideration of juvenile adjudications at sentencing would appear to be their usefulness in predicting future criminal behavior. See Alfred Blumstein, Using Juvenile Records to Predict Criminal Behavior, in Bureau of Justice Statistics, National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Use (1997).

Juvenile-justice proceedings in most states are attended with fewer procedural safeguards than adult criminal trials. See Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court 109-165 (1999). At least one state has concluded, consistent with subsection (2), that the use of juvenile adjudications as a basis for criminal-history scoring later in life ought to depend on the level of due process attending the juvenile adjudications. See Minnesota Sentencing Guidelines and Commentary, Comment II.B.401 (2015) (noting that consideration given juvenile adjudications in adult criminal-history scoring was "broadened" after the legislature created new procedural rights in the state's juvenile-justice system, including the right to effective assistance of counsel and the right to a jury trial in some cases).

For discussions of the presumption of reduced culpability among juvenile offenders, including discussions of relevant scientific findings in adolescent brain development, see Roper v. Simmons, 543 U.S. 551, 569-571 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. ___ (2012).

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e. Limitations periods. Most American sentencing guidelines jurisdictions have enacted "decay" or "gap" policies that set time limitations after which prior offenses may not be included in the criminal history score for a current offense. Decay policies establish a fixed period of time after which offenses may no longer be counted. The start date of such limitations periods varies across jurisdictions, and may be keyed to the commission of the prior offense, the date of sentencing for the prior offense, or the date upon which the sentence for the prior offense was fully served. Gap policies have the same effect as decay rules, but instead define a period of time in which an offender must remain crime-free in order to "washout" or discount past offenses. For a comprehensive survey of approaches in American guidelines jurisdictions, see Richard D. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Criminal History Enhancements Sourcebook (Robina Institute of Criminal Law and Criminal Justice 2015), at 29-37.

Jurisdictions that enact decay or gap provisions typically set shorter periods of time for less serious crimes and longer periods for more serious crimes; durations are generally 10 to 15 years. See Minn. Sentencing Guidelines, §§ 2.B.1.c and 2.B.3.e (2014) ("A prior felony . . . must not be used in computing the criminal history score if a period of fifteen years has elapsed"; 10-year period for misdemeanors); Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102-03 (2013) ("Prior felony offenses . . . will not be counted if a period of fifteen (15) years has elapsed"; 10 years for prior misdemeanors); U.S. Sentencing Guidelines Manual § 4A1.2(e) (2014) (decay period of 15 years for more severe offenses and 10 years for less severe offenses); Wash. State Adult Sentencing Manual 58 (2013) ("Prior Class B (juvenile or adult) felony convictions . . . are *not* included in the offender score if . . . the offender had spent ten consecutive years in the community without having been convicted of any crime" and "[p]rior Class C (juvenile or adult) felony [or serious traffic] convictions are *not* included in the offender score if . . . the offender has spent five consecutive years in the community without having been convicted of any crime.") (emphasis in original).

A number of states apply a "gap" period of 10 years to all offenses regardless of their severity. See D.C. Voluntary Sentencing Guidelines Manual 10 ("Prior convictions for misdemeanors lapse at the same rate as felonies (ten years)."); Fla. Crim. Punishment Code: Scoresheet Preparation Manual 10 (2014) ("Convictions for offenses committed more than 10 years before the date of the commission of the primary offense must not be scored as prior record if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or other sanction, whichever is later, to the date of the commission of the primary offense."); Mich. Sentencing Guidelines Manual Step 1.D. (2016), Mich. Code of Crim. P. § 777.50(1) ("[D]o not use any conviction . . . that precedes a period of 10 or more years between the discharge date from a conviction . . . and the commission date of the next offense resulting in a conviction.").

A few states exempt certain serious offenses from their decay or gap policy altogether so that these more serious offenses are always considered in the criminal history score. See Arkansas Sentencing Standards Grid Offense Serious Rankings & Related Material 102 (2013) (counting all prior convictions at offense seriousness levels 6 through 10); Del. Sentencing Accountability Comm'n Benchbook 27 (2016) ("Felony A and B crimes are excluded from this policy and should always be considered at the time of sentencing."); Wash. State Adult Sentencing Guidelines Manual 58 (2013) ("Prior Class A and felony sex convictions are always included in the offender score.").

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A handful of guidelines states never allow prior adult convictions to lapse for purposes of criminal-history calculations. See Kan. Stat. § 21-6810(3) (no decay period for adult convictions, but some juvenile adjudications decay); N.C. Gen. Stat. § 15A-1340.14; 204 Pa. Code § 303.6(c) (limitations period only for juvenile adjudications); Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines, General (9th ed. 2006), Instructions at 18.

Most U.S. guidelines jurisdictions have adopted special limitations periods for consideration of prior juvenile offenses. Some jurisdictions use decay or gap policies. See D.C. Voluntary Sentencing Guidelines Manual § 2.2.4 (2014) (juvenile adjudications are not counted if they are beyond a five-year window before the current offense); Wash. State Adult Sentencing Guidelines Manual 58 (2013) ("Prior Class B [juvenile] felony convictions . . . are *not* included in the offender score if . . . the offender had spent ten consecutive years in the community without having been convicted of any crime. Prior Class C [juvenile] felony convictions . . . are *not* included in the offender score if . . . the offender had spent five consecutive years in the community without having been convicted of any crime.") (emphasis in original); Fla. Crim. Punishment Code: Scoresheet Preparation Manual 10 (2014) ("Juvenile dispositions of offenses committed by the offender within 5 years before the date of the commission of the primary offense must be scored as a prior record if the offense would have been a crime if committed by an adult."). Kansas uses a decay approach for certain lower-level juvenile felonies and misdemeanors. Kan. Stat. Ann. § 21-6810(d)(4) (2014) ("Except as otherwise provided, a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the juvenile adjudication is for [a certain listed] offense."). A small number of states establish hard age limits after which juvenile adjudications will no longer be considered. See Minn. Sentencing Guidelines § 2.B.4.a.3 (2014) (juvenile adjudications not considered for offenders 25 or older at the time of their current offense); Md. Sentencing Guidelines Manual § 7.1.B (Feb. 2015) (assigning a score of '0' for offenders 23 years or older by date of current offense). Some jurisdictions combine an age limit with a gap or decay policy. See Kan. Stat. Ann. § 21-6810(d)(4) (2014) ("Except as otherwise provided, a juvenile adjudication will decay if the current crime of conviction is committed after the offender reaches the age of 25, and the juvenile adjudication is for [a certain listed] offense."); Penn. Sentencing Guidelines Implementation Manual § 303.6 (7th Ed. 2012) (certain juvenile adjudications not counted if "[t]he offender was 28 years or age or older at the time the current offense was committed and . . . [t]he offender remained crime-free during the ten-year period immediately preceding the offender's 28th birthday."); Va. Sentencing Guidelines, Gen'l Instructions 27-29 (17th ed., 2014) (requiring a five-year decay period for low-level juvenile crimes once the juvenile reaches the age of 19).

The sliding-scale rule was first suggested in Julian V. Roberts, The Role of Criminal History in the Sentencing Process, in Michael Tonry ed., Crime and Justice, vol. 22 (1997), at 335-336. Frase et al. propose that states should compare the risk of the offender compared to the nonoffender at various points of the decay period and evaluate whether those differences justify stepping down the value that a prior offense contributes to the criminal history score as it ages. Richard S. Frase, Julian V. Roberts, Rhys Hester, and Kelly Lyn Mitchell, Criminal History Enhancements Sourcebook (Robina Institute of Criminal Law and Criminal Justice 2015), at 34. One state commends such an approach to trial judges in the exercise of their sentencing discretion. See Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6 (judges given discretion in weight given to criminal history because "[a]s prior convictions become more distant from the present offense, they become less reliable indicators of risk").

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Studies in both the United States and England and Wales have shown that recidivism risk for persons with criminal records diminishes over substantial periods of time, and eventually converges with the risk of criminal behavior among persons with no criminal record. See Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009); Keith Soothill and Brian Francis, When Do Ex-Offenders Become Like Non-Offenders?, 48 The Howard Journal 373, 385 (2009); Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 Crime & Delinquency 64, 80 (2007); Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology & Public Policy no. 3, 483-504 (2006).

f. Monitoring criminal history's impact. On prosecutorial manipulation of criminal-history scoring rules, Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research 131, 157, 160, 177-178, 183-184, 194-195, 214 (2005) (documenting changes in prosecutorial practices following adoption of sentencing guidelines in Minnesota aimed toward building up offenders' criminal-history scores, and sentencing commission's modifications of the guidelines in light of changed prosecutorial behavior).

There is much evidence that criminal-history scoring, although ostensibly a neutral sentencing criterion, can have differential impacts by race. African American defendants appear in criminal courtrooms, on average, with larger numbers of past convictions than white defendants. See Richard S. Frase, What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations? 38 Crime and Just. 201 (2009); Shawn D. Bushaway and Anne Morrison Piehl, Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing, 35 Law & Soc'y Rev. 733, 741, 761 (2001); John Kramer & Jeffrey J. Ulmer, Sentencing Disparity and Departure from the Guidelines 13 Justice Q. 81 (1996).

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§ 6B.08. Multiple Sentences; Concurrent and Consecutive Terms. [115]

(1) The commission shall develop guidelines addressing the imposition of sentence in cases involving multiple convictions for the same offender, whether imposed in a single proceeding or separate proceedings, or for a crime committed while serving a different sentence or awaiting trial on another offense.

(2) The guidelines developed pursuant to subsection (1) shall include a general presumption in favor of concurrent sentences.

(3) In a single proceeding involving multiple convictions, the guidelines shall include a presumption requiring the court to account for the existence of lesser

[115] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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current convictions when imposing sentence on the most serious offense for which the defendant is being sentenced.

(4) For selected categories of cases, the commission may create presumptions in favor of consecutive sentences.

(5) Sentencing courts may depart from the guideline presumptions established pursuant to subsections (2) through (4) with adequate written explanation of the reasons for its departure set forth pursuant to § 7.XX.

(6) To the degree feasible, guideline presumptions should seek to minimize disparity in total sentence severity for defendants being sentenced for multiple convictions, whether the sentences are imposed consecutively in a single proceeding, separate proceedings in the same court, or multiple proceedings in two or more jurisdictions.

(7) Except as may be provided by the sentencing commission pursuant to subsection (4), when consecutive sentences are imposed, there shall be a heavy presumption in the guidelines that the total sentence length will not exceed double the maximum term of the presumptive sentence for the most serious of the offender's current convictions. Deviation from this presumption shall be treated as an extraordinary departure under § 7.XX(3).

Comment:

a. Scope. This Section directs the Sentencing Commission to provide guidance to judges tasked with imposing sentence on defendants subject to punishment for multiple crimes. Section 6B.08 interacts with § 7.06 of the original Code ("Multiple Sentences: Concurrent and Consecutive Terms") (a revised version of which is included in this draft). This provision directs the commission to guide sentencing courts in the exercise of their judicial authority under § 7.06 in two ways: first, by creating presumptions regarding the imposition of concurrent and consecutive sentences; and second, by creating special guidelines governing the length of sentence in cases where a defendant is being sentenced for more than one crime in the same jurisdiction or in multiple jurisdictions.

Subsection (1) directs the sentencing commission to develop guidelines for the imposition of multiple sentences, whether the sentences arise out of the same proceeding or separate proceedings; subsection (2) specifies that the guidelines should contain a general presumption in favor of concurrent sentences. Subsections (3) and (4) temper the presumption in favor of concurrent sentences by requiring that the guidelines include a presumption that the sentence imposed on the most serious crime of conviction in a multi-count proceeding account for the existence of other convictions and authorizes the sentencing commission to identify categories of cases in which a presumption in favor of consecutive sentencing is proper. Subsection (5) authorizes judicial departures from any of the presumptions established by the commission under

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1 subsections (2)-(4) when the court provides a statement of reasons. Subsection (6) encourages
2 the commission to develop guideline presumptions that minimize disparity between defendants
3 similarly situated with respect to their crimes of conviction. Subsection (7) treats as an
4 extraordinary departure the imposition of consecutive sentences that impose more than twice the
5 maximum term of the presumptive sentence for the most serious of the offender's current
6 conviction, unless such a sentence is presumptively authorized pursuant to subsection (4).

7 *b. Default rules and departures.* No American jurisdiction has formulated a satisfactory
8 approach to the punishment of offenders convicted of multiple current offenses, in large part
9 because of the complexity of the task. Moreover, no consensus exists for how courts ought to
10 analyze such cases. There is widespread agreement that an offender convicted of two similar
11 offenses, or three, should not as a general rule receive a simplistic additive punishment of two
12 times, or three times, the penalty that would be handed down for a single offense. There is an
13 equally strong intuition that the multiple offender should not generally receive a sentence
14 identical to that appropriate for a single crime. Between the extremes of additive punishment and
15 no incremental punishment at all, however, no broadly applicable principle for appropriate
16 resolution of these cases has been articulated.

17 Section 6B.08 therefore works from a plan of default rules that allow substantial latitude for
18 individualized decisionmaking in specific cases. Subsection (2) provides that, in the majority of
19 cases, the commission shall set forth a presumption in favor of concurrent sentences. This
20 reflects an explicit legislative judgment that in most cases a penalty of proportionate severity for
21 all offenses of conviction can usually be assessed within the maximum penalty range provided
22 for the most serious crime of current conviction. This presumption reflects actual judicial
23 practice: trial judges with unfettered discretion in multi-count cases select concurrent penalties
24 more often than consecutive penalties.

25 The presumption in subsection (2) is not intended to operate as a bar against consecutive
26 sentences. In order to depart from the default rule, a sentencing court must find substantial
27 reasons grounded in the purposes of sentencing, see §§ 1.02(2)(a) and 7.XX(2), and articulate
28 them on the record at the time of sentencing. Such departures are subject to the deferential
29 standard of appellate review in § 7.09(5)(d).

30 The default mechanism carries important advantages for a subject area that has produced so
31 little consensus in theory or policy. A default presumption ensures that trial courts must give
32 reasons when consecutive sentences are pronounced, or when concurrent sentences are
33 announced in cases otherwise subject to a presumption of consecutive sentencing under
34 subsection (4). Thus, a jurisprudence of consecutive and concurrent sentencing can develop over
35 time. Under this approach, the governing law is not ultimately the province of the legislature or
36 commission. Instead, the judiciary holds greatest authority to develop a principled framework
37 through the common-law process. This approach is to be preferred to a one-size-fits-all rule

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imposed by the commission. It is also to be preferred over a system in which consecutive penalties may be imposed without explanation or opportunity for review.

c. Severity adjustments in concurrent sentences. The general presumption in favor of concurrent sentences should work side by side with provisions that allow for appropriate adjustments in the severity of penalties to take account of offenders' multiple criminal acts. Subsection (3) charges the commission with the promulgation of such adjustments, which attach to the sentence imposed for the most serious count of conviction. In some existing guidelines systems, multiple offenses (other than the most serious count) are treated in the same way the guidelines would otherwise treat offenders' criminal history. In these systems, scoring of the additional counts can result in marked increases in the recommended punishment for the most serious crime. The precise mechanism chosen by a state commission is not dictated by the revised Code. The important principle embedded in subsection (3) is that the rules in multi-count cases should not treat additional offenses as "free" and subject to no additional penalty.

d. Exceptions to default presumptions. Subsection (4) allows the commission to designate selected categories of multi-count cases as outside the general presumption of subsection (2). Two kinds of exceptions are permitted. First, the commission may select some categories of cases as appropriate for a presumption in favor of consecutive penalties on multiple counts. Second, the commission may select some categories of multi-count cases for which there is no presumption.

When the revised Code speaks of "categories of cases," as in subsection (4), the language is intended to give the commission broad discretion to formulate the operative categories. A "category" may be defined by the types of crime in a multi-count case, the most serious count standing alone, the relationship between the multiple counts, the current convictions in conjunction with an offender's prior record, or myriad other possibilities. In deciding what categories of cases may be appropriate for consecutive sentences, the commission must ground its selection in the purposes of sentencing in individual cases as set forth in § 1.02(2)(a). For example, although a sentencing commission's guidelines set forth a default presumption in favor of concurrent sentences in multiple-count cases, the guidelines might set forth a presumption in favor of consecutive sentences for offenders with current convictions of more than one count of sexual assault, applicable to offenders who have a prior conviction for an act of sexual or other violence committed within 10 years of the current crimes. In justifying this exception, the commission might rely upon principles of proportionality (see § 1.02(2)(a)(i)), or the incapacitation of dangerous offenders; see § 1.02(2)(a)(ii). Similarly, the commission might recommend consecutive sentencing for crimes that occur within an institutional setting, with the purpose of deterring individuals serving such sentences from attempting to escape or harm a fellow inmate or staff member; see § 1.02(2)(a)(ii). Additionally, the commission might recommend consecutive sentencing for crimes committed while an offender is on probation.

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It may be wise for any newly chartered commission to exercise its powers under subsections (2) and (4) with caution until data on sentencing patterns and departures from the general presumption in favor of concurrent sentences have accumulated and case law has fleshed out the circumstances in which departures from default presumptions for and against concurrent sentences are most appropriate. See § 6A.05(5)(d) (instructing the commission to "study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law").

e. Multiple proceedings. Guidance on the imposition of sentence for multiple counts is salutary in any case but is particularly helpful in cases where multiple sentences are being imposed in multiple proceedings, either because the government has issued multiple indictments, or because the defendant is being prosecuted in more than one jurisdiction for related conduct. To the degree possible, the guidance provided by the sentencing commission should help to ensure that the total sentence imposed on multiple offenses does not turn on the happenstance of whether separate crimes are charged in a single, or multiple, proceedings. Accordingly, subsection (6) instructs the commission to create mechanisms in the guidelines, when feasible, to minimize disparity in total sentence severity in such cases. Providing such guidance can provide an important check upon prosecutorial charging discretion in multiple-count cases, particularly for cases tried within the same jurisdiction, and reduce disparity across sentencing judges working under the direct guidance of the sentencing commission.

f. Heavily presumptive limits on consecutive sentences to incarceration. Subsection (7) addresses the problem of total severity in the context of incarceration sentences through the device of the "heavy presumption." See §§ 6B.01(5) and 7.XX(3). Subsection (7) creates a heavy presumption that the total incarceration term ordered in a consecutive sentence will not exceed double the maximum term of the presumptive sentence for the most serious of the current convictions. In order to go beyond this limitation, a sentencing court must meet the standard for an extraordinary departure in § 7.XX(3); that is, the court must find that there are extraordinary circumstances in the case such that a consecutive sentence of twice the presumptive penalty would be unreasonable in light of the purposes set forth in § 1.02(2)(a). Extraordinary departures are subject to a de novo standard of appellate review under § 7.09(5)(e).

g. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments:

(1) The commission shall develop ~~guidelines~~ recommendations addressing the imposition of sentence in cases involving multiple convictions for the same offender, whether imposed in a single proceeding or separate proceedings, and for crimes committed while serving a sentence or awaiting trial for another offense.

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(2) The guidelines developed pursuant to subsection (1) shall include a general ~~presumption~~ recommendation in favor of concurrent sentences.

(3) In a single proceeding involving multiple convictions, the guidelines shall include a ~~presumption~~ recommendation ~~requiring~~ that the court ~~to~~ account for the existence of lesser current convictions when imposing sentence on the most serious offense for which the defendant is being sentenced.

(4) For selected categories of cases, the commission may create ~~presumptions~~ recommendations in favor of consecutive sentences.

(5) ~~Sentencing courts may depart from the presumptions established pursuant to subsections (2) through (4) with adequate written explanation of the reasons for its departure set forth pursuant to § 7.XX.~~ Sentencing courts shall give full consideration to the recommendations in subsections (2) through (4). If a sentencing court deviates from those recommendations, the court shall comply with the procedures set forth in § 7.XX.

(6) To the degree feasible, guideline ~~presumptions~~ recommendations should seek to minimize disparity in total sentence severity for defendants being sentenced for multiple convictions, whether the sentences are imposed consecutively in a single proceeding, separate proceedings in the same court, or multiple proceedings in two or more separate jurisdictions.

(7) Except as may be provided by the sentencing commission pursuant to subsection (4), when consecutive sentences are imposed, there shall be a ~~heavy presumption~~ strong recommendation in the guidelines that the total sentence length will not exceed double the maximum term of the ~~presumptive~~ recommended sentence for the most serious of the offender's current convictions. Deviation from this presumption shall be treated as an extraordinary departure under § 7.XX(3).

Most of the changes suggested above substitute the concept of guidelines "recommendations" for the stronger term "presumptions" in the unaltered provision, see § 6B.01, Comment *b*, while retaining the structure and logic of the provision as a whole.

The suggested revision of subsection (5) cross-references § 7.XX, and ensures that deviations by the sentencing court from the recommendations in § 6B.08 will be subject to the same procedural requirements as other departures from the guidelines. Although the guidelines are merely recommendations in the Code's advisory-guidelines structure, the sentencing court must still give full consideration to those recommendations, weigh them in light of the purposes of the sentencing system, and provide a written statement of reasons for any departure from guidelines recommendations. See § 7.XX, Comment *i*.

Subsection (7) is retained with only minor alteration in the Code's advisory-guidelines system. This reflects a policy judgment that the mechanism of an "extraordinary departure"

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remains useful to policy makers in selected circumstances, even in a sentencing structure in which all guidelines promulgated by the sentencing commission are advisory. See § 6B.01, Comment *b*.

Factfinding necessary to overcome the heavy presumption laid down in subsection (7) will sometimes implicate the Sixth Amendment requirements of jury factfinding and the reasonable-doubt standard of proof. When the jury-trial right is engaged, § 7.07B sets out appropriate procedures.

REPORTERS' NOTE

a. Scope. Although most states—including many with sentencing commissions—leave the decision of whether to run sentences concurrently or consecutively to the discretion of the court, cf. Conn. Gen. Stat. § 53a-37 (1973); Okla. Stat. Tit. 22, § 976 (1999); Md. Code Regs. 14.22.01.04(B) (2014), the type of guidance § 6B.08 requires sentencing commissions to provide is not without precedent. Several state sentencing commissions already provide guidance to sentencing judges on the proper use of consecutive and concurrent sentences, see, e.g., Utah Adult Sentencing & Release Guidelines 8-9 (2014); La. Admin. Code tit. 22, § 215 (1992). The form this guidance may take varies considerably, but contributes tremendously to the equality of sentencing decisions: after all, the decision to impose a consecutive sentence will often increase the time a defendant spends in custody at least as much as a decision to sentence at the top, rather than the bottom, of a guideline range. For a comprehensive discussion of the ways in which sentencing commissions can structure guidance about how to handle the imposition of multiple sentences, see Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System 199-200 (2013).

b. Default rules and departures. Statutes in many states already contain "presumptions" in favor of concurrent sentencing. Many states require courts to provide explanation before imposing consecutive sentences, *see* Smylie v. State, 823 N.E.2d 679, 686 n.8 (Ind. 2005) (describing requirement of aggravating circumstance to justify consecutive sentences), or presume that sentences are concurrent unless otherwise specified. See Haw. Rev. Stat. § 706-668.5 (20015); N.C. Gen. Stat. § 15A-1354 (2012). Some states go further and limit the permissible reasons for imposing consecutive sentences. See Tenn. Code Ann. § 40-35-115 (2010). Similarly, a number of states identify by statute circumstances in which consecutive sentences are presumptively warranted, including crimes of escape and other offenses committed while the defendant was serving a sentence on a separate offense. See Ariz. Rev. Stat. Ann. § 13-711(B) (2009); Colo. Rev. Stat. § 18-8-209(2) (2010). A smaller number of states have adopted a presumption in favor of consecutive sentences. See, e.g., Ariz. Rev. Stat. Ann. § 13-711(A) (2009); W. Va. Code § 61-11-21 (2014).

c. Severity adjustments in concurrent sentences. There are various ways in which sentencing guidelines can ensure adequate punishment of a defendant for repeated wrongdoing without requiring consecutive sentences. As Richard Frase has explained, guidelines can allow aggregation of harm (monetary, drug quantity, etc.) among separate cases to count toward sentencing on the highest count of conviction, or can "permit or require multiple current convictions to enhance sentence severity under a formula that can yield a penalty less severe than fully consecutive sentencing . . . but more severe than fully concurrent sentencing." Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System 199-200 (2013) (citing examples from the Federal Sentencing Guidelines and the Minnesota Sentencing Guidelines). Under subsection (3), courts are free to take any approach so

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long as the guidance offered properly accounts for the multiple offenses in calculating the quantum and nature of the punishment due.

e. Multiple proceedings. Perhaps the most difficult task assigned to the commission under this provision is the that of developing guidance to reduce disparity in the aggregate sentence imposed on defendants charged with multiple crimes in a single proceeding and those charged with multiple offenses in separate proceedings, particularly when those separate proceedings occur in jurisdictions over which the commission has no influence. One example of a statutory attempt to guide the imposition of sentence in such cases is Fla. Stat. § 921.16(2) (2014), which explicitly addresses the authority of the court to impose its sentence concurrent to a sentence imposed by a foreign jurisdiction.

f. Heavily presumptive limits on consecutive sentences to incarceration. Subsection (7) creates a heavy presumption against consecutive sentences that amount to more than twice the maximum term of the presumptive sentence for the most serious current crime of conviction. This presumption is similar to a Massachusetts Sentencing Guidelines provision that reads: "The total of consecutive sentences to the state prison may be combined up to twice the upper limit of the sentencing guidelines range in the grid cell of the governing offense. Where the total of the combined sentences exceeds twice the upper limit, it shall be considered a departure from the guidelines." Massachusetts Sentencing Guide 27 (1998).

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§ 6B.09. Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending.[116]

(1) The sentencing commission shall develop instruments or processes to assess the needs of offenders for rehabilitative treatment, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(2) The commission shall develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(3) The commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter

[116] This Section was originally approved in 2011; see Tentative Draft No. 2.

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prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

Comment: [117]

a. Scope. Responsible actors in every sentencing system—from prosecutors to judges to parole officials—make daily judgments about the treatment needs of offenders, and the risks of recidivism posed by offenders. These judgments, pervasive as they are, are notoriously imperfect. They often derive from the intuitions and abilities of individual decisionmakers, who typically lack professional training in the sciences of human behavior. In some instances, judgments about offenders' future conduct may be influenced by the biases—conscious or unconscious—of official decisionmakers. Frequently, as when statistical recidivism risk instruments are used by parole-releasing authorities, behavioral predictions are given weight in procedural settings that allow little or no opportunity for challenge by the person affected, yet may add many years to the duration of a prison term.

This Section recognizes that American sentencing systems will and should take account of an offender's future behavior, including the offender's amenability to rehabilitation and propensity to recidivate, when assigning penalties; see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (recognizing the purposes of offender rehabilitation and the incapacitation of dangerous offenders as fundamental to the sentencing system). The provision seeks to bring the best available information to these tasks, and draws on the research capabilities of the sentencing commission to provide such information to sentencing courts through the vehicle of sentencing guidelines.

A primary ambition of § 6B.09 is to bring greater transparency and procedural fairness to considerations of predicted conduct in the sentencing system, particularly when evaluations of recidivism risk are at issue. In the Code's determinate sentencing scheme, no parole-releasing agency exists to pass such judgments. Instead, the revised Code "domesticates" the use of risk assessments by repositioning them in the open forum of the courtroom, where the tools devised by the sentencing commission are available for inspection, and where the constitution guarantees the offender legal representation to contest any adverse findings. This represents a significant constraint on the use of recidivism risk as a sentencing factor when compared with the current realities of American criminal justice, and especially when § 6B.09's scheme is matched against everyday practices in states where prison policy is made primarily through the release decisions of parole boards.

Section 6B.09 takes an attitude of skepticism and restraint concerning the use of high-risk predictions as a basis of elongated prison terms, while advocating the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties. When

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debating the use of recidivism measures during sentence proceedings, the Code's drafters were deeply concerned about the use of prediction instruments in pursuit of the selective incapacitation of especially dangerous offenders—even though exactly this policy has been effected by parole boards for many decades. Longstanding tolerance of the risk-based incapacitative approach has stemmed in part from the low-profile workings of the parole-release process. The Institute anticipates that other substantive concerns about the use of risk assessments in sentencing decisions will no doubt be brought forward in the courtroom setting—issues that were never raised in the low-visibility, low-process forums of parole release.

The revised Code's approach to risk assessment is constrained in comparison to the 1962 Code. The original Code included offender-based judgments of risk as a major variable in the sentencing process. Section 7.03 of the 1962 Code called for risk-based analysis as a ground for "extended" minimum and maximum terms of imprisonment. Section 7.03(1) authorized judges to identify "persistent" offenders "whose commitment for an extended term is necessary for protection of the public." Categorization as a persistent offender under the original Code was based on an offender's age and criminal record. Original § 7.03(3) authorized extended prison terms for an offender found by the courts to be "a dangerous, mentally abnormal person." This provision required the court to make findings, following a psychiatric examination of the offender, that the offender's mental condition was "gravely abnormal," and that the offender posed "a serious danger to others."

In addition, the 1962 Code made risk assessment a primary responsibility of the parole board in determining the lengths of prison terms. Under original § 305.9(1)(a), continued confinement of a prisoner was appropriate when the board found a "substantial risk" that the prisoner would not conform his behavior to the law or the conditions of his parole. Prolonged incarceration could also be supported on the parole board's judgment that the prisoner's continued participation in rehabilitative programming "will substantially enhance his capacity to lead a law-abiding life when released at a later date," see original § 305.9(1)(d). Given the 1962 Code's indeterminate sentencing structure, such inquiries into risk of reoffending and incomplete rehabilitation could serve as the basis for many years of extended confinement in individual cases. For example, for a felony of the second degree, the parole board's views on offender risk could be the difference between a one-year prison stay and a ten-year term. For first-degree felonies, such considerations might determine whether an offender served only one year, or any period up to a life prison term. See original § 6.06.

Needs and risk assessments are distinct tasks, and are treated separately in this provision. Needs assessments seek to identify criminogenic attributes of particular offenders that may be addressed through correctional programming. One goal of needs assessment is to match particular offenders with the treatment interventions most likely to bring about positive changes. Risk assessments, in contrast, estimate the probability that an individual will engage in violent or other criminal conduct in the future.

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New § 6B.09 contemplates the use of risk assessments only when supported by credible recidivism research, and encourages the use of actuarial risk-assessment instruments as a regular part of the felony sentencing process. Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions. The superiority of actuarial over clinical tools in this arena is supported by more than 50 years of social-science research.

b. Offender needs assessments. The revised Code takes an open-ended approach to evaluations of the treatment needs of offenders, and their amenability to rehabilitative programs of particular kinds. The science of matching individual offenders to particular treatment programs best suited to them is still in its infancy. There is no stable research consensus on how best to perform the task. The revised Code is therefore not directive on this question, and permits the use of clinical as well as actuarial methods for the determination of offenders' correctional needs and the types of interventions reasonably likely to address those needs. The main strategy of subsection (1) is to provide impetus to the research function of the sentencing commission, and a procedure for incorporating the resulting knowledge into the judicial sentencing process.

c. Risk assessment and judicial discretion. Subsection (2) mandates that evidence-based means of risk assessment be developed by the sentencing commission. Where appropriate, these tools may be incorporated generally into the sentencing guidelines, where their ultimate use will reside in the discretion of the trial judge.

Subsection (3) mandates that certain information be made available to, and be considered by, the court. Section 6B.09 significantly expands judicial discretion in cases where an offender is identified as posing an unusually low risk to public safety. Under subsection (3), for example, the sentencing court may impose a mitigated sentence without encountering the hurdle of the guidelines departure standard, see § 7.XX(2) (Tentative Draft No. 1, 2007). In addition, subsection (3) qualifies the operation of mandatory-minimum-penalty provisions, increasing the sentencing court's power to override the application of such laws in appropriate cases.

d. Low-risk offenders. Among felony offenders sentenced to prison, a term of incarceration is sometimes unnecessary on grounds of public safety. Risk assessments are most easily justified when used to identify otherwise prison-bound offenders whose confinement will likely serve no incapacitative purpose. From an actuarial perspective, attempts to identify persons of low recidivism risk are more often successful than attempts to identify persons who are unusually dangerous. If used as a tool to encourage sentencing judges to divert low-risk offenders from prisons to community sanctions, risk assessments conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders' families, and communities. The use of validated actuarial tools produces lower probabilities of future victimizations in society than prison-diversion decisions based on professional or clinical judgments.

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e. High-risk offenders. While not mandating or encouraging the practice, subsection (2) would permit the use of actuarial offender risk assessments as a basis for punishments more severe than offenders would otherwise have received. Judgments—or guesses—about offenders' future criminality have long been integral to American criminal-justice systems at the judicial sentencing stage and, even more significantly, in the decisions of parole boards. Subsection (2) contemplates substantive risk-based decisions comparable to those historically made by paroling agencies, but now considered in open court, with a full record, and ultimately subject to appellate review. Equivalent protections have never been available in the context of parole boards' release decisions. One fundamental goal of § 6B.09 is to bring transparency and accountability to a part of the sentencing system that has long existed in darkness.

Section 6B.09 is not motivated by a policy determination that, compared with past practice, it is desirable to expand the use of risk assessment as a basis for longer incarceration terms. There are compelling reasons for an attitude of caution in the use of high-risk assessments at sentencing. Most importantly, error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high. Although there have been important advances in the predictive sciences in recent decades, particularly when applied to mentallyill offender populations, most projections of future violence are wrong in significant numbers of cases. The unavoidable mis-sorting of "false positives"—those predicted to be dangerous who are in fact harmless—presents compound ethical problems. Some find it difficult to countenance the extended incarceration of any human being in anticipation of crimes they have not yet committed—even "true positives" who would in fact commit the predicted criminal acts if released. With false positives, the case is harder still: extended incarceration is imposed for crimes they will *never* commit.

Although the problem of false positives is an enormous concern—almost paralyzing in its human costs—it cannot rule out, on moral or policy grounds, all use of projections of high risk in the sentencing process. If prediction technology shown to be reasonably accurate is not employed, and crime-preventive terms of confinement are not imposed, the justice system knowingly permits victimizations in the community that could have been avoided. Although specific victims cannot be named in advance, the human suffering brought about by "true positives" in the community is both serious and, in statistical terms, ineluctable. In short, we can avoid the unneeded incarceration of those incorrectly identified as dangerous offenders (whom we cannot separate in advance from the truly dangerous) only by accepting the costs of victimizations of innocent parties (whom we cannot identify in advance). There is no wholly acceptable alternative in either direction—indeed, both options approach the intolerable. The proper allocation of risk, as between convicted offenders and potential crime victims, is a policy question as difficult as any faced by criminal law in a civilized society.

In presumptive sentencing-guidelines systems, favored by the revised Code, one important layer of procedural protection to allegedly high-risk defendants is mandated by the federal constitution. Before an elevated penalty may be imposed based on a projection of future

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dangerousness, the underlying facts must be found by a jury, under the reasonable-doubt standard of proof, as required by the Sixth Amendment; see § 7.07B (Tentative Draft No. 1, 2007). Once supportive facts are established by appropriate procedures, however, ultimate discretion about whether and how to make use of an adverse risk assessment remains with the trial court subject to appellate review. See § 7.07B(6) (id.). This constitutional requirement does not exist, however, in advisory-guidelines systems, or in indeterminate sentencing systems.

f. Reasonable feasibility. One important question left for case-by-case judicial determination in the administration of § 6B.09 is whether the sentencing commission has established the reasonable reliability of predictions generated under this provision. That is, if predictions of future behavior are not attended by reasonable proofs of their accuracy, they may not be consulted as part of the sentencing process. Ultimately this is an issue that must be resolved by the courts of each state. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007).

g. Proportionality constraints. The consideration of needs and risk assessments under this provision may not be used to support a sentence that is disproportionately lenient or severe in light of the gravity of the offense, the harms, if any, done to crime victims, and the blameworthiness of the offender. See § 1.02(2)(a)(i). The proportionality constraint, which applies under the revised Code to all criminal sentencings, is a feature of statutory law and is intended to regulate punishment severity more closely than the forgiving standard of "gross disproportionality" under federal constitutional law. Although all actors in the sentencing system are required by law to exercise their authorities in ways calculated to avoid disproportionate penalties, the Code places ultimate responsibility to render judgments of sentence proportionality in the courts. See §§ 7.XX(2),(3); 7.09(5)(b).

h. Provision requires adequate funding. The performance of research needed to support § 6B.09 is not included among the sentencing commissions' mandatory responsibilities in Article 6A, see § 6A.05 (Tentative Draft No. 1, 2007). Section 6A.05(4)(b) states that the commission "*may* . . . conduct or participate in original research to test the effectiveness of sentences imposed and served in meeting the purposes [of sentencing, including offender rehabilitation and the incapacitation of dangerous offenders] in § 1.02(2)." Section 6A.05(4)(c) states that the commission "*may* . . . collect and, where necessary, conduct research into the subsequent histories of offenders who have completed sentences of various types and the effects of sentences upon offenders, victims, and their families and communities." Section 6A.05, Comment *d*, recognizes that research of this kind is expensive and time-consuming, and therefore should not be part of the commission's mandatory duties in the absence of additional resources.

Legislatures that adopt § 6B.09 must recognize that supplemental funding will be needed to support the use of evidence-based sentencing recommended in this provision. Expenditures on necessary research may realize large benefits. Particularly with respect to the identification of low-risk offenders, substantial monetary savings may result from the diversion of offenders who otherwise would have been incarcerated. With respect to the extended confinement of high-risk

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offenders, the avoidance of future serious victimizations, if more successfully achieved under this provision than through other methods, carries significant economic and intangible benefits.

REPORTERS' NOTE [118]

a. Scope. Risk assessment may be defined as "predicting who will or will not behave criminally" in the future. Needs assessment, in contrast, may be defined as "using predictive methods to attempt a reduction in criminality through assignment to differential treatments." See Stephen D. Gottfredson and Laura J. Moriarty, Statistical Risk Assessment: Old Problems and New Applications, 52 Crime & Delinq. 178, 192 (2006).

On the superiority of actuarial over clinical predictions of risk, see Paul E. Meehl, Clinical vs. Statistical Prediction (1954); Michael Gottfredson and Donald Gottfredson, The Accuracy of Prediction, in Alfred Blumstein ed., Criminal Careers and Career Criminals (1986) ("in virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment"); W.M. Grove and Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction, 2 Psychology, Public Policy and Law 293 (1996); Grant T. Harris, Marnie E. Rice, and Catherine A. Cormier, Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 Law & Human Behavior 377 (2002) (finding that "composite clinical judgment scores were significantly correlated with violent recidivism, but significantly less than the actuarial scores"). In recent decades, the science of actuarial prediction has advanced substantially, while the success of clinical predictions has not. John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 Va. L. Rev. 391, 406 (2006).

b. Offender needs assessments. On the early stage of development of needs-assessment technologies for individual offenders, see Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002), at 42-44. A few states have built needs assessments into the legal framework of their sentencing systems. Kansas's risk-needs assessment statute for drug offenders, for example, incorporates actuarial tools for the determination of risk of recidivism, and clinical tools for the selection of treatment interventions to be used in specific cases. See Kan. Stat. § 4729(b)(1),(2).

d. Low-risk offenders. On the over-incarceration of low-risk offenders, see Anne Morrison Piehl, Bert Useem, and John J. DiIulio, Jr., Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States (1999), at 9 (cost-benefit analysis of imprisonment in three states, estimating that crime prevention through incapacitation could justify the confinement of only half of all inmates).

As a matter of predictive accuracy, it is easier to identify low-risk offenders than high-risk offenders. See Kathleen Auerhahn, Selective Incapacitation and the Problem of Prediction, 37 Criminology 703 (1999); Hennessey D. Hayes and Michael R. Geerken, The Idea of Selective Release, 14 Just. Quarterly 353, 368-369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders"; proposing policy of "selective release" as opposed to selective incapacitation); Stephen D. Gottfredson and Michael Gottfredson, Selective Incapacitation?, 478 Annals of

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the American Academy of Political and Social Science 135 (1985) ("Predictive accuracy, while much in need of improvement, is sufficient for [the policy of selective deinstitutionalization], but insufficient for [the policy of selective incapacitation]").

Virginia was the first state to develop an actuarial risk-assessment tool to be used at sentencing for purposes of diverting low-risk offenders otherwise bound for prison into community sanctions. The instrument was based on a study of recidivism patterns of Virginia felons released from Virginia's prisons over an 18-month period in the early 1990s. The study followed all releasees for a minimum period of three years, and used the probability of a new felony conviction as the measure of risk. The commission regularly updates its recidivism research to ensure that the guidelines' risk instruments remain current as predictive measures. See generally Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Virginia Criminal Sentencing Commission, 2010 Annual Report (2011), at 38-41.

e. High-risk offenders. For an argument in favor of the cautious use of actuarial assessment to identify offenders who pose a high risk of future dangerousness by sentencing courts, and with heightened procedural protections, see Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry & Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985).

For many years, the standard error rate among the best actuarial instruments tested in the research literature (measured as false positives versus true positives) stood at roughly two to one. See John Monahan, The Clinical Prediction of Violent Behavior (1981), at 48-49. For some classes of offenders, however, significant improvements in predictive accuracy have occurred over the past decade. See John Monahan et al., Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence (2001). Among a validation sample assembled to test the prediction methodology developed in the MacArthur Study, "true positive" rates of roughly 50 percent were achieved when predicting future violence among mentally ill offenders. See John Monahan et al., An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders, 56 Psychiatric Services 810 (2005). The better risk scales can yield correct classifications, measured against actual recidivism data, in up to 70 percent of all cases (across all levels of risk, not just the highest risk category), although many instruments currently in use do not perform as well. See Christopher Slobogin, Risk Assessment, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011); Gerald G. Gaes, Review of CARAS: Colorado Actuarial Risk Assessment Scale (Colorado Department of Public Safety, 2009), in Colorado Division of Criminal Justice in Cooperation with the State Board of Parole, Information Collection and Analysis of Parole Board Decisions: Status Report (2009), Appendix B at 5-6, available at dcj.state.co.us/ors/pdf/docs/SB09-135/SB09-135_Report_11-1-09.pdf (last visited Mar. 11, 2011); Shamir Ratansi and Stephen M. Cox, State of Connecticut, Assessment and Validation of Connecticut's Salient Factor Score (2007), at 6-7, available at www.ct.gov/doc/lib/doc/pdf/RevalidationStudy2007.pdf (last visited Mar. 9, 2011); Tammy Meredith, John C. Speir, and Sharon Johnson, Developing and Implementing Automated Risk Assessments in Parole, 9 Justice Research and Policy 1 (2007), at 15-17; James Austin, Dana Coleman, Johnette Peyton, and Kelly Dedel Johnson, Reliability and Validity Study of the LSI-R Risk Assessment Instrument (The Institute on Crime, Justice, and Corrections, 2003), at 18, available at http://www.portal.state.pa.us/portal/server.pt/community/corrections___alternative_sanctions/7625/assessment_instruments/526270 (last visited Mar. 9, 2011).

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The U.S. Supreme Court has not addressed the constitutionality of the use of offender risk assessments at sentencing when based on facts determined by the trial court as opposed to a jury. Under presumptive sentencing guidelines, if risk assessments are used as the basis for aggravated departure penalties, the Sixth Amendment almost certainly requires that the defendant be given the right to jury determination of underlying facts other than prior convictions, with the requirement of proof beyond a reasonable doubt. See Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007). Risk assessments used in support of mitigated sentences, as recommended in § 6B.09(3), present no Sixth Amendment issues under current law. See § 7.07B and Reporter's Note (Tentative Draft No. 1, 2007); Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes, 105 Colum. L. Rev. 1082, 1094-1101 (2005) (listing exceptions to *Blakely*'s holding). Under advisory sentencing guidelines, the use of risk assessments at sentencing may not trigger Sixth Amendment concerns. In United States v. Booker, all nine Justices were in agreement that sentencing factfinding under advisory guidelines could be performed by the trial court free of the jury-trial guarantee. See 543 U.S. at 233 (2005) (Stevens, J., opinion of the Court); id. at 259 (Breyer, J., opinion of the Court). For the revised Code's recommendations concerning the design of an advisory-guidelines scheme, see Appendix A (Tentative Draft No. 1, 2007).

i. Risk assessment as used by sentencing commissions. Virginia was the first state to incorporate actuarial risk-assessment instruments into sentencing guidelines. Both the validity of the instruments used, and the effects on incarceration within the state, were evaluated independently by the National Center of State Courts. See Virginia Sentencing Commission, 2006 Annual Report (2006), at 31-36; Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). The Virginia risk-assessment instrument takes account of an offender's gender, but not race or ethnicity, as a correlate of recidivism. Both policy decisions comport with § 6B.06(2)(a),(4)(b) (Tentative Draft No. 1, 2007). Virginia uses actuarial measures to identify low-risk drug and property offenders, and sex offenders at high risk of committing a future offense of violence. Virginia Criminal Sentencing Commission, Assessing Risk Among Sex Offenders in Virginia (2001). Virginia's use of identifications of high-risk offenders in the state does not conform to the procedural restrictions recommended in this provision. The factual bases for projection are not made subject to the jury-trial procedures laid out in § 7.07B (Tentative Draft No. 1, 2007). Moreover, trial-court sentencing decisions are not subject to substantive appellate review in Virginia as they would be under the revised Code; see § 7.09.

For research on the question of whether an offender's gender correlates with risk of recidivism, see U.S. Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Guidelines 1 (2004), at 11 (reporting the results of a study which found that women recidivate at a lower rate than men, with a rate of 24.3% for men and 13.7% for women); see also Patrick A. Langan and David J. Levin, U.S. Dep't of Justice, Recidivism of Prisoners Released in 1994 (2002) , at 7; Allen J. Beck and Bernard E. Shipley, U.S. Dep't of Justice, Recidivism of Prisoners Released in 1983, at 7 (1989), at 5. One study failed to find any important difference in reoffending rates among men and women, although the study was limited to offenders released from federal prisons. Miles D. Harer, Federal Bureau of Prisons, Recidivism Among Federal Prisoners Released in 1987 (1994), at 3 ("Recidivism rates were almost the same for males and females; 40.9 percent of the males recidivated compared to 39.7 percent of the females.").

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1 Other states have also made risk assessment, or consultation of recidivism data, a feature of at least some
2 judicial sentencing decisions:

3 As part of 2003 drug-sentencing reform recommended by the Kansas Sentencing Commission, the Kansas
4 legislature instituted mandatory risk and needs assessments for offenders convicted of drug-possession offenses. The
5 assessments must be made available to sentencing courts as part of the presentence investigation report. See Kan.
6 Stat. §§ 21-4714(b)(9) & 21-4729(b). Under § 4729(h)(2), diversions of drug offenders from prison to a community
7 treatment program pursuant to the provision are exempted from the departure rules of the state's sentencing
8 guidelines.

9 Missouri's sentencing commission includes the same risk-assessment scoring system used by the state's parole
10 board (with minor modifications) as part of felony presentence reports. The reports provide sentencing judges—and
11 the parties—with a recidivism risk assessment at the time of sentencing. See Michael A. Wolff, Missouri's
12 Information-Based Discretionary Sentencing System, 4 Ohio State Crim. L.J. 95, 112-114 (2006) ("The Parole
13 Board's risk scoring is slightly more extensive because the Parole Board has three factors that it uses that are based
14 upon behavior while in prison; obviously, these institutional behavioral factors are not present at the time of
15 sentencing"). See also Missouri Sentencing Advisory Commission, Recommended Sentencing: Report and
16 Implementation Update 48-53, 72-74 (2005). The system is still too new for its effects on recidivism rates to be
17 evaluated. See Wolff, supra, at 118.

18 North Carolina's sentencing commission has studied the possibility of generating risk- assessment instruments
19 to be used at sentencing based on statewide recidivism data. See North Carolina Sentencing Policy and Advisory
20 Commission, Correctional Program Evaluation: Offenders Placed on Probation or Released from Prison in Fiscal
21 Year 2003/04 (2008), at pp. 106-107:

> 22 *The validity of offender risk scores as a predictive tool might point to its use in the criminal*
> 23 *justice decisionmaking process*. As we learn more about offenders and whether they will
> 24 recidivate, the more critical question for policy makers is how to target resources efficiently to
> 25 prevent future criminality. To this end, the use of risk scores in this and previous reports has
> 26 proven to be the most comprehensive predictive measure of recidivism. The risk score assigned to
> 27 an offender, which is comprised of preexisting personal and criminal history factors, has been
> 28 consistently associated with the disposition and program assignments imposed by the court as well
> 29 as with the offender's probability of reoffending. Since the most expensive correctional resources
> 30 (i.e., prisons) are predominantly being used by the high risk offenders and minimal resources are
> 31 required by the low risk offenders, it may prove to be a good use of tax dollars to target medium
> 32 risk offenders for less restrictive correctional programming. This investment in offenders who are
> 33 medium risk may play an important part in reducing their possibility of recidivating and ultimately
> 34 utilizing more expensive resources. The availability of risk scores earlier in the criminal justice
> 35 process might also help inform the discretion of decisionmakers such as judges and prosecutors at
> 36 conviction and sentencing.

37 In Oregon, Judge Michael Marcus has developed a computerized "sentencing support" system that provides
38 sentencing judges with information concerning offenders' likelihood of recidivism (of any kind, as well as violent

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recidivism) following sentences to criminal sanctions of different types, based on the offense, the offender's characteristics, and recidivism data in the state. See Michael Marcus, Sentencing Support Tools: User Manual for Judges (2009), at 7, 10, available at http://www.smartsentencing.info/sentencingsupporttransition.html (last visited Mar. 14, 2011). The software incorporates an offender's gender and "ethnicity" (broken down into categories of Asian, African American, Hispanic, American Indian or Alaskan, and White) as correlates of postsentence recidivism. The consideration of race and ethnicity is disapproved in Tentative Draft No. 1 (2007), § 6B.06(2)(a), and raises serious constitutional concerns, while consideration of gender for the narrow purpose of risk and needs assessments is expressly permitted by the revised Code, id., § 6B.06(4)(b).

Wisconsin's sentencing guidelines incorporate offender risk assessments into all guidelines worksheets. See, e.g., Wisconsin Sentencing Commission, Guidelines Worksheet: Robbery, Wis. Stat. § 943.32, at http://wsc.wi.gov/docview.asp?docid=3302 (last visited Mar. 9, 2011). See also Wisconsin Sentencing Commission, Three Critical Sentencing Elements Reduce Recidivism: A Comparison Between Robbers and Other Offenders (2006).

With the exception of capital cases and offenses carrying a sentence of life without possibility of release, Washington State authorizes the sentencing court to order a risk assessment prior to sentencing and requires the court to consider the assessment if it is prepared. See Rev. Code Wash. § 9.94A.500(1).

Sentencing commissions often use the scoring of criminal history within guidelines as a form of offender risk assessment. Some commissions have tested empirically the accuracy of recidivism projections based solely on criminal-history categories within the guidelines. See, e.g., U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (2004).

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§ 6B.10. Offenses Not Covered by Sentencing Guidelines.[119]

(1) The sentencing commission shall promulgate guidelines applicable to all felony and misdemeanor offenses under state law except as provided in this Section.

(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad that presumptive sentences cannot reasonably be fashioned, or for other sufficient reasons that inclusion in the guidelines would be of marginal utility.

(3) Offenses not covered in the guidelines shall be sentenced in the discretion of the sentencing court subject to § 7.XX(5).

(4) The commission may promulgate presumptive rules to be used by sentencing courts in cases where offenses have inadvertently or otherwise been omitted from the guidelines.

[119] This Section was originally approved in 2007; see Tentative Draft No. 1.

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Comment: [120]

a. Scope. This Section recognizes the reality discovered in every sentencing-commission jurisdiction that there are some offenses in the criminal code that are so obscure, infrequently enforced, or poorly defined that the promulgation of sentencing guidelines for those crimes would serve little purpose. In addition, although not expressly authorized by § 6B.10, commissions sometimes fail inadvertently to promulgate guidelines for discrete offenses. This Section allows the commission to make deliberate omissions of offenses from the guidelines in defined circumstances, and sets out provisions for the sentencing of cases where crime categories have been purposefully or mistakenly omitted from the coverage of guidelines.

Subsection (1) reiterates § 6B.02(1) (providing that the guidelines shall include presumptive sentencing provisions for offenders convicted of felonies and misdemeanors) but states further that exceptions to the coverage of the guidelines must be in accordance with this Section.

b. Offenses that may be omitted from the guidelines. Borrowing from the actual practice of state sentencing commissions, subsection (2) permits the calculated omission from the guidelines of offenses for which prosecutions are rarely initiated, that are defined so broadly in the criminal code that presumptive sentences cannot reasonably be fashioned, or for other sufficient reason why inclusion would be of marginal utility.

With respect to poorly defined offenses, it must be remembered that § 6B.04(3)(a) (both alternative versions) instructs the commission to create presumptive sentencing ranges that are relatively narrow from lower to upper boundary. This task cannot sensibly be performed by the commission for offenses that are so amorphous as to encompass an expansive variety of offense behaviors, harms to victims, or levels of culpability on the part of offenders. In such instances, the commission should recommend that the legislature tighten the relevant statutory definitions, and perhaps introduce appropriate grading distinctions, to better segregate meaningful legal categories for criminal punishment; see §§ 6A.04(4)(B), 6A.05(4)(a). See also 1962 Code, § 1.02(1)(e) (one general purpose of the Code's provisions governing the definition of offenses is "to differentiate on reasonable grounds between serious and minor offenses").

c. Sentencing of offenses not covered by guidelines. Offenses not included in the guidelines, whether this is done deliberately pursuant to subsection (2), or through neglect of the commission, must nonetheless receive sentences following convictions. Subsection (3), and the more detailed § 7.XX(5), provide the basic procedure that courts are to follow. Penalties in such cases are within the discretion of the trial courts, within statutory limits. Trial-court discretion is guided, however, by the purposes of sentencing in individual cases, see § 1.02(2)(a), the treatment of analogous offenses in the guidelines, and any presumptive provisions included in the guidelines that are applicable generally to noncovered offenses; see subsection (4). In cases

[120] This Comment has not been revised since § 6B.10's approval in 2007. All Comments will be updated for the Code's hardbound volumes.

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that result in an incarceration term, the trial judge must produce a written explanation for the punishment imposed, which is appealable under the deferential standard of review in § 7.09(5)(d). If sufficient case precedent arises under these provisions, the commission may derive principles from the judicial rulings to support the promulgation of new guidelines to cover previously omitted offenses. Alternatively, the commission may use the judicial decisions as one source of wisdom when considering recommendations for legislative change under § 6A.04(4)(B) or § 6A.05(4)(a).

d. Presumptive provisions for omitted offenses. The commission may choose to include presumptive rules or standards in the guidelines to assist trial courts in the sentencing of offenses not specifically covered by the guidelines. For example, the guidelines may set out a hierarchy of types of injuries to crime victims that the commission itself has used in reaching judgments about proportionate penalties within the guidelines. (This example assumes that the commission has employed such a scaling of victim injuries; nothing in the revised Code requires that a commission use this exact methodology.) The guidelines might further provide that a sentencing court should consult this schematic of harms as part of its thought process in pronouncing sentence for an omitted crime.

The useful guidance that may be provided under this subsection is left to the commission's discretion and, indeed, subsection (4) leaves the question of whether to do so to the election of the commission. Section 7.XX(5) requires trial courts to consult such provisions, if made by the commission, whenever setting punishment for a non-guideline crime.

e. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) and (4) as follows:

> **(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad that ~~presumptive~~ recommended sentences cannot reasonably be fashioned, or for other sufficient reasons why inclusion in the guidelines would be of marginal utility. . . .**
>
> **(4) The commission may promulgate ~~presumptive rules to be used by~~ recommendations for sentencing courts in cases where offenses have inadvertently or otherwise been omitted from the guidelines.**

The suggested revisions merely substitute terminology appropriate to sentence "recommendations" where language of "presumptions" occurs in the unaltered provision; see § 6B.01, Comment *b*.

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REPORTERS' NOTE [121]

b. Offenses that may be omitted from the guidelines. Subsection (2) is based on Minnesota Sentencing Guidelines and Commentary§ II.A.04 (2006). See also Washington Adult Sentencing Guidelines Manual (2006), at I-1. The provision contemplates that a sentencing commission will amend its guidelines if the conditions of subsection (2) are found to be inapplicable. See Minnesota Sentencing Guidelines and Commentary § II.A.04 (2006) ("If a significant number of future convictions are obtained under one or more of the unranked offenses, the Commission will reexamine the ranking of these offenses and assign an appropriate severity level for a typical offense"); Washington Adult Sentencing Guidelines Manual (2006), at II-120.

c. Sentencing of offenses not covered by guidelines. In most sentencing guidelines jurisdictions, the sentencing commission provides rules or recommendations for judges who must pronounce sentence for an offense not covered by the guidelines. See Arkansas Sentencing Commission Website, Omitted Offenses Policy (2007); Kan. Stat. § 21-4707(c)(2) (2006); Minnesota Sentencing Guidelines and Commentary § II.A.04 (2006); Md. Code Regs. 14.22.01.09(B)(2)(g) (2007); Mo. Sentencing Advisory Comm'n, Report and Recommendation Update (2005), at 25; 204 Pa. Code § 303.3(f) (2005); Or. Admin. R. 213-004-0004 (2007); Pa. Sentencing Guidelines Standards (2005), at 65; Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines (9th ed. 2006), General Instructions at 5–6; Rev. Code Wash.§ 9.94A.505(2)(b) (2007).

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§ 6B.11. Effective Date of Sentencing Guidelines and Amendments.[122]

(1) The sentencing commission shall promulgate its initial set of proposed sentencing guidelines no later than [date]. The proposed guidelines shall take effect [180 days later] unless disapproved by act of the legislature.

(2) Proposed amendments to the guidelines may be promulgated as needed in the judgment of the commission, but no more frequently than once per year. Proposed amendments must be submitted to the legislature no later than [date] in a given year, and shall take effect [180 days later] unless disapproved by act of the legislature.

(3) New or amended guidelines shall apply to offenses committed after their effective date. If new or amended guidelines decrease the sentence severity of prior law, the commission shall recommend to the legislature procedures under which the sentences of offenders currently serving or otherwise subject to sentences under the prior law may be adjusted to conform with the new or amended guidelines.

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[122] This Section was originally approved in 2007; see Tentative Draft No. 1.

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Alternative § 6B.11. Effective Date of Sentencing Guidelines and Amendments.

(1) The sentencing commission shall submit its initial set of proposed sentencing guidelines to the legislature no later than [date]. The proposed guidelines shall take effect when enacted into law by the legislature.

(2) The sentencing commission shall submit proposed amendments to the guidelines to the legislature as needed in the judgment of the commission, but no more frequently than once per year. Proposed amendments must be submitted no later than [date] in a given year, and shall take effect when enacted into law by the legislature.

(3) New or amended guidelines shall apply to offenses committed after their effective date. If new or amended guidelines decrease the sentence severity of prior law, the commission shall recommend to the legislature procedures under which the sentences of offenders currently serving or otherwise subject to sentences under the prior law may be adjusted to conform with the new or amended guidelines.

Comment: [123]

a. Scope. These alternative provisions address the question of how and when sentencing guidelines promulgated by the commission shall take legal effect. Both alternatives speak to the commission's initial set of guidelines proposals, see § 6A.04(1), and later guidelines or guideline amendments, see § 6A.05(2)(a).

b. Legislative override versus legislation adoption. The alternative mechanisms set forth in these provisions mirror a split in practice among American guideline jurisdictions. The law in a number of jurisdictions provides that the commission's guidelines, once formally proposed, shall take effect after a stated period of time in the absence of disapproval by act of the legislature. This might be called the "legislative override" approach, and is reproduced in the first version of § 6B.11. The law in a comparable number of guideline jurisdictions, in contrast, requires that the legislature affirmatively adopt the commission's guideline proposals before they take legal effect. This could be called the "legislative adoption" approach, and is the basis for Alternative § 6B.11.

Successful state guidelines systems have grown up under both legislative override and adoption frameworks. Strong arguments can be advanced in favor of either approach. In theory, the legislative-override plan cedes greater independence to the commission, and greater insulation from political interference, than the legislative-adoption alternative. In practice, however, commissions in legislative-adoption states have often played strong and effective roles, and have achieved a degree of political insulation comparable to commissions in legislative-override states. The working relationship between a commission and the legislature appears to be

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a more important variable in the lawmaking process than the manner by which guidelines are to become effective.

Proponents of the legislative-adoption approach assert that guidelines formally enacted by the legislature enjoy greater legitimacy than guidelines in override jurisdictions. This argument, too, carries surface plausibility. But experience in a number of states has shown that the widespread acceptance of the guideline system, and high levels of judicial agreement with presumptive guideline recommendations, can both be realized within the legislative-override framework.

The drafters of the revised Code concluded that the choice between "override" and "adoption" alternatives should be made by each state in light of their local political circumstances.

c. Offenses covered by the guidelines. Subsection (3) is identical in both alternative versions of § 6B.11. It provides that new or amended guidelines shall apply to offenses committed after their effective date. When newly effective guidelines work an increase in the severity of punishments to be imposed, as compared with prior law, the effective-date provision in subsection (3) is constitutionally required by the Ex Post Facto Clause.

For new or amended guidelines that represent a decrease in severity as compared with prior law, however, it is constitutionally permissible, and desirable as a matter of public policy, that the benefit of the new provisions be extended to offenders otherwise subject to the prior law. The precise means by which such retroactive adjustments should be made is a complex subject, however. The practical difficulties of retroactive application vary substantially among offenders who committed offenses under the regime of prior law but are not yet charged, those who offended under prior law and are in the midst of the adjudication process, and those already sentenced under prior law. In the latter category particularly, it may be difficult retroactively to duplicate the judicial sentencing process that would have unfolded if the new guidelines had been in effect at an earlier time.

Rather than setting down a fixed statutory approach to these potentially convoluted problems, subsection (3) requires the commission to suggest an appropriate set of accommodations to the legislature whenever new or amended guidelines are promulgated.

REPORTERS' NOTE [124]

b. Legislative override versus legislation adoption. For states employing a legislative-override mechanism, see Ark. Code § 16-90-802(d)(2)(D)(i) (2006) ("revised [voluntary sentencing] standards will be in effect unless modified by the General Assembly at its next session or until revised again by the commission"); Minn. Stat. § 244.09, subd. 11 (2006) ("Any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or in the early release of

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any inmate, with the exception of a modification mandated or authorized by the legislature or relating to a crime created or amended by the legislature in the preceding session, shall be submitted to the legislature by January 15 of any year in which the commission wishes to make the change and shall be effective on August 1 of that year, unless the legislature by law provides otherwise"); 42 Pa. Cons. Stat. § 2155(c) (2006) ("Sentencing guidelines adopted by the commission shall become effective 90 days after publication in the Pennsylvania Bulletin . . . unless disapproved [by concurrent resolution of the General Assembly]."); Va. Code Ann. § 17.1-806 (2006) ("any modification to the discretionary sentencing guidelines adopted by the Commission shall be contained in the annual report required under § 17.1-803 and shall, unless otherwise provided by law, become effective on the next following July 1.").

States using the legislative-adoption model usually enact sentencing guidelines into statutory law. Jurisdictions following this approach include Alabama, Kansas, North Carolina, Ohio, Oregon, and Washington. See Ala. Code § 12-25-34(d) (2006); Or. Rev. Stat.§ 137.667(2) (2005); S.C. Code § 24-26-50 (2006); Rev. Code Wash.§§ 9.94A.850(2)(b) & 9.94A.865 (2006).

In Delaware, the legislature provided that the original sentencing guidelines drafted by the sentencing commission would have no force or effect until adopted into court rules by the Delaware Supreme Court. 11 Del. Code § 6581(a) (2006). The same mechanism applies to guidelines amendments. See Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987).

There is no evidence that choice between legislative adoption and override models is related to a sentencing commission's long-term success and influence. See Ronald F. Wright, Amendments in the Route to Sentencing Reform, 13 Crim. Justice Ethics 58 (1994).

c. Offenses covered by the guidelines. Guidelines, or amended guidelines, are generally applicable only to offenses committed after the new guidelines become effective. See, e.g., Minnesota Sentencing Guidelines and Commentary § III.F (2006); Or. Rev. Stat. § 137.669 (2005); 204 Pa. Code § 303.1(c) (2005); Rev. Code Wash. § 9.94A.345 (2006). Even without an express statutory provision, guidelines that increase penalty severity over prior law would violate the Ex Post Facto Clause if applied to offenses committed before their effective date. See Calder v. Bull, 3 U.S. 386 (1798); Lindsey v. Washington, 301 U.S. 397, 401 (1937); Weaver v. Graham, 450 U.S. 24 (1981); Miller v. Florida, 482 U.S. 423, 433-434 (1987); Collins v. Youngblood, 497 U.S. 37, 43 (1990).

ARTICLE 7. JUDICIAL SENTENCING AUTHORITY

§ 7.XX. Judicial Authority to Individualize Sentences.[125]

(1) The courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2).

(2) In sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of

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the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a).

(a) A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.

(b) A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.

(c) A sentencing court may not base any decision affecting a sentence upon a factor prohibited by statute, constitutional law, or controlling judicial decision, and may not violate a limitation imposed by the same authorities.

(d) The degree of a departure from the guidelines in an individual case shall be determined by the sentencing court in light of the purposes of § 1.02(2)(a).

(3) The legislature or the courts may create rules or standards relating to sentencing that carry a heavy presumption of binding effect. Deviation from such a heavy presumption in an individual case shall be treated as an extraordinary departure. A sentencing court may impose a sentence that is an extraordinary departure only when extraordinary and compelling circumstances demonstrate in an individual case that a sentence in conformity with the heavy presumption would be unreasonable in light of the purposes in § 1.02(2)(a).

(a) There shall be a heavy presumption in the guidelines that a departure sentence to incarceration may not exceed a term twice that of the maximum presumptive sentence for the offense. A more severe sentence shall be treated as an extraordinary departure.

(b) Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).

(4) Whenever a sentencing court renders a sentencing decision that is a departure or an extraordinary departure, the court shall provide an explanation of its reasons on the record, including an explanation of the degree of the departure or extraordinary departure.

(5) Sentences of individual offenders for offenses not covered by the guidelines shall be rendered by sentencing courts consistent with the purposes of § 1.02(2)(a). The sentencing court shall consult the guidelines for their treatment of analogous offenses, if any, as

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benchmarks for proportionate punishment, and for any presumptive provisions applicable to offenses not covered by the guidelines. For all sentences that include a term of incarceration under this subsection, the sentencing court shall provide an explanation on the record of its reasons for the sentence imposed.

(6) All findings of fact contemplated in this Section shall be made by the court or a jury as provided in §§ 7.07A and 7.07B.

(7) No sentence imposed by a sentencing court may exceed the maximum authorized penalties for the offense or offenses of conviction as set forth in §§ 6.03 through 6.11A.

Comment: [126]

a. Scope. This provision defines the authority of trial courts to individualize sentences within the revised Code's structure of sentencing guidelines and appellate sentence review. It must be read in conjunction with § 6B.04 (limiting to "presumptive legal force" all guidelines created by the commission) and § 7.09 (setting forth meaningful yet deferential standards of appellate review of sentencing decisions in individual cases). These three provisions together carve out the relative powers of the commission, the trial courts, and the appellate courts.

b. Judicial discretion in light of legislative purposes. Section 7.XX repeatedly frames sentencing courts' discretionary authority, the limitations upon that authority, and the courts' burdens of explanation in terms of the underlying purposes of the sentencing and corrections system set forth in § 1.02(2). This is part of the revised Code's broad-based effort to make the purposes provision integral to decisions at all stages of the sentencing process, see § 1.02(2), Comment *a*.

Subsection (1) has exact parallels in § 7.09(1) (addressed to appellate courts) and § 6B.03(1) (addressed to the sentencing commission). It states that all exercises of judicial authority under Article 7 must be consistent with the legislative purposes in § 1.02(2). Later subsections within § 7.XX address particularized applications of this requirement, and use § 1.02(2)(a) as a vehicle for the delineation and preservation of judicial discretion in individual cases. Subsection (1) is broader than any later reference to the purposes provision, however, in that it explicitly embraces the whole of § 1.02(2). The remainder of § 7.XX speaks to sentencing discretion in individual cases—a subject treated in § 1.02(2)(a) (general purposes of sentencing in individual cases). The courts, however, must sometimes attend to systemic purposes in the course of deciding specific cases, see § 1.02(2)(b) (general purposes of sentencing system as a whole). This may occur when a court is called upon to interpret an ambiguous statutory command setting forth a legal standard, prohibition, requirement, or process rule. Subsection (1) makes clear that sentencing courts must attend to systemic purposes whenever these are implicated by judicial action.

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Illustrations:

1. A court is faced with alternative possible readings of a statutory requirement that it give reasons for a particular kind of sentencing decision, cf. § 7.XX(4) and (5). On one construction, the court would be called upon to provide a statement of reasons for the sentence imposed; on another interpretation, the court would not be required to provide an explanation. Decision must be informed by the court's best understanding of § 1.02(2) as a whole. The court may rely upon § 1.02(2)(b)(viii) as grounds for giving broad rather than narrow construction to the statute's requirement. Under § 1.02(2)(b)(viii), one general purpose of the sentencing and corrections system, in matters affecting the administration of the system as a whole, is "to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities."

2. The proper construction of a statutory or guideline provision that addresses the sentencing consideration to be given a personal characteristic of an offender is in doubt. The court has grounds to believe that one interpretation would exacerbate racial or ethnic disparities in punishment in the jurisdiction, while an alternative construction would avoid this result. Decision must be informed by the court's best understanding of § 1.02(2) as a whole. The court may rely upon § 1.02(2)(b)(iii) in support of the second interpretation of the ambiguous provision. Section 1.02(2)(b)(iii) states that one general purpose of the sentencing system, in matters affecting the administration of the system as a whole, is "to eliminate inequities in sentencing across population groups." The court might also look to the underlying spirit of § 1.02(2)(b)(iii) (general purpose "to ensure that steps are taken to forecast and prevent unjustified overrepresentations of racial and ethnic minorities in sentenced populations when laws and guidelines affecting sentencing are proposed, revised, or enacted").

c. Departure authority. Subsection (2) addresses the question of judicial sentencing discretion in individual cases as it will arise most frequently in a guidelines system: To what extent do trial courts possess authority to deviate from presumptive sentences in the guidelines, or from other rules set forth in guidelines? If guidelines are mandatory in effect, then sentencing courts have no discretion beyond that granted by the commission in guidelines. On the opposite end of the continuum, if guidelines are wholly advisory, then judicial sentencing discretion within statutory limits is not constrained by the commission's actions. The revised Code strikes an institutional balance of authority between these two extremes. The courts and the commission both hold meaningful authority within the Code's sentencing structure, although greater discretion over sentencing outcomes ultimately rests with the judiciary rather than the commission; see § 6B.04, Comment *b*.

Subsection (2) lays down the general guidelines "departure standard" for the revised Code. This is the single most important design feature of a guidelines system in mediating the relative

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authorities of the commission, the trial courts, and the appellate courts. The departure standard—including the rigor with which it is enforced on appeal—defines the guidelines structure as mandatory, nearly mandatory, strongly presumptive, moderately presumptive, weakly presumptive, or advisory—with minute calibrations possible all along this continuum.

Under subsection (2), a trial judge, when sentencing an individual offender, may depart from a presumptive penalty or any other presumptive provision in the guidelines "when substantial circumstances exist that the presumptive sentence or provision will not best effectuate the purposes in § 1.02(2)(a) (general purposes of sentencing and corrections in individual cases)." The "substantial circumstances" standard is meant to be less restrictive than the "substantial *and compelling* circumstances" standard in use in many American jurisdictions with presumptive sentencing guidelines.

Subsection (2)(a) adds operational detail to the general approach stated in the first clause of subsection (2). When departing from a presumptive guideline sentence, trial courts may rely upon the enumerated aggravating and mitigating factors in the guidelines themselves, but courts are not limited to these enumerated considerations. See also § 6B.04(4) ("The guidelines shall include nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences in individual cases"). Subsection (2)(a) explicitly opens the door to judge-made aggravating or mitigating factors "grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines."

Illustrations:

3. A defendant appears for sentencing in a case of fraud and embezzlement in the course of employment as the victim's financial adviser. During his professional relationship with the victim, the defendant initiated an inauthentic romantic relationship with the victim, which he used to further gain her trust in order to facilitate his crimes. The guidelines do not enumerate as an aggravating factor that a defendant has feigned emotional involvement with a victim in furtherance of an offense. Nonetheless, the trial court may rely on this factor as basis for an upward departure if the court concludes that the defendant's actions intensified the harms done to the victim, increased the offender's blameworthiness in the commission of the crimes, or both, so long as the degree of departure is proportionate in light of those considerations; see § 1.02(2)(a)(i). The departure sentence may be appealed by the defendant, and the reasoning of the trial court may be tested, subject to the standard of review in § 7.09(5).

4. A defendant appears for sentencing for residential burglary and several counts of theft. The presumptive sentence under the guidelines would be a term of incarceration. The defendant is addicted to cocaine and committed the crimes to support his drug habit. The court is presented with an assessment of the defendant's treatment needs; see § 6B.09 (to be drafted), that suggests he is a good candidate for a community-based

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drug-treatment program. The guidelines do not enumerate as a mitigating departure factor a defendant's amenability to drug treatment. Nonetheless, the trial court may rely on the defendant's amenability to treatment as basis for departure if the court finds that a sentence to community-based treatment would best effectuate the purpose of offender rehabilitation in § 1.02(2)(a)(ii), provided there is "realistic prospect of success" that the program will restore the defendant to a law-abiding lifestyle, see id., and provided the sentence would not be disproportionately lenient in light of the gravity of the defendant's crimes, the harms done to his victims, and his blameworthiness; see § 1.02(2)(a)(i). The departure sentence may be appealed by the government, and the reasoning of the trial court tested, subject to the standard of review in § 7.09(5).

Subsection (2)(b) sets out the only substantive constraint placed upon a trial court's guideline departure authority that originates in § 7.XX itself. The provision excludes departures premised on bare disagreement with the commission's judgment concerning an appropriate penalty for an "ordinary case" under the guidelines. As explained in § 6B.04, Comment *c*, the revised Code views the commission, due to the credibility of the collective judgment of its membership, as uniquely situated to set down a framework of appropriate sentences for typical cases. When departing from this framework, a judge must conclude that an individual case presents one or more substantial circumstances, grounded in the purposes of punishment, that render the ordinary penalty less appropriate than the departure sentence.

Subsection (2)(c) contemplates further potential limitations on judicial sentencing discretion. None may be authored by the commission, however; see § 6B.02(7). The two most important categories of prohibition or limitation are those mandated by constitutional law or controlling judicial precedent. To large degree, these can be seen as constraints the judicial branch sees fit to impose upon itself, through constitutional interpretation or the courts' judgment about the best governance of the sentencing system; see § 6B.06(1) and Comment *b*. Subsection (2)(c) also recognizes that the legislature may enact its own limitations upon judicial sentencing discretion. Under the scheme of the revised Code, however, this legislative power should be exercised only in narrow circumstances; see § 6B.06, Comment *a*.

Subsection (2)(c) is broader than subsections (2)(a), (2)(b), and (2)(d) in that (2)(c) embraces "any decision affecting sentence," including departures. The other subsections speak only to departures.

Subsection (2)(d) sets out the further rule that, not only are the courts the prime arbiters of those factors that may support guideline departures, they should also control the impact that departure factors will have on resulting penalties. See § 6B.04(4) ("The commission may not quantify the effect given to specific aggravating and mitigating factors") and § 6B.04, Comment *e*. The general authority stated in subsection (2)(d) is of course subject to the authoritative limitation recognized in subsection (2)(c). Moreover, subsection (3)(a), this provision, places a

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statutory limitation on extreme departures from the guidelines in some cases; see Comment *d* below.

d. Extraordinary departures. Subsection (3) creates a mechanism for a second tier of regulation beyond the general guideline departure standard, where heightened constraints may be placed on judicial sentencing discretion. Borrowing from experience in American guidelines systems, this more restrictive approach is meant to be employed sparingly. Only two applications are given in subsection (3), and the revised Code contains a third application in § 6B.08(2) (heavy presumptions available as limitations upon consecutive sentences in defined circumstances). The device allowed in subsection (3) must be policed carefully so that its use does not subvert the fundamental policy choice, reflected throughout the revised Code, that the judiciary should hold the lion's share of authority within the sentencing structure. Accordingly, the first sentence of subsection (3) states that only the legislature or the judiciary itself may set down a heavy presumption subject to the extraordinary-departure standard; see also § 6B.01(5).

Subsection (3)(a) articulates a stringent legal standard for especially dramatic departures from presumptive sentences. The provision is intended to reinforce the proportionality of incarceration sentences by guarding against outlier penalties. Subsection (3)(a) creates a "heavy presumption" that prison or jail sentences may not exceed a term twice that of the maximum presumptive penalty in the guidelines. In order to overcome the heavy presumption, a trial court must make findings that satisfy the "extraordinary departure" standard, rather than the substantial-circumstances standard generally applicable to guideline departures. In order to justify an extraordinary departure, there must be "extraordinary and compelling circumstances" in a particular case that a sentence in conformity with the heavy presumption would be unreasonable in light of the purposes in § 1.02(2)(a). Sentencing decisions that fall under the heading of extraordinary departures are subject to de novo review on appeal, and not the deferential standard of review applied to departures generally; see § 7.09(5)(e).

Subsection (3)(a) is but one of several devices in the revised Code's sentencing scheme to safeguard the principle of proportionality in sentencing, and it works chiefly at the edges of the problem. The provision polices only confinement terms that are extremely divergent from the commission's collective judgment of appropriate penalties, yet allows room for the possibility that such dramatic deviations may be proportionate and justifiable when the purposes of sentencing so demand.

Without subsection (3)(a), upward departures from presumptive penalties would be permitted under a unitary "substantial circumstances" standard, and subject to a deferential standard of appellate review, limited only by the statutory maximum penalties for the offenses of conviction, see subsection (6). A departure increment of many years would encounter no greater burden of explanation than an increment of several months. Borrowing from examples in state guidelines systems, subsection (3)(a) places the applicable legal standards on a gradient. Once the extremity of a departure becomes sufficiently great, the controls upon judicial discretion

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tighten. Subsection (3)(a) is not meant to replace the principle mechanisms for the pursuit of proportionate sentencing, however, which are the trial and appellate courts' responsibilities to work toward punishments in every case that best effectuate the purposes in § 1.02(2)(a), including the overarching proportionality rule in § 1.02(2)(a)(i).

Subsection (3)(b) also uses the extraordinary-departure mechanism to enhance judicial discretion in most American jurisdictions. The provision creates a limited judicial departure power applicable to otherwise mandatory penalty provisions. It is borrowed from precedent in a small handful of states, where similar departure powers have existed for categories of mandatory penalties or specific penalties. Although the revised Code recommends that a provision modeled on subsection (3)(b) should be given general applicability throughout the criminal code, a legislature wishing to apply it selectively might choose to enumerate those mandatory provisions affected by the departure power, or those not affected.

The 1962 Code took the view that mandatory sentences should not be enacted by a legislature for any offense. The revised Code continues that blanket recommendation. See § 6B.05 and Comment (to be drafted). Still, the revised Code would ignore reality were it not to recognize that mandatory-penalty provisions now exist in every American jurisdiction, and they have proliferated greatly since the 1962 Code. Subsection (3)(b) therefore addresses jurisdictions that have not followed the Institute's policy position, and suggests a vehicle for introducing judicial discretion into the domain of mandatory sentencing, targeted to reach those cases in which a discretionary outlet is most needed. If, in some future era, there are American legal systems with no mandatory punishments, subsection (3)(b) will be harmless surplusage.

Subsection (3)(b) employs the extraordinary-departure standard as a restriction upon most deviations from mandatory-penalty provisions—but one that grants courts discretion to avoid egregious applications of mandatory punishments. These are defined as cases in which, in light of the purposes of sentencing, mandatory penalties would result in unreasonable sentences. A trial judge must cite "extraordinary and compelling circumstances" in the individual case to support such a conclusion, and the trial court's decision will be subject to appellate review under the de novo standard in § 7.09(5)(e).

Subsection (3)(b) is aimed at the worst injustices arising under mandatory-sentencing laws. It does not fully effectuate the Institute's longstanding objection to mandatory penalties. Rather, it is intended as a substantial improvement in the law of jurisdictions that persist in the use of mandatory provisions.

Illustration:

5. Defendant appears for sentencing for the current offense of theft of three golf clubs worth $1200. He has earlier convictions of robbery and burglary, entered seven years before commission of the current crime. Under the terms of a state statute, defendant's current offense plus his prior convictions trigger a mandatory minimum penalty of 25 years in prison. The trial court has discretion to depart from the mandatory

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minimum term, and impose a lesser term, if the court finds that extraordinary and compelling circumstances exist in the case such that imposition of the mandatory penalty would result in an unreasonable sentence in light of the purposes of sentencing in § 1.02(2)(a). One possible ground for departure is that the 25-year sentence would be unreasonably disproportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender; see § 1.02(2)(a)(i). Such a departure must be based on a full examination of the facts of the case and must be explained by the court on the record, including an explanation of the sentence chosen in lieu of the mandatory penalty. The extraordinary-departure sentence may be appealed by the government and is subject to the stringent standard of review in § 7.09(5)(e).

e. Explanations of reasons for departure. Subsection (4), following virtually every American guidelines jurisdiction, requires that a trial judge provide a full statement of reasons on the record whenever the judge renders a sentence that is a departure or, in the revised Code's terminology, an extraordinary departure. The explanation must identify the circumstances of the individual case cited as grounds for the departure, together with an explanation of the degree of the departure away from the presumptive penalty. In other words, the court's explanation must address why the presumptive sentence was not appropriate, and why the departure sentence is appropriate. Both subjects must be framed in terms of the purposes of sentencing and corrections; see subsections (2)(a) and (2)(d).

The statement of reasons required in subsection (4) serves a number of purposes within the sentencing system. First, it pushes sentencing judges to engage in the disciplining process of articulated justification. Many flaws in reasoning, or insights otherwise hidden, come to light only through the effort of explanation. This commonplace of professional observation motivates much of judicial practice in realms other than sentencing. Subsection (4) does not push the rationale to its fullest possible extension, however. Penalties that align with guideline presumptions (or statutory presumptions) are assumed to rest upon the reasoning of the commission (or legislature) in propounding recommendations for ordinary cases.

Second, the requirement serves the goal of communication of each judge's reasoning process to other judges, and others in the sentencing system. If judges are to contribute meaningfully to the evolution of the sentencing system, the intellectual work product of their labors in individual cases must be transparent and accessible. An innovative turn in departure jurisprudence may gain precedential value, for example, especially if approved by an appellate court. Moreover, the sentencing commission under the revised Code is charged with ongoing review of judicial decisionmaking, and must regularly consider amendments to the guidelines so that they better comport with the sentencing practices of judges; see § 6A.05(5)(d). Collaborative interactions between the judiciary and the commission, as envisioned in § 6A.01(2)(b), require routinized feedback.

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Third, subsection (4) is an absolute prerequisite of meaningful appellate review of departure decisions. Without a statement of the sentencing court's findings of fact and legal analysis in selecting punishment in a given case, the appeals process is unmoored. The disablement of appellate review prevents the judiciary from contributing substantively to the development of a common law of sentencing, and also forecloses meaningful enforcement of those principles of sentencing law that are binding upon judges; see, e.g., §§ 1.02(2), 6B.06, 7.XX(2)(b).

Apart from considerations of reviewability, subsection (4) imposes marginal reinforcement of guideline presumptions as a practical matter. The extra effort required of a judge when departing from the guidelines encourages judges to reflect before rendering such decisions.

Finally, the requirement of a statement of reasons is intended to enhance the legitimacy of the sentencing process in the eyes of the offender, the victim, and the public. The selection of a particular punishment within an expansive statutory range can appear a mystifying process, and may appear an illegitimate process to a skeptical onlooker. In a guidelines system, presumptive sentences are a significant narrowing of statutory ranges; see § 6B.04(3)(a) (alternative versions). When a presumptive sentence is imposed, the offender, the victim, and other observers are given the assurance that the case has been treated as an ordinary one, and the punishment is consistent with that given in the majority of cases of its kind. Further, the appropriate penalty has not been chosen arbitrarily by a single judge (whose opinion may differ from the judge in the courtroom next door), but reflects the collective judgment of a sentencing commission composed of members with wide experience and differing perspectives on the criminal-justice system.

When a judge imposes a sentence outside of the presumptive sentencing range, however, whether more lenient or severe than the guideline penalty, a burden of explanation to all those affected by the decisions is justly imposed. The court's statement of reasons provides reassurance that the departure has not resulted from idiosyncrasy on the part of the judge. All onlookers deserve to know that departure analysis is not purely discretionary, but is guided by principles of general application, and is subject to review. Although a departure sentence may not be "uniform" in the sense that it is a cookie-cutter replica of penalties given other defendants, it is "uniform" in its neutral application of the purposes of sentencing; see § 1.02(2)(b)(ii).

f. Sentencing for offenses not covered by guidelines. Subsection (5) governs the sentencing process for offenses not included in the guidelines; see § 6B.10. In these cases, there is no express starting point for the trial court's analysis of an appropriate penalty as would be given in a presumptive guideline recommendation. Typically, the only authoritative guidance a court will have in such cases is the full expanse of the statutory range of available penalties. Subsection (5) imports a consistent reasoning process to a task that might otherwise be one of unstructured discretion. The provision requires, first, that judges consult the purposes of sentencing in individual cases when selecting punishments in such cases. Second, judges should consult the guidelines as a framework for proportionality in punishment, by looking to the guidelines' treatment of analogous offenses, or offenses that are somewhat more or less serious than the

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instant crime. This replicates the evaluative process that the commission performs for categories of cases included in the guidelines, but has not done in the instant case. Third, the judge should look to any express guideline provisions that may have been authored by the commission to give further guidance in such cases.

The final sentence of subsection (5) requires trial courts to provide statements of reasons on the record for imposing a sentence of incarceration in cases covered by the subsection. In such cases, there is no presumptive penalty that carries automatic credibility as the product of the commission's best collective judgment. In all cases under subsection (5), therefore, the rationales rehearsed in Comment *e*, supportive of the requirement of a statement of reasons in *departure* cases, are again applicable. Subsection (5) includes an arbitrary threshold provision that explanation on the record is required only when a term of incarceration is imposed on the defendant. Individual jurisdictions may decide to modify this threshold, for example, to include only felony sentences, or to include all non-guideline sentences without qualification.

g. Factfinding by judge or jury. Most of the factfinding contemplated under this provision is to be performed by the court during sentencing proceedings. For a limited category of factual issues, however, the Sixth Amendment mandates jury determination under the reasonable-doubt standard. Sections 7.07A and 7.07B, which are explicitly cross-referenced in § 7.XX(6), speak to the division of labor between court and jury for resolution of factual issues at sentencing. Because the revised Code views the trial court as the most important decisionmaker in the sentencing process, see § 1.02, Comment *h*, the scope of factfinding responsibility committed to the jury is the bare minimum required by the Constitution. All conclusions of law that follow upon the making of a factual record are reserved to the sentencing court; see § 7.07A(2).

h. Statutory maximum penalties as ultimate limits on sentencing discretion. Subsection (6) rehearses the revised Code's elementary understanding that all sentencing in a guidelines structure must take place within the ultimate boundaries of the maximum authorized penalties for any offenses of conviction, see also § 6B.02(8) (parallel limitation upon commission's authority to create presumptive sentences). This is a structural feature of nearly every American guidelines system, and has become a pillar of federal constitutional law.

i. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) and (5), as follows:

(2) In sentencing an individual offender, sentencing courts ~~may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a)~~ shall give full consideration to all sentencing guidelines applicable to

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the case. Sentencing courts shall assess the weight to be given the guidelines' recommendations in light of the purposes stated in § 1.02(2).

(a) ~~A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.~~ Sentencing courts should be especially cognizant of the legislative goal of encouraging sentences that are uniform in their neutral application of the general purposes of sentencing and correction of individual offenders, and should consult the guidelines as useful benchmarks in the pursuit of that goal.

~~(b) A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.~~

~~(c)~~ (b) A sentencing court may not base any decision affecting a sentence upon a factor prohibited by statute, constitutional law, or controlling judicial decision, and may not violate a limitation imposed by the same authorities.

~~(d) The degree of a departure from the guidelines in an individual case shall be determined by the sentencing court in light of the purposes of § 1.02(2)(a).~~ . . .

(5) Sentences of individual offenders for offenses not covered by the guidelines shall be rendered by sentencing courts consistent with the purposes of § 1.02(2)(a). The sentencing court shall consult the guidelines for their treatment of analogous offenses, if any, as benchmarks for proportionate punishment, and for any ~~presumptive provisions~~ recommendations applicable to offenses not covered by the guidelines. For all sentences that include a term of incarceration under this subsection, the sentencing court shall provide an explanation on the record of its reasons for the sentence imposed.

The reworking of § 7.XX(2) is an especially important matter for jurisdictions that opt to use advisory rather than presumptive guidelines. Advisory guidelines by definition do not carry force of law and, indeed, cannot do so if it is an important legislative objective to adopt a guidelines system that escapes Sixth Amendment jury-factfinding requirements at sentencing. Even so, the institutional benefits of a sentencing commission and guidelines structure would largely be lost if trial courts routinely disregarded the commission's recommendations as expressed in advisory guidelines. It is therefore desirable, in a well-designed advisory-guidelines system, to create procedural requirements that encourage rigorous consultation of guidelines provisions, while drawing short of investing them with direct enforceability.

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Section 7.XX together with § 7.09 (Appellate Review of Sentences) can impose structure upon the sentencing process even within an advisory regime. Section 7.XX must play its role, however, without reference to trial courts' "departure power" as an explicit legal standard. Within a presumptive-guidelines framework, the unaltered subsection (2) relies upon the departure-power mechanism, allowing a sentencing court to deviate from a guidelines presumption only when the court finds that "substantial circumstances exist that the presumptive sentence or provision will not best effectuate the purposes in § 1.02(2)(a)." Subsections (2)(a) through (2)(d) give additional content to the standard. The courts' departure power cannot be exercised, as a matter of law, in the absence of sufficient factual findings and legal analysis to satisfy the "substantial circumstances" standard.

In an advisory system, the best alternative to a formal departure power is imposition of procedural requirements that trial courts must (1) consult the sentencing guidelines carefully and accurately, (2) analyze the guidelines' applicability to a particular case with reference to the general purposes of sentencing, and (3) articulate their factual and legal reasoning on the record when departing from the guidelines. The suggested amendments to subsection (2), together with the unamended subsection (4), lay down this multi-step process. All of these steps can then be made subject to meaningful appellate review, see § 7.09, Comment *i*.

Subsection (2)(a) directs trial courts—and appellate courts performing their review function—toward special solicitude to one among the several legislative purposes of the sentencing system. The legislature has declared it an important aspiration to "encourage sentences that are uniform in their neutral application of the general purposes of sentencing and correction of individual offenders"; see § 1.02(2)(b)(ii) (as amended for an advisory-guidelines system). Uniformity,_conceived as consistency of thought process, is the systemic value most placed at risk in a jurisdiction that chooses to adopt advisory rather than presumptive sentencing guidelines. Subsection (2)(a) in effect acknowledges that the legislature and sentencing commission cannot effectively promote this core objective in an advisory structure unless judges throughout the state, at all levels of the court system, internalize the value of uniformity and exert their own powers to preserve it.

Subsection (2)(b) must be deleted in an advisory-guidelines system. It assumes that guidelines presumptions are enforceable in the absence of legally sufficient reasons for departure, and identifies one rationale for departure that is never by itself sufficient. The substantive premise of subsection (2)(b) is no longer operative under advisory guidelines.

Even so, the interaction of amended §§ 7.XX and 7.09 in the Code's advisory structure would not allow a trial court's departure from a guidelines recommendation to stand if premised on "mere disagreement" with the guidelines. Subsection 7.XX(4) requires courts to supply a written explanation of reasons for a departure from the guidelines, and subsection (2) insists that this explanation must follow "full consideration" of guidelines recommendations in light of the purposes of sentencing and corrections. In the Code's advisory-guidelines system, therefore, a

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trial court may indeed depart based on personal disagreement with the guidelines, but the basis for disagreement must be laid out in writing, reflect a full consideration of applicable guidelines, and be grounded in the purposes of sentencing and correction set forth in § 1.02(2). The resulting sentence and the trial court's analysis may then be tested on appellate review, see § 7.09, Comment *i* (as amended for an advisory-guidelines system).

In an advisory system, the procedures described above are not designed exclusively to work as constraints upon judicial sentencing discretion. In order for advisory guidelines to function optimally, they must earn and maintain the respect of judges across the state. The sentencing commission, accordingly, has a continuous need for information about cases in which existing guidelines have met with the disapproval of sentencing courts—especially when appellate courts have concurred in the lower courts' views. Under § 6A.05(5)(d), this feedback allows the commission to perform its ongoing duty to "study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law." When an appellate court has upheld a trial court's sentence based on well-reasoned disagreement with a guidelines recommendation, the judiciary sends a strong message to the commission that the guideline in question should be reassessed.

Subsection (2)(c) is not affected by the shift from presumptive to voluntary guidelines. The prohibitions and limitations referenced in the subsection are not creatures of guidelines.

Subsection (2)(d) must be deleted in an advisory system for the same reasons that subsection (2)(b) must go. If the guidelines have no presumptive legal force, the "degree of departure" cannot be regulated in any explicit, legally enforceable way.

Subsection (3), concerning "extraordinary departures," remains intact in the Code's advisory-guidelines system. Extraordinary departures do not use the commission's guidelines as a reference point, but are sentences that deviate from a heavy presumption established by the legislature or the appellate courts. See § 6B.01, Comment *b*.

The single amendment in subsection (5) merely reflects the necessity of replacing all terminology of "presumptions" with "recommendations" in an advisory system. See § 6B.01, Comment *b*.

REPORTERS' NOTE [127]

c. Departure authority. In existing guidelines systems, the most common formulation of the departure standard is that there must be a "substantial and compelling" reason or circumstance to justify a departure sentence. This language was first used in Minnesota. See Minnesota Sentencing Guidelines and Commentary § II.D (2006) ("the judge shall pronounce a sentence within the applicable [guidelines] range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice

[127] This Reporters' Note has not been revised since § 7.XX's approval in 2007. All Reporters' Notes will be updated for the Code's hardbound volumes.

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Manual, § 5.2.1; Kan. Stat. § 21-4716 (2006); Mich. Comp. Laws § 769.34(3); Or. Admin. R. 213-008-0001 (2007); Rev. Code Wash. § 9.94A.535 (2006).

The revised Code adopts a less stringent "substantial circumstances" departure standard, see § 7.XX(3). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(iv) (1994) (recommending "substantial reasons" standard). A requirement of "compelling" reasons suggests that few departure penalties should be affirmed on appeal, which is contrary to the intent of the revised Code. No state guidelines system has produced high rates of reversal of sentences on appeal. One survey of appellate-court decisions under state sentencing guidelines observed that trial-court departures are generally upheld on the basis of "substantial" reasons, even when "substantial and compelling" reasons are required by the literal terms of the state's guidelines. See Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Northwestern L. Rev. 1441 (1997).

Some states encourage or require judges to select or explain departure sentences in light of the underlying purposes of sentencing. See District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.4; Kan. Stat. § 21-4719 (2006); Minnesota Sentencing Guidelines and Commentary § II.D (2006).

d. Extraordinary departures. Several jurisdictions have adopted provisions that forbid, limit in especially strong terms, or discourage extreme departures—even in cases where some degree of departure is justified. See Delaware Sentencing Accountability Commission Benchbook 2006, at 23; Kan. Stat. § 21-4719(b) (2006); State v. Spain, 590 N.W.2d 85 (Minn. 1999); Or. Admin. R. 213-008-0003(2) (2007). The rules in Kansas, Minnesota, and Oregon, like subsection (3)(a), all attach to sentences that exceed twice the presumptive maximum guidelines penalty. The revised Code, in deference to judicial sentencing discretion, does not forbid extreme departures. Rather, it subjects them to especially strict legal requirements associated with "extraordinary departures."

The extraordinary-departure mechanism was inspired in part by Minnesota case law. See Neal v. State, 658 N.W.2d 536, 544 (Minn. 2003) (in "an unusually compelling case . . . where severe aggravating circumstances exist," a departure of more than twice the presumptive maximum is allowed; this standard is stricter than the "substantial and compelling circumstances" normally used to justify departures). It is also based on proposals of the Massachusetts Sentencing Commission. See Francis J. Carney, Jr., Developing Sentencing Guidelines in Massachusetts: A Work in Progress, 20 Law & Policy 247, 270 (1998) (commission recommended a departure standard for "going below the mandatory minimum term" [for drug offenses] that would be "more stringent than the ordinary standard for departure from a guideline range").

It has been the longstanding policy of The American Law Institute that no American jurisdiction should adopt mandatory minimum punishments for any offense. Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), Comment to § 6.06 and Alternative § 6.06 at 124-125. The revised Model Penal Code continues this firm policy position. However, the drafters of the revised Code also recognize that mandatory-penalty laws have proliferated in the United States and exist today in all jurisdictions. A survey in the mid-1990s found that all American jurisdictions had at least some mandatory-minimum prison penalties in their criminal codes, although the numbers and terms of such laws differed widely from state to state. Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996), at 20-23 and table 3-1. To avoid turning a blind eye to this reality, the

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revised Code creates a broad statutory mechanism to soften the rigid application of mandatory penalties, wherever they exist.

A handful of jurisdictions have granted discretion to sentencing courts to deviate from specified mandatory penalties. A proposal to create a broad departure power similar to that in subsection (3)(b) was also included in the Massachusetts Sentencing Commission's recommendations for a new state sentencing structure. See Kan. Stat. § 21-4720(9) (2006); State v. Olson, 325 N.W.2d 13 (Minn. 1982); State v. Feinstein, 338 N.W.2d 244 (Minn. 1983); Minnesota Sentencing Guidelines and Commentary § II.E & Comment II.E.03 (2006); Francis J. Carney, Jr., Developing Sentencing Guidelines in Massachusetts: A Work in Progress, 20 Law & Policy 247, 270-272 (1998). In federal law, there are limited exceptions to the strict application of some mandatory minimum penalties. See 18 U.S.C. § 3553(e),(f) (2006) (known as the "safety valve" provision).

Illustration 5 is adapted from the facts of Ewing v. California, 538 U.S. 11 (2003). The *Ewing* Court held that a mandatory sentence of 25 years to life imposed under California's three-strikes law, for the current offense of theft of golf clubs worth $1200, was not grossly disproportionate under the Eighth Amendment's Cruel and Unusual Punishment Clause. Subsection (3)(b) grants courts statutory authority, in an appropriately extreme case, to deviate from the terms of the mandatory punishment.

e. Explanation of reasons for departure. In most American guidelines jurisdictions, a statement of the court's reasons for departure must be made on the record or in writing. See Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Kan. Stat. § 21-4718(a)(4) (2006); Md. Code Regs. 14.22.01.05(A) (2007); Mich. Comp. Laws § 769.34(3) (2006); Minn. Stat. § 244.10 subd. 2 (2006); N.C. Gen. Stat. § 15A-1340.16(c) (2006); Or. Rev. Stat. § 137.671(2) (2005); Or. Admin. R. 213-013-0001(3)(i) (2007); 204 Pa. Code § 303.13(c) (2005); Tenn. Code § 40-35-210 (2006); Va. Code § 19.2-298.01(B) (2006); Rev. Code Wash. § 9.94A.535 (2006); Wis. Stat. Ann. § 973.017(10m) (2006). See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 29 (recommending that "jurisdictions explicitly require sentencing courts to explain increases or decreases in sentence from any presumptive or guideline starting point"). Trial courts must also submit sentence reports to the sentencing commission for each case, and these generally require that reasons for departure decisions be given. See §§ 6A.08(4) and Comment *d*; § 6A.05(5)(a) and Comment *e*.

In a small number of advisory-sentencing-guidelines systems, no judicial explanation of reasons for departure from guidelines presumptions is required by law. See Ark. Code § 16-90-804(a) (2006); State v. Foster, 845 N.E.2d 470, 497 (Ohio 2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 2.

i. States choosing an advisory-guidelines system. In an advisory-sentencing-guidelines system there is no formal, legally enforceable departure standard such as those catalogued in the Reporter's Note to Comment *c*, above. Other devices must be used to encourage judicial compliance with sentencing guidelines. See § 6B.04, Reporter's Note to Comment *f*. Subsections (2) and (4), as adapted to an advisory-guidelines system, mandate "full consideration" of the guidelines by trial courts—even though the guidelines' recommendations are advisory—and place a burden of explanation on courts when they deviate from the guidelines.

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§ 7.02. Choices Among Sanctions.[128]

(1) Sentencing courts should grant a deferred adjudication to defendants when considerations of justice and public safety do not require that they be subjected to the stigma and collateral consequences associated with formal conviction.

(2) Sentencing courts should impose a sentence of unconditional discharge when a more severe sanction is not necessary to serve the purposes of sentencing in § 1.02(2)(a)(i). In assessing whether such a sentence is proportionate in an individual case, the court shall consider that unconditional discharge carries the following punitive effects:

(a) the stigma attached to the conviction itself;

(b) the fact that the instant conviction can be used as criminal history in a later prosecution of the offender; and

(c) the effects of collateral consequences likely to be applied to the defendant under state and federal law.

(3) Sentencing courts may impose probation when necessary to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, or reduce the risks that they will commit new offenses. In deciding whether to impose probation, the sentencing court shall take the following considerations into account:

(a) Probation should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Probation should not be viewed as a default sanction when other sanctions are not imposed.

(c) Community corrections resources should not be used for unnecessary probation sentences.

(4) Sentencing courts may impose incarceration when necessary to incapacitate dangerous offenders or when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. In deciding whether to impose incarceration, the sentencing court shall take the following considerations into account:

(a) Incarceration should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Prison and jail resources should not be used for unnecessary sentences of incarceration.

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[128] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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(5) Notwithstanding subsection (4), a sentence of incarceration of no more than [60] days may be imposed, with the offender's consent, as an alternative to a sentence of probation.

(6) Sentencing courts may impose postrelease supervision to follow a term of incarceration when necessary to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, or address their needs for housing, employment, family support, medical care, and mental-health care during their transition from prison to the community. In deciding whether to impose postrelease supervision, the sentencing court shall take the following considerations into account:

(a) Postrelease supervision should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Postrelease supervision should not be viewed as a default sanction to follow a term of incarceration.

(c) Community corrections resources should not be used for unnecessary sentences of postrelease supervision.

Comment:

a. Scope. The original Code gave extensive treatment to questions of choices among authorized sanctions. It contained several Sections addressed to sentencing courts, each with a fair amount of detail, although all of the provisions took the form of unenforceable advisements to the courts. The advisory nature of these provisions has limited their impact. For example, § 7.01 of the original Code addressed the appropriate use of prison sanctions and stated a number of limiting principles for their use. Although a number of states adopted some version of original § 7.01, state laws on this model have had little discernible impact on sentences actually imposed.

One major change in the new Code is to abandon the advisory approach to choice-of-sanctions provisions. In the revised Code, § 7.02 is legally binding on sentencing judges and enforceable through appellate sentence review; see § 7.09. The Section is intended to be equally enforceable in jurisdictions with presumptive and advisory sentencing guidelines—or no guidelines at all.

The revised Code does not replicate the 1962 Code's extended treatment of questions of choice among sanctions. The provisions of the original Code were written for a system with no sentencing guidelines. The numerous choice-of-sanctions Sections in the original Code might even be viewed as proto-guidelines. In the revised Code's preferred structure of presumptive sentencing guidelines, choice-of-sanctions statutory provisions can be considerably more compact.

Section 7.02 is intended to be useful and effective in sentencing systems of all varieties. Among guidelines jurisdictions, some will have looser guidelines than others, with broad ranges

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of recommended sanctions, and some will be advisory rather than presumptive. See § 1.02(2), Comments *p* and *q* (stating that the Model Penal Code's first-order recommendation is that all states should adopt systems of presumptive sentencing guidelines, but the Code's second-order recommendation is that advisory guidelines should be adopted as preferable to no guidelines at all). Many states continue to operate without any form of sentencing guidelines. In such jurisdictions an authoritative statutory treatment of core principles for the selection of sanctions is especially important.

A legislature should use caution when enacting choice-of-sanction provisions with legally binding effect. Rigid rules should not be locked into statutory language unless they capture fundamental principles. Poorly designed statutory edicts carry high costs in flexibility and constrain the evolution of a common law of sentencing. In the Code's recommended structure, such evolution is meant to occur through a collaborative process that includes input from the sentencing commission, sentencing courts, and appellate courts.

b. Deferred adjudications. Subsection (1) encourages sentencing judges to grant deferred adjudications to defendants in appropriate cases, which may be done on motion of either party or on the court's own motion; see § 6.02B. Under the Code's scheme, a deferred adjudication does not require a plea of guilty. At the same time, it gives the court power to order probation and economic sanctions. Deferred adjudications further the Code's purposes "to render sentences no more severe than necessary" and "to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct." See § 1.02(2)(a)(iv). One major benefit of deferred adjudication, when used wisely, is that it can often spare the defendant the many collateral consequences of conviction imposed by state and federal law; see Article 6x.

c. Consideration of sentences of unconditional discharge. Subsection (2) encourages sentencing judges to consider the sanction of unconditional discharge as a sufficient punishment in many cases. See § 6.02(1)(e) (authorizing the sanction of "unconditional discharge, if a more severe sanction is not required to serve the purposes of sentencing in § 1.02(2)(a)"). Subsection (2) reflects the Institute's view that probationary sentences are handed down too frequently in many or most American jurisdictions, so that sentencing judges require credible alternatives. Some judges report that they often impose probation so they will appear to be "doing something" in cases when a prison sentence is not appropriate. Similarly, judges report that they sometimes impose long lists of sentence conditions so that probation will not be seen as an overly lenient outcome.

In the last 40 years, increased use of probation has frequently been advocated as an "alternative" to the growing use of prison sentences. Policy recommendations in favor of the greater use of probation "instead of" prison have generally been offered without reservations about the overuse of probation. Similarly, it has been argued that greater use of "early" release from prison, resulting in more persons on parole supervision, would reduce overflowing prison populations. These prescriptions were based on a fallacy. Community sanctions in the aggregate

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have not functioned as substitutes for prison sentences. Instead, in the past several decades, probation and parole-supervision populations have grown in tandem with—and just as rapidly as—the nation's prisons and jails. While the term "mass incarceration" has been in common parlance for years in America, the term "mass supervision" has now also entered the lexicon.

Recent scholarship has shown that sanctions of community supervision are used in the United States far more often (based on probation and parole rates per population) than in any European country. Based on Council of Europe reports, for example, the average probation rate in American states is seven times the average European probation rate, and (based on less complete data from the Council of Europe) similar disparities seem to exist in parole supervision rates.

There are systemwide costs to the American norm of high probation rates. Almost everywhere, the number of sentences of community supervision imposed in this country far outstrips the resources available for their satisfactory administration. In addition, large probation and postrelease supervision populations in America are major "feeders" into the nation's prison systems. Across the country, more than 30 percent of prison admissions each year are due to parole revocations rather than new convictions and court commitments—and a comparable number may be due to probation revocations (which many jurisdictions do not track).

Subsection (2), and other parts of § 7.02, are designed to communicate as clearly as possible that scarce community corrections resources should be conserved and prioritized for cases in which community sanctions serve definable and achievable purposes. To be effective, § 7.02 must announce a strong and clear legislative policy. It must also supply sentencing judges with a reasoning process to make more sparing use of probation (and community supervision), together with the imprimatur of statutory endorsement.

In order for sentences of unconditional discharge to be acceptable to judges and to the public, there must be recognition that a conviction without further penalty is a serious and punitive criminal-justice response to criminal behavior. Subsection (2) calls attention to the fact that social stigma attaches to convictions without further action on government's part, that the conviction functions as criminal history and will increase the defendant's exposure to significantly greater punishments in any later prosecution, and that dozens if not hundreds of collateral consequences of conviction will be applicable to convicted offenders through the operation of state and federal law. These realities, if viewed through the lens of proportionality in sentencing, supply a material quantum of punishment in cases of unconditional discharge.

d. Use of probation only when necessary. Probation sanctions are sometimes dispensed in cases where offenders do not require supervision or services. In many courtrooms, probation is the "default" criminal sanction that is used reflexively when a prison sentence is not appropriate. Subsections (2) and (3), working together, attempt to change this established practice and way of thinking. Subsection (3) begins with a reference to the legislative purposes for the use of probation, which may be imposed "when necessary to hold offenders accountable for their

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criminal conduct, promote their rehabilitation and reintegration into law-abiding society, or reduce the risks that they will commit new offenses." This language mirrors § 6.03(2):

> The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses.

Subsection (3) repeats the formulation above and adds three considerations that sentencing judges are instructed to take into account. First, subsection (3)(a) states that "[p]robation should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction." This makes express the negative implication of §§ 6.03(2) and 7.03(3). The policy of the revised Code is to make use of community sanctions *only when* they aim to serve a legitimate and identifiable societal purpose. The pressure felt by courts to "appear to be doing something" is not among the authorized purposes of the sanction.

Subsection (3)(a) further provides that the minimum standard of certainty for use of probation is a "reasonable belief" that the sanction will serve one or more of its authorized purposes. The Code does not require certainty that a given sanction will achieve the goals that justify its imposition, but does require reasonable grounds to believe their accomplishment is feasible. See § 1.02(2)(a)(ii).

Subsection (3)(b) is included to combat the broadly held norm, in many American criminal courtrooms, that probation is a more or less automatic sanction for some classes of offenses. Arguably, its language adds nothing to subsection (3)(a), except that it addresses attitudes and practices that are widespread in many jurisdictions.

Subsection (3)(c) is an admonition that sentencing courts must take account of the fact that resources to carry out probation sentences are perpetually in short supply, and that unnecessary use of probation sanctions is a drain on those resources, making it more difficult for probation supervision agencies to properly supervise clients with the highest risks and needs. The provision is not intended to require courts to consult the latest data on probation caseloads before passing sentences, nor is it an instruction that otherwise-justified probation sentences should be withheld in circumstances of probation overcrowding. Rather, it requires courts to take the resource costs of probationary sentences into account when weighing the benefits the sanction may achieve in an individual case. Subsection (b) helps effectuate the general purpose of the sentencing system "to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources." See § 1.02(2)(b)(iv).

e. When incarceration sentences are appropriate. Subsection (4) dovetails with § 6.06(2), which provides:

> **(2) The court may impose incarceration:**
>
> **(a) when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or**

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1 **(b) when other sanctions would depreciate the seriousness of the offense,**
2 **thereby fostering disrespect for the law. When appropriate, the court may**
3 **consider the risks of harm created by an offender's criminal conduct, or the total**
4 **harms done to a large class of crime victims.**

5 Subsection (4) repeats the formulation above, and adds two considerations that sentencing judges
6 are instructed to take into account. First, subsection (4)(a) provides that "[i]ncarceration should
7 not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the
8 sanction." Second, subsection (4)(a) provides that the minimum standard of certainty for use of
9 incarceration is a "reasonable belief" that the sanction will serve one or more of its authorized
10 purposes. The Code never requires certainty that a given sanction will achieve the goals that
11 justify its imposition, but does require that there be reasonable grounds to believe that the
12 accomplishment of a utilitarian objective is feasible; see § 1.02(2)(a)(ii).

13 Subsection (4)(b) requires sentencing courts to weigh the resource costs of prison and jail
14 sentences when deciding whether to make use of those sanctions. The subsection is not intended
15 to require courts to stay abreast of the latest incarceration population data and forecasts, nor does
16 it foreclose the use of incarceration during periods of prison and jail overcrowding. Instead, it
17 requires courts to take the resource costs of prison and jail sentences into account when
18 evaluating the benefits the sanctions may achieve in an individual case. This is meant to serve as
19 an additional check on the use of carceral sanctions that are not fully justified in their legislative
20 purposes. Subsection (3)(b) helps effectuate the general purpose of the sentencing system "to
21 ensure that adequate resources are available for carrying out sentences imposed and that rational
22 priorities are established for the use of those resources," see § 1.02(2)(b)(iv).

23 *f. Prison as an alternative to probation*. Some probation sentences are more severe than
24 short prison sentences. Probation sentences can be highly intrusive in their regulation of
25 offenders' lives, and they persist for months or years. During their probation terms, offenders are
26 at risk of revocation and the potential sanction of a substantial prison stay. For offenders at high
27 risk of revocation, it is necessary to compare the eventual prison time they are likely to serve
28 following probation revocation; and the shorter period of incarceration that might be available as
29 an "alternative" to probation. Subsection (5) would provide such an alternative with the
30 defendant's consent. Surveys of offenders have shown that, at least in some instances, they
31 prefer to get their sentences "over with" in a defined period of time, even if it means a short
32 prison or jail stay, in order to avoid the intrusions and chances of failure that attend community
33 supervision.

34 Subsection (5) provides that a confinement sentence of no longer than 60 days may be
35 imposed as an alternative to a sentence of probation, so long as the offender consents to the
36 substitution. The limitation of 60 days is stated in brackets, indicating that state legislatures
37 should exercise their own best judgment in setting the precise ceiling they will allow—and
38 allowing room for experimentation across jurisdictions. Consistent with this Section, states may

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prefer caps of 30 days or 90 days, but carceral sentences longer than 90 days would be inconsistent with the intent of subsection (5) to authorize only short terms of confinement.

g. Use of postrelease supervision only when necessary. Under the revised Code's scheme, postrelease supervision is a sanction in its own right, to be imposed or withheld by the court at the time of original sentencing. The Code views postrelease supervision as a typical concomitant to determinate prison sentences, but not one that is automatically imposed. See § 6.09(1) and (5) ("When the court sentences an offender to prison, the court may also impose a term of postrelease supervision. . . . The length of term of postrelease supervision shall be independent of the length of the prison term, served or unserved, and shall be determined by the court"). Section 7.02(6) thus speaks to the exercise of judicial discretion when weighing the need for postrelease supervision in an individual case. It also furthers the Code's general policy concern: that there is a crisis in the resources available for the supervision and prison releasees, and programming necessary for their successful reintegration. See 6.09, Comment *b* ("Resources for postrelease supervision are likely to remain in critically short supply for the foreseeable future, and all states should take steps to conserve those resources and channel them to areas of greatest need and highest use."). Subsection (6), in parallel with subsection (3) dealing with probation, requires that sentencing courts deliberate on the purposes to be effected by postrelease supervision, and its costs, before ordering it in a particular case. It reiterates the authorized legislative purposes of the sanction, also set out in § 6.09(2):

> **The purposes of postrelease supervision are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, and address their needs for housing, employment, family support, medical care, and mental-health care during their transition from prison to the community.**

Some individuals released from prison will derive no benefit from postrelease supervision and do not pose risks to public safety that warrant supervision. For example, research shows that first-time prison releasees tend to present low risks of reoffending—much lower on average than releasees who have served more than one prison term. On the other hand, many releasees have acute needs immediately upon release that are unmet in most states. Recidivism is most likely to occur in the first weeks and months following release, with a steadily declining likelihood of offending as time goes by. Research also shows that programming is most likely to make a difference in recidivism rates when targeted at individuals in high-risk or high-needs categories. There is evidence the community sanctions are least effective, and can even be counterproductive, when focused on low-risk and -needs offenders.

Subsection (6)(a) further provides that the minimum standard of certainty for use of postrelease supervision is a "reasonable belief" that the sanction will serve one or more of its authorized purposes. The Code does not require certainty that a given sanction will achieve the

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1 goals that justify its imposition, but does require reasonable grounds to believe their
2 accomplishment is feasible; see § 1.02(2)(a)(ii).

3 Subsection (6)(b) expresses the sentiment that postrelease supervision should not be a
4 "default sanction" following every prison term. Similar to subsection (3)(b) dealing with
5 probation, its language adds nothing to subsection (6)(a), except that it addresses attitudes and
6 practices that are widespread in many jurisdictions.

7 Subsection (6)(c) is an admonition that sentencing courts must take account of the fact that
8 resources to carry out postrelease supervision are perpetually in short supply, and that
9 unnecessary use of the sanction is a drain on those resources, making it more difficult for
10 supervision agencies to focus on clients with the highest risks and needs. The provision is not
11 intended to require courts to consult the latest data on supervision caseloads before passing
12 sentences, nor is it an instruction that otherwise-justified postrelease supervision sentences
13 should be withheld in circumstances of oversubscription.

14 *h. Economic sanctions not addressed in this provision*. Principles for the dispensation of
15 economic sanctions are separately treated in § 6.04 (Economic Sanctions; General Provisions).

16 **REPORTERS' NOTE**

17 *b. Deferred adjudications*. State provisions authorizing deferred adjudications exist in many states, although
18 there is a wide variety in terminology and approach across jurisdictions. See Ark. Code § 16-93-1206 ("suspended
19 imposition of sentence"); Cal. Penal Code §§ 1000 & 1000.8 ("deferred entry of judgment"); Colo. Rev. Code § 18-
20 1.3-102 ("deferred sentencing"); 11 Del. Cod. § 4218 ("probation before judgment"); N.D. R. Crim. Proc. 32.2
21 ("pretrial diversion"); Conn. Gen. Stat. § 54-56e ("accelerated pretrial rehabilitation"); Hawaii Rev. Stat. § 853-1
22 ("deferred acceptance of guilty plea"); Ill. Compiled Stat. § 5/5-6-1 ("disposition of supervision"); Maryland Code,
23 Criminal Procedure § 6-220 ("probation before judgment"); N.Y. Crim. Proc. Law § 170.55 ("adjournment in
24 contemplation of dismissal"); Ohio Rev. Code § 2935.36 ("pretrial diversion"); Ohio Rev. Code § 2951.041
25 ("intervention in lieu of conviction" for defendants in need of drug or alcohol treatment); Wis. Stat. § 971.39
26 ("deferred prosecution" after charges have been filed).

27 For background on deferred-adjudication processes across the states, see Margaret Colgate Love, Alternatives
28 to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences, 22 Fed. Sent'g Rep. 6, 7
29 (2010) (noting that "[d]eferred adjudication schemes are statutorily authorized in over half the states"). Love credits
30 the provisions of the original Code for spawning much of the state legislation that now exists on deferred
31 adjudications. See id. ("In the 1970s, many states adopted deferred adjudication laws that were evidently inspired by
32 the corrections articles of the Model Penal Code.").

33 *d. Use of probation only when necessary*. On the overuse of probation, see Cecelia Klingele, Rethinking the
34 Use of Community Supervision, 103 J. Crim. L. & Criminology 1015 (2013). Critics of probation have long
35 observed that the rate of criminal reoffending by those under supervision is relatively unaffected by the availability
36 of treatment programs, or even the nature of interactions between agents and their clients. See Ralph W. England,
37 Jr., What is Responsible for Satisfactory Probation and Post-Probation Outcome?, 47 J. Crim. L. & Criminology

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667, 674 (1957). More recent studies have reached similar conclusions. A 2005 study comparing rearrest rates for individuals released through both mandatory and discretionary supervision schemes, and those released without supervision found no differences at all between those without supervision and those released with supervision under mandatory release schemes. Amy Solomon, Vera Kachnowski, and Avinash Bhati, Does Parole Work? Analysis of the Impact of Postrelease Supervision on Rearrest Outcomes (Urban Institute: 2005). See also James Bonta et al., Exploring the Black Box of Community Supervision, 47 J. Offender Rehabilitation 248, 251 (2008) (reporting study findings that indicated no statistically significant relationship between community supervision and the incidence of violent recidivism); Faye Taxman, Probation, Intermediate Sanctions, and Community-Based Corrections, in Joan Petersilia and Kevin R. Reitz, The Oxford Handbook of Sentencing and Corrections (2012), at 374-375 ("There have been no experiments or studies on whether being on probation (i.e., having contacts between the probation officer and offender) as opposed to having no oversight has any impact on offender behavior."). Some have argued that supervision not only does little good, but may cause overt harm. Christine Scott-Hayward has documented the effects of supervision on the ability of offenders to secure and maintain employment and reestablish familial connections, and has found that in some cases supervision methods and conditions interfere with successful reentry. See Christine Scott Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. (2011).

e. When incarceration sentences are appropriate. The subject matter of subsection (2) is of profound importance in a nation that currently leads the world in per capita incarceration, with average incarceration rates that are seven times those in Western Europe. America's prison and jail populations have fallen into modest decline since 2009—the first period of reductions in nearly four decades, see E. Ann Carson, Prisoners in 2014 (Bureau of Justice Statistics 2015). Even so, the U.S. has maintained its position of world "leadership" in incarceration rates. See Jeremy Travis, Bruce Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press 2014); World Prison Brief, Highest to Lowest—Prison Population Rate (Institute for Criminal Policy Research 2016), available at: http://www.prisonstudies.org/world-prison-brief; Tapio Lappi-Seppälä, American Exceptionalism in Comparative Perspective: Explaining Trends and Variation in the Use of Incarceration, in Kevin R. Reitz, ed., American Exceptionalism in Crime and Punishment (Oxford University Press 2017).

For an extended discussion of the reasoning behind the Code's recommendations concerning the authorized purposes of incarceration penalties, see § 6.06, Comments *a* through *h*.

f. Prison as an alternative to probation. For an argument in favor of a provision such as subsection (5), see Cecelia Klingele, Rethinking the Use of Community Supervision, 101 J. Crim. L. and Criminology 1015 (2014).

g. Use of postrelease supervision only when necessary. There are wide differences in state approaches toward postrelease supervision. In some states, a period of post-release supervision is mandatory. See, e.g., 18 N.H. Rev. Stat. § 504-A:15 (2010) (requiring minimum of nine moths' supervision for all prisoners prior to completion of prison sentence); Wis. Stat. § 973.01 (requiring all sentences of imprisonment to include bifurcated terms of confinement and "extended supervision"). Two states, Maine and Virginia, have no such programming for the vast majority of prison releasees. Among the other states, per capita populations of parolees in 2011 varied from a low of 28 per 100,000 in Florida to a high of 1015 per 100,000 in Arkansas, with a national average of 357 per 100,000.

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Bureau of Justice Statistics, Probation and Parole in 2011 (2012), at 18 app. table 4. Comparative statistics relied upon in the Comment are taken from Australian Bureau of Statistics, Year Book Australia, 2012, at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Community-based%20corrections~72 (last viewed September 14, 2013) (In Australia, the reported parole supervision rate for 2011 was 69 per 100,000 adults); Dirk van Zyl Smit and Alessandro Corda, American Exceptionalism in Parole Release and Supervision, in Kevin R. Reitz ed., American Exceptionalism in Crime and Punishment (forthcoming 2014) (calculating Danish and Austrian rates from Council of Europe data).

For arguments that parole supervision is not needed for all releasees, see Joan Petersilia, California's Correctional Paradox of Excess and Deprivation, in Michael Tonry ed., 37 Crime & Justice: A Review of Research 207 (2008) (California's "mandatory parole system . . . fails to properly focus resources on the most dangerous and violent paroled offenders, at the expense of public safety"). In light of the statistical evidence, Professor Petersilia advocated the following policy reforms for the state of California:

> Employ parole supervision selectively and in a more concentrated way, so that it targets the most likely recidivists. End or dramatically reduce the imposition of parole on those who are least likely to reoffend, which wastes resources and provides a negligible public safety benefit.

Another scholar has argued that, at least in the case of lower risk offenders, post-release supervision has outlived its usefulness, and advocates its abolition. Christine S. Scott-Hayward, The Failure of Parole: Rethinking the Role of the State in Reentry, 41 N.M. L. Rev. 421, 431 (2011). The former Commissioner of Corrections for New York City, Martin Horn, has proposed the abolition of postrelease supervision and instead providing releasees vouchers for needed transitional services. Martin F. Horn, Rethinking Sentencing, 5 Correctional Management Quarterly 34, 38 (2001).

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§ 7.03. Eligible Sentencing Considerations.[129]

(1) When determining the severity and types of sanctions to impose on a convicted offender, the courts may consider factors relevant to the purposes of sentencing in § 1.02(2), with the exception of factors prohibited or limited by constitutional law, express statutory provision, or controlling judicial precedent.

(2) Except as provided in this Section, the courts shall give no weight to the following factors when determining the severity of sentences:

(a) an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief; and

[129] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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(b) alleged criminal conduct on the part of the offender other than the current offenses of conviction, criminal conduct admitted by the offender and, consistent with § 6B.07, the offender's prior convictions and juvenile adjudications.

(3) A departure sentence or an extraordinary-departure sentence may not be based on any factor necessarily included in the elements of the offense of which the offender has been convicted, and no finding of fact may be used more than once as a ground for departure or extraordinary departure.

(4) Notwithstanding subsection (2)(a), the courts may consider the following factors when determining the severity and types of sanctions to impose on a convicted offender:

(a) The courts may consider the personal characteristics of offenders when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be imposed.

(b) The courts may consider an offender's gender when relevant to an assessment of the risks of future criminality or the treatment needs of offenders.

(c) The courts may consider offenders' financial circumstances for the purpose of determination of economic sanctions.

(5) The fact that the defendant has entered a plea agreement may be credited against the severity of sentence as provided in the sentencing guidelines. A plea agreement or sentence agreement standing alone shall not be sufficient ground to support a departure or extraordinary departure, even if agreed upon by the parties. Departure and extraordinary departure sentences following such agreements must be supported by facts sufficient to meet the relevant legal standard for departure.

(6) Following a motion by the government or defense, or on the court's own motion, the sentencing court may consider offenders' substantial assistance to the government in criminal investigations or prosecutions as grounds to reduce the severity of sentences that would otherwise be imposed. The courts shall consider any relevant sentencing guidelines in making such determinations.

Comment:

a. Scope. This Section speaks throughout to sentencing courts and appellate courts. When it refers to "the courts," it is intended to address all levels of the judicial system. This provision parallels § 6B.06, which speaks to sentencing factors that may be considered by the sentencing commission when promulgating sentencing guidelines.

A legislature should exercise caution when forbidding the judiciary to weigh whole categories of sentencing factors, or when limiting the consideration of those factors, and should do so only when strong public-policy or constitutional concerns are present. For the most part, rules about how and when sentencing factors should be considered are best developed through

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the common-law process of decisions in individual cases and the appellate review of those decisions; see § 7.09, Comment *a*. This Section sets forth those few areas in which considerations relevant to the purposes in § 1.02(2) should nonetheless be declared ineligible by legislative command.

Subsection (1) recognizes that further rules of ineligibility, or limitations on how sentencing factors may be considered, can originate in constitutional law or controlling judicial precedent in the state. The omission of the sentencing commission from the entities authorized to proscribe or limit the consideration of designated sentencing factors is deliberate. Elsewhere, the Code expressly states that the commission does not hold such power; the force of sentencing guidelines under the Code's scheme can never exceed "presumptive" legal enforceability. See § 6B.02(7) ("(7) No provision of the guidelines shall have legal force greater than presumptive force as described in this Article in the absence of express authorization in legislation or a decision of the state's highest appellate court. The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court."). In the revised Code, the judiciary's powers to depart from sentencing guidelines, and to develop a common law of sentencing, are ultimately superior to the commission's authority to structure judicial discretion through guidelines; see §§ 6B.04, 7.XX; § 7.09(1). Section 7.03(1) establishes an important aspect of the common-law making power of the courts when it states that "controlling judicial precedent" may limit the expansive range of factors that otherwise are open to consideration by sentencing courts. Without explicit statutory acknowledgment, the courts may not recognize their own discretion to carve out exceptions to the general grant of permission in subsection (1).

b. General authority and limitations. Many American jurisdictions grant sweeping authority to sentencing courts to weigh virtually all conceivable factors concerning the offense or the offender when making sentencing determinations. Although the revised Code gives courts broad authority to weigh factors relevant to the purposes of the sentencing system in § 1.02(2), this Section lays down a small number of important statutory prohibitions and contemplates that the courts of the state may decide to create additional limitations or prohibitions.

c. Prohibited personal characteristics of offenders. Many jurisdictions have provisions in statute or guidelines similar in spirit to subsection (2)(a). In part, subsection (2)(a) restates federal and state constitutional law, yet the subsection does not rely upon constitutional foundations. Its provisions represent good public policy even if not demanded by constitutional strictures. It is therefore open to the courts to interpret the scope of subsection (2)(a) more broadly than analogous constitutional limitations.

d. Exceptions to subsection (2)(a). Subsection (4)(a) states an important exception to subsection (2)(a). Subsection (2)(a) may not be read to prohibit consideration of an offender's race, ethnicity, sexual orientation or identity, natural origin, religion or creed, or political

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affiliation or belief, if such factors are part of a showing that the defendant presents circumstances of hardship, deprivation, vulnerability, or handicap that ought to be weighed in mitigation of sentence.

Subsection (4)(b) states a limited exception to the subsection (2)(a), allowing consideration of an offender's gender as a sentencing factor when necessary to an assessment of risks of future criminality or the offender's treatment needs. The exception is based on research that gender is a robust predictive factor, at least in some settings, of future criminality. Women overall are less likely to recidivate than men and, when they reoffend, tend on average to commit less serious crimes. Unless there is a compelling principle that requires sentencers to ignore this knowledge, women offenders should not be treated as though they present the same risk profiles as men. The revised Code's definition of uniformity in sentencing equates "uniformity" with the consistent application of principles across cases; see § 1.02(2)(b)(ii) and Comment *i* (stating that the Code aims toward "consistency of analysis, applied evenhandedly to all defendants who appear for sentencing. All convicted offenders are entitled to the same 'reasoned pursuit' of the purposes set out in subsection (2)(a)."). It is a false consistency to perform risk assessments for male offenders based on male data and to perform risk assessments for female offenders also based on male data. An unqualified bar to gender-based criteria in risk assessment would discriminate against women as a group when measured against their observed propensity for criminal behavior.

Subsection (4)(c) provides that determinations of appropriate economic sanctions may take into account the wealth and income stream of particular offenders. This principle is essential to the Code's approach to economic penalties. See § 6.04(6) ("No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."); § 6.04B(4)(b) (allowing for means-based fines "calculated with reference to . . . the net income of the defendant, adjusted for the number of dependents supported by the defendant, or other criteria reasonably calculated to measure the wealth, income, and family obligations of the defendant.").

e. Alleged nonconviction offenses. Subsection (2)(b) reflects the Institute's policy that, if criminal penalties are to be assessed for crimes a defendant is believed to have committed, those crimes must first be charged and proven at trial beyond a reasonable doubt or admitted by the defendant. The provision embraces the "conviction-offense" philosophy of a number of state sentencing-guidelines systems and the American Bar Association's Criminal Justice Standards for Sentencing. It rejects the modified "real-offense" approach of the federal sentencing guidelines.

Subsection (2)(b) bars consideration at sentencing of alleged criminal offenses that have never been charged, that have been charged but dismissed (perhaps as part of a plea agreement), or that have been charged and tried resulting in acquittals.

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1 In the revised Code's sentencing structure, and under current constitutional law, such
2 alleged criminal conduct would require proof beyond a reasonable doubt to a jury as part of
3 sentencing proceedings; see § 7.07B(1).

4 In most American jurisdictions, however, the federal constitution does not mandate that
5 juries find facts supportive of aggravating sentencing factors under the reasonable-doubt
6 standard, even when the alleged aggravating facts are offenses of which the defendant has not
7 been convicted. The Code's conviction-offense principle, as stated in subsection (2)(b), is meant
8 to apply in jurisdictions even when the principle is not a constitutional command.

9 This rule responds to the concern that determinations of guilt are attended by numerous
10 constitutional and subconstitutional safeguards at trial that often evaporate in the relative
11 informality and brevity of sentence proceedings. These trial protections include a defendant's
12 right to a jury trial, the presumption of innocence, the requirement of proof of all constituent
13 elements of offenses beyond a reasonable doubt, the right to confront adverse witnesses, the
14 availability of the exclusionary-rule remedy for unconstitutionally acquired evidence, the Double
15 Jeopardy guarantee barring relitigation of an acquittal, and the rules of evidence. Equivalent
16 protections have not traditionally been available at sentencing proceedings.

17 Subsection (2)(b) also responds to the practical reality that, while there may be occasional
18 exceptions, sentence proceedings typically command far less time, care, and attention on the part
19 of the court and the parties than a full-blown criminal trial. The "procedural differential"
20 between trial and sentencing is a chasm rather than a crevice. Even if the Constitution is not
21 offended, it is an anomaly with grave impacts upon fairness and process regularity to allow the
22 litigation of criminal guilt for the first time at sentencing, or to permit the relitigation of charges
23 that could not be sustained at trial. The anomaly is all the more serious—as often occurs under
24 "real-offense" sentencing—when the penalty consequences attending a finding of "guilt" at
25 sentencing are identical to those that would have resulted from a formal conviction at trial.

26 Subsection (2)(b) does not advance an idealized conviction-offense philosophy that would
27 disallow all sentencing considerations other than the bare facts of conviction as established in the
28 elements of the conviction offenses. No American jurisdiction has gone to this extreme.
29 Subsection (2)(b) does not forbid sentencing consideration of aggravating or mitigating
30 circumstances surrounding offenses of conviction, or personal characteristics of the offender, or
31 the impact of an offense on its victim, or other factors relevant to the purposes of sentencing
32 under § 1.02(2)(a)—with the exception of factual considerations that have been defined by the
33 legislature as crimes separate or different from the conviction offenses. The Code places the
34 burden on prosecutors to charge and obtain convictions for additional or more serious offenses
35 before punishment for those offenses may be imposed.

36 *f. Double counting of offense elements.* Subsection (3) ensures that a fact already established
37 as part of the determination of a defendant's guilt cannot be counted a second time as a departure
38 factor in aggravation of sentence. Similarly, it prevents any single factor from counting more

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than once as a ground for departure or extraordinary departure, even when not an offense element.

g. Plea agreement as a mitigating factor. Subsection (5) proceeds from the assumption that, as a general rule, a plea agreement or sentence agreement standing alone should provide no grounds for a departure or extraordinary departure from applicable guidelines or statutory sentencing law. In order to approve a plea agreement that calls for a departure sentence of some kind, and as a prerequisite to sentencing in conformity with such an agreement, the court must find that there are adequate factual circumstances in the record to support the agreed-upon departure from the guidelines.

If the rule were otherwise, the parties would hold the power to disregard the sentencing guidelines in every case involving a plea bargain. This could lead to perverse results, and an unwanted expansion of prosecutorial bargaining leverage. The opening of great distances in severity between the presumptive-guidelines sentence and the penalty a prosecutor can offer in plea negotiations could place great pressure on defendants to plead guilty to charges that overstate their criminal behavior, and may coerce innocent defendants to "admit" guilt. For example, in a hypothetical case, a prosecutor might insist on a guilty plea to a serious felony charge in exchange for an agreement that there will be a mitigated departure sentence to probation.

The Code does allow for guilty-plea discounts (called "acceptance of responsibility" discounts in some jurisdictions), so long as they are formulated by the sentencing commission as part of the sentencing guidelines; see § 6B.06(5). The Code does not dictate formulae for guilty-plea guidelines, but this provision and § 6B.06(5) reflect a policy that reductions of sentences in return for guilty pleas should be governed by rules of general application, and those rules should be open to public inspection. Depending on how the sentencing commission chooses to address the issue, the use of guilty-plea discounts would not necessarily be "departures" from guidelines recommendations, but could be incorporated as part of the derivation of the presumptive-guidelines sentences.

h. Cooperation as a mitigating factor. Subsection (6) expressly grants sentencing courts authority to consider a defendant's cooperation with the government as a factor in mitigation of sentence. In some American guidelines system, the courts may do so only following a motion by the prosecutor. Subsection (6) clarifies that, under the Code's scheme, a court's authority exists upon motion by the government, the defense, or the court's own motion.

The Institute recognizes that it will be a rare case in which a court grants a mitigated sentence under subsection (6) in the face of opposition from the prosecutor. As an element of the sentencing decision, however, it is fundamental to the Code that this ultimately be a matter of judicial sentencing discretion, and that prosecutors should not have unregulated power to "rule" that the sentencing discount will not be available in individual cases. In extreme cases in which

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prosecutors unreasonably withhold their support, the sentencing judge ought to have the power to render an appropriate sentence.

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b. General authority and limitations. The common-law rule, still applied in many jurisdictions, places virtually no limitations on the information courts are permitted to consider at sentencing. See People v. Arbuckle, 587 P.2d 220, 223 (Cal. 1978); People v. Newman, 91 P.3d 369, 371-372 (Colo. 2004); State v. Bletsch, 912 A.2d 992, 1003 (Conn. 2007); State v. Malone, 694 S.W.2d 723, 727 (Mo. 1985); State v. Aldaco, 710 N.W.2d 101, 110-111 (Neb. 2006); State v. McKinney, 699 N.W.2d 460, 466 (S.D. 2005).

c. Prohibited personal characteristics of offenders. For provisions similar to subsection (2)(a), see Ala. Code § 12-25-2(a)(2) ("geography, race, or judicial assignment."); Ark. Code § 16-90-801(b)(3) ("race, gender, social, and economic status"); District of Columbia Code § 24-112(d) ("race, sex, marital status, ethnic origin, religious affiliation, national origin, creed, socioeconomic status, and sexual orientation of offenders"); Mich. Comp. Laws § 769.34(3)(a) ("gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion"); Minnesota Sentencing Guidelines and Commentary § II.D.1 (race, sex, employment or employment history, impact of sentence on profession or occupation, educational attainment, living arrangements, length of residence, and marital status); Ohio Rev. Code § 2929.11(C) ("race, ethnic background, gender, or religion of the offender"); Tenn. Code § 40-35-102(4) ("race, gender, creed, religion, national origin and social status of the individual").

A few jurisdictions rule out consideration of the defendant's personal characteristics or circumstances more expansively than subsection (2)(a). The broadest prohibitions exist in Washington and Kansas. The Washington Sentencing Guidelines proscribe "discrimination as to any element that does not relate to the crime or the previous record of the defendant." Rev. Code Wash. § 9.94A.340. As explained by the sentencing commission:

> [T]he Legislature considered enumerating specific factors which could not be considered in sentencing the offender, including race, creed and gender. However, the Legislature decided that to list such factors could narrow the scope of their intent, which was to prohibit discrimination as to any element that does not relate to the crime or the previous record of the defendant.

Washington Adult Sentencing Guidelines Manual, at II-23¬–24. Kansas law is the same. See Kan. Stat. § 21-4702. The Kansas provision was expressly aimed at the elimination of unconscious racial and ethnic discrimination in sentencing. See Kansas Sentencing Commission, Final Recommendations (1991), at 4.

Some guidelines systems do not broadly prohibit the consideration of an offender's personal characteristics or circumstances as sentencing factors, and some even invite the consideration of specified personal circumstances. North Carolina, for example, counts among the factors supportive of a mitigated sentence that the defendant has been honorably discharged from the armed services, has a positive employment history or is gainfully employed, or has a "support system in the community." N.C. Gen. Stat. § 15A-1340.16(e)(14), (18), (19). See also Missouri Sentencing Authority Comm'n, Report and Implementation Update (2005), at 73 (offender's education level and employment status should be considered in measuring risk of recidivism); Virginia Sentencing Guidelines, 9th

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Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet used by judges at sentencing includes age and sex of offender, whether offender was regularly employed, and whether offender was ever married); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 5, 7 (guidelines encourage the consideration of the offender's age, education, employment history, and whether the defendant has "strong and stable ties" to family and community).

d. Exceptions to subsection (2)(a). (1) Hardship or deprivation. Subsection (4)(a) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(c) (1994). See Tenn. Code § 40-35-113(7) (2006) (mitigating factors include: "The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self.").

(2) Gender. A pronounced gender gap in rates of serious criminality is found in all societies, and is stable across time. See Michael R. Gottfredson and Travis Hirschi, A General Theory of Crime (1990), at 144-149. For example, in 2005, police departments nationwide reported that males were 89 percent of those arrested for murder, 99 percent for rape, 89 percent for robbery, and 79 percent for aggravated assault. Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports (2006), tbl. 33.

At least one American sentencing commission uses a defendant's sex as one important variable in a risk-assessment instrument that identifies low-risk offenders who may safely be diverted from prison under the state's guidelines. See Virginia Sentencing Guidelines, 9th Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet based on current offense type, single or multiple counts, prior record, age, and sex of offender, whether offender regularly employed, and whether offender was ever married). The instrument was based on a multi-year recidivism study of Virginia offenders. It was validated in an independent evaluation, and has been used by Virginia judges as a basis for the diversion of thousands of offenders, who would otherwise have been recommended for a prison sentence under the guidelines, into community sanctions. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Virginia Sentencing Commission, 2005 Annual Report, at 29-31. The research base for Virginia's program satisfies the requirement in subsection (4)(b) that the use of gender as a sentencing factor must have "a reasonable basis in research or experience."

(3) Financial circumstances. Subsection (4)(c) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(b) (1994). See, e.g., Ohio Rev. Code § 2929.18(E) (2006) ("A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it").

e. Alleged nonconviction offenses. Subsection (2)(b) follows the approach endorsed in ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.6 (1994) ("Sentence should not be based upon the so-called 'real offense,' where different from the crime of conviction"). It also conforms with the practice of other English-speaking countries; see Kevin R. Reitz, Proof of Aggravating and Mitigating Facts at Sentencing, in Julian V. Roberts, Mitigation and Aggravation at Sentencing (Cambridge University Press, 2014) (on this question, comparing the United States with Canadian, English, and Australian systems). Nevertheless, the majority of American states allow real-offense sentencing without limitation.

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Real-offense sentencing in the United States is less commonplace that it was 10-15 years ago. The constitutional law of subcapital sentencing now forecloses—or significantly complicates—consideration of real-offense facts as a basis for punishment in a minority of American jurisdictions. See Blakely v. Washington, 542 U.S. 296 (2004) (under Washington sentencing guidelines, defendant has right to jury determination of aggravating fact beyond a reasonable doubt if establishment of the fact is legally required before judge may impose a penalty above the presumptive-guidelines range); United States v. Booker, 543 U.S. 220 (2005) (under federal sentencing guidelines, defendant has right to jury determination of facts beyond a reasonable doubt if the establishment of those facts is legally required before judge may impose increased penalties under the guidelines); and Cunningham v. California, 127 S. Ct. 856 (2007) (under California statutory sentencing scheme, defendant has right to jury determination of aggravating circumstance beyond a reasonable doubt if establishment of the circumstance is legally required before judge may impose a penalty above the statutory presumptive penalty).

A presumptive-sentencing-guidelines system, such as the one recommended in the revised Code, is subject to the *Blakely* rule. Aggravating departure factors of nearly all kinds must be proven to juries at the sentencing stage beyond a reasonable doubt. The Code denominates these as "jury-sentencing facts," see § 7.07B(1), Tentative Draft No. 1 (2007). The universe of jury-sentencing facts includes allegations of criminal behavior for which no conviction has been obtained. If the government wants the sentencing court to consider non-conviction crimes, therefore, they must be proven at sentencing under the same standard as in a criminal trial. While it remains to be seen whether defendants will enjoy all the same rights at a proceeding before a factfinding jury at sentencing as the rights they enjoy at trial, the two procedures are fundamentally similar. In a jurisdiction governed by *Blakely*, therefore, the "problem" of real-offense sentencing is no longer very large.

Nevertheless, most cases in most American sentencing systems, including jurisdictions that make use of advisory sentencing guidelines, are not subject to *Blakely*'s commands. The Justices in *Booker* were unanimous, for instance, that indeterminate sentencing systems or jurisdictions with advisory guidelines were unaffected by the Court's newly-minted constitutional rules. In *Blakely*-exempt jurisdictions, real-offense sentencing may occur without constitutional limitation. For example, the Supreme Court has held that the Due Process Clause is not violated when a sentence is premised on conduct for which the defendant has been acquitted. See Witte v. United States, 515 U.S. 389 (1995). Three state guidelines states—all of them advisory systems—explicitly permit the consideration of nonconviction conduct of all kinds. See Md. Code Regs. 14.22.01.09(A); State v. Winfield, 23 S.W.3d 279 (Tenn. 2000).

In the majority of American jurisdictions unaffected by the *Blakely* rule, therefore, the statutory prohibition in subsection (2)(b) is essential.

Prior to *Blakely* and *Booker*, most presumptive-sentencing-guidelines systems in the states (but not the federal system) had adopted a "conviction offense" philosophy to the following extent: Guidelines presumptions or recommendations were based on offenses for which defendants had been convicted (including current offenses and criminal history), and took no account of different or additional "nonconviction" offenses defendants were alleged during sentencing proceedings to have committed. See Michael Tonry, Sentencing Matters (1996), at 94.

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1 A handful of states affirmatively forbade consideration at sentencing of alleged offenses or offense elements
2 beyond those for which there were formal convictions. These proscriptions remain in the law, even though they are
3 now reinforced by the *Blakely* rule. See Minnesota Sentencing Guidelines and Commentary § II.A.02:

4 Offense severity is determined by the offense of conviction. The Commission thought that serious legal and
5 ethical questions would be raised if punishment were to be determined on the basis of alleged, but unproven,
6 behavior, and prosecutors and defenders would be less accountable in plea negotiation. It follows that if the offense
7 of conviction is the standard from which to determine severity, departures from the guidelines should not be
8 permitted for elements of offender behavior not within the statutory definition of the offense of conviction. Thus, if
9 an offender is convicted of simple robbery, a departure from the guidelines to increase the severity of the sentence
10 should not be permitted because the offender possessed a firearm or used another dangerous weapon.

11 The Minnesota and Washington proscriptions have been enforced by the appellate courts. See, e.g., State v.
12 Womack, 319 N.W.2d 17 (Minn. 1982). See also Rev. Code Wash. §§ 9.94A.520 & 9.94A.530(2) (2006);
13 Washington Adult Sentencing Guidelines Manual (2006), at II-138 ("The Commission believed that defendants
14 should be sentenced on the basis of facts which are acknowledged, proven, or pleaded to. Concerns were raised
15 about facts which were not proven as an element of the conviction or the plea being used as a basis for sentence
16 decisions, including decisions to depart from the sentence range."); State v. McAlpin, 740 P.2d 824 (Wash. 1987).

17 Prior to *Blakely* and *Booker*, the federal sentencing-guidelines system was the only system in the United States
18 to require sentencing courts to base guidelines sentences upon both conviction and nonconviction offenses. See
19 U.S.S.G. § 1B1.3 (the "Relevant Conduct" provision). The Supreme Court has held that the "real conduct" approach
20 was central to Congress's intent in authorizing creation of the federal guidelines. See United States v. Booker, 543
21 U.S. 220, 250 (2005) (Breyer, J., Opinion of the Court) ("Congress' basic statutory goal—a system that diminishes
22 sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the
23 real conduct that underlies the crime of conviction"). For criticisms of the federal guidelines' relevant-conduct rules,
24 see David Yellen, Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing,
25 58 Stan. L. Rev. 267 (2005); Michael Tonry, Sentencing Matters (1996), at 93-95; Kate Stith and José A. Cabranes,
26 Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), at 148-150.

27 *f. Double counting of offense elements*. Provisions similar to subsection (3) are found in most or all guidelines
28 jurisdictions. See Alaska Stat. § 12.55.155(e); Delaware Sentencing Accountability Commission Benchbook 2006,
29 at 94; Pa. Sentencing Guidelines Standards, at 160; Tenn. Code § 40-35-114; Utah Sentencing Comm'n, Adult
30 Sentencing and Release Guidelines, at 16; Rev. Code Wash. § 9.94A.537. A close variation on this theme is found in
31 Kan. Stat. § 21-4716(c)(3) ("If a factual aspect of a crime is a statutory element of the crime or is used to subclassify
32 the crime on the crime severity scale, that aspect of the current crime of conviction may be used as an aggravating or
33 mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is
34 significantly different from the usual criminal conduct captured by the aspect of the crime"). See also Mich. Comp.
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36 *g. Plea agreement as a mitigating factor*. Some American guidelines jurisdictions, and the sentencing
37 guidelines for England and Wales, include express provisions on the degree of mitigation defendants should be
38 entitled to receive in exchange for pleas of guilty. In other guidelines jurisdictions, the question is not addressed and

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is effectively left to the court's discretion in each case. The revised Code adopts the former approach. See U.S.S.G., § 3E1.1 ("Acceptance of Responsibility" provision allowing for reduction of the "offense level" by two levels); Sentencing Guidelines Council for England and Wales, Definitive Guideline, Reduction in Sentence for a Guilty Plea (2007).

h. Cooperation as a mitigating factor. Most sentencing-guidelines jurisdictions recognize a defendant's cooperation with an ongoing government investigation as a mitigating factor at sentencing. See Ark. Code § 16-90-804(c)(1)(H),(I); Delaware Sentencing Accountability Commission Benchbook 2006, at 94, 98; District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.3(7); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 23; N.C. Gen. Stat. § 15A-1340.16(e)(7); Pa. Sentencing Guidelines Standards (2005), at 188; Tenn. Code § 40-35-113(9)-(10) (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 15-16; Rev. Code Wash. § 9.94A.450(2)(b); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

At least two guidelines jurisdictions have required a government motion before the defendant's cooperation may be considered as a ground for mitigated sentence. See Kan. Stat. § 21-4716(e) ("Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist"); U.S.S.G. § 5K1.1 (2006) (same). Subsection (6) is not so qualified. This comports with the ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.10(b) (2004) (rejecting government motion requirement, but stating that prosecutor's views should be "considered" by the sentencing court). See also Cynthia K.Y. Lee, Prosecutorial Discretion, Substantial Assistance and the Federal Sentencing Guidelines, 42 UCLA L. Rev. 105 (1994) (criticizing government motion requirement in federal law).

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§ 7.04. Sentences upon Multiple Convictions. [130]

(1) The sentencing court shall consult all relevant guidelines and presumptions established by the sentencing commission pursuant to § 6B.08 when imposing sentence on a defendant who is

(a) being sentenced in the same proceeding for more than one conviction;

(b) the subject of multiple criminal proceedings in the same jurisdiction or a foreign jurisdiction; or

(c) already serving a sentence arising out of a different criminal case.

[130] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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(2) Except as otherwise provided in this Section, multiple terms of imprisonment shall run concurrently or consecutively as the court determines when the sentence is imposed. The court may order its sentence to be served concurrent with or consecutive to any sentence the defendant is already serving, but may not specify whether the sentence it imposes will be served concurrent with or consecutive to any pending sentence that has yet to be imposed in another jurisdiction.

(3) The court shall not sentence to probation a defendant who is under sentence of imprisonment [with more than 30 days remaining] or simultaneously impose a sentence of probation and a sentence of imprisonment on separate counts.

Comment:

a. Scope. The original version of § 7.04 was addressed to the interaction between multiple sentences in a largely indeterminate sentencing system. It included details regarding the computation of aggregate minimum and maximum terms for multiple indeterminate sentences, the interplay between determinate and indeterminate sentence terms for offenders serving sentences of both types, and the connection between indeterminate sentences of incarceration and sentences of probation. See Model Penal Code § 7.06 (1962). With the adoption of a determinate sentencing structure for all custodial sentences, most of these complex problems disappear.

Most of the still-relevant content of the old provision is now largely covered by § 6B.08, which requires sentencing commissions to develop guidance for courts regarding the length and configuration of sentences in cases involving multiple convictions, and § 6.07, which governs the award of sentence credit. Consequently, the revised version of former § 7.06 is a streamlined reminder to sentencing courts of the need to consult relevant guideline provisions and presumptions before exercising discretion in setting the duration and configuration of sentences in cases involving multiple convictions, with additional restrictions on the court's ability to configure its sentence with respect to pending sentences in other cases or to impose probation on defendants serving sentences of incarceration. Subsection (1) requires courts to consult guidelines and presumptions promulgated by the sentencing commission pursuant to § 6B.08 when imposing sentence on a defendant who is being sentenced in the same proceeding for more than one conviction; has pending sentences in separate criminal proceedings in the same jurisdiction or a foreign jurisdiction; or is already serving a sentence for a separate conviction. Subsection (2) allows a court to order its sentence served concurrent with or consecutive to sentences the defendant has already been ordered to serve in other cases, but it prohibits the court from specifying the configuration of its sentence in relation to pending sentences in other criminal proceedings out of respect for the independent authority of each criminal tribunal. Subsection (3) reiterates the position of the original Code that sentences of probation should not be imposed on defendants who are serving sentences longer than 30 days and prohibits courts from imposing probation in such cases.

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1 *b. Configuration of sentence with respect to sentences imposed by other courts.* Subsection
2 (2) addresses, insofar as it is possible to do so, the authority of the court to control the interaction
3 of its sentence and any sentence imposed by another court in a separate proceeding. Recent
4 litigation in federal and state court, including the Supreme Court's decision in Setser v. United
5 States, 132 S. Ct. 1463 (2012), have raised the question of whether a court may order its sentence
6 served concurrent with or consecutive to not only already-imposed sentences in other cases, but
7 yet-to-be imposed sentences. Subsection (2) explicitly answers that question by allowing courts
8 to configure their sentences with respect to sentences that have already been imposed, but not
9 with respect to sentences that remain outstanding in other cases, whether in the same jurisdiction
10 or a foreign one. It does so out of respect for comity between courts, recognizing that a decision
11 by an earlier court regarding sentence configuration with respect to pending cases ties the hands
12 of the later sentencing court, infringing on its jurisdiction and raising the possibility of
13 conflicting sentencing orders.

14 *c. Limits on sentences of probation.* Recognizing that a fundamental feature of probation is
15 its ability to impose constraints in a community setting, subsection (3) limits the court's ability to
16 impose a sentence of probation when a defendant is already serving a prison sentence or when
17 the court is imposing a sentence of confinement longer than 30 days on a separate crime of
18 conviction. Subsection (3), like § 7.07(6)(a) of the original Code, allows courts to impose
19 probation on defendants who have less than 30 days remaining on a custodial sentence or who
20 are being sentenced to serve less than 30 days on a crime of current conviction. This result can
21 be justified by the fact that § 6.03 authorizes courts to impose up to 30 days' confinement as a
22 condition of probation. Subsection (3) does not, however, permit courts to impose probation
23 when the defendant is serving a lengthier sentence, as doing so would effectively nullify the
24 sentence of probation, in whole or in part, when it is served concurrent to a custodial sentence.
25 Courts are not only prohibited from imposing concurrent sentences of probation, however;
26 subsection (3) prohibits the imposition of consecutive sentences of probation as well. To the
27 degree that a court wishes to ensure that a defendant receives supervision in the community
28 following a sentence of confinement, it should impose a period of postrelease supervision
29 pursuant to § 6.02(1)(d) rather than a consecutive term of probation.

30 **REPORTERS' NOTE**

31 *a. Scope.* This Section updates § 7.06 of the original Code, which addressed imposition of multiple
32 indeterminate and determinate sentences. At the time of the original Code's release, every U.S. jurisdiction used an
33 indeterminate sentencing system—a sentencing structure the Code embraced as well. The current revision of the
34 Model Penal Code embraces a determinate sentencing structure that requires a re-examination of the interaction
35 between sentences. Although this Section has been updated considerably to account for the move to determinate
36 sentencing, the bedrock principle of imposing multiple sentences remains the same: judges retain discretion to issue
37 concurrent or consecutive sentences. Setser v. United States, 132 S. Ct. 1463, 1468 (2012) ("Judges have long been
38 understood to have discretion to select whether the sentences they impose will run concurrently or consecutively
39 with respect to other sentences that they impose or that have been imposed in other proceedings. . . .").

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b. Configuration of sentence with respect to sentences imposed by other courts. "[A]bundant federal case law recognizes" that state sentencing courts may not impose a sentence to run concurrently with an anticipated federal sentence. Erin E. Goffette, Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction, 37 Val. U. L. Rev. 1035, 1039 n.19 (2003); see also, e.g., United States v. Ballard, 6 F.3d 1502, 1508 (11th Cir. 1993); United States v. Smith, 972 F.2d 243, 244 (8th Cir. 1992); People v. Chaklader, 29 Cal. Rept. 2d 344, 346-347 (Cal. Ct. App. 1994). The opposite is not true. Before *Setser*, some federal appellate courts interpreted 18 U.S.C. § 3584(a) as barring federal judges from ordering "a sentence to run concurrently or consecutively to a nonexistent term" pending in federal or state court. Taylor v. Sawyer, 284 F.3d. 1143, 1148 (9th Cir. 2002); see also United State v. Smith, 472 F.3d 222, 225-226 (4th Cir. 2006); Romandine v. United States, 206 F.3d 731, 738-739 (7th Cir. 2000); United States v. Quintero, 157 F.3d 1038, 1039-1041 (6th Cir. 1998). However, in *Setser*, the Supreme Court interpreted 18 U.S.C. § 3584(a) as permitting federal trial judges to order federal sentences to run concurrently or consecutively to anticipated state sentences. 132 S. Ct. at 1468. Even after *Setser*, at least one circuit has continued to bar federal trial judges from ordering a sentence to run consecutively to pending *federal* sentences, citing the Court's comment in dicta that § 3584(a) arguably "impliedly prohibits [a consecutive sentencing order in advance of an anticipated federal sentence] because it gives that decision to the federal court that sentences the defendant when the other sentence is 'already' imposed." United States v. Montes-Ruiz, 745 F.3d 1286, 1291 (9th Cir. 2014) (alterations in original) (quoting *Setser*, 132 S. Ct. at 1471 n.4). Regardless how federal courts interpret § 3584(a), this provision expresses a preference for courts to select the relationship of their sentence only to sentences that have already been imposed by other courts.

This is consistent with a number of state courts that have held that sentences "may only be required to be served consecutively to an existing sentence." Percival v. State, 506 So.2d 66, 67 (Fla. Dist. Ct. App. 1987); see also, e.g., State v. King, 802 P.2d 1041, 1043 (Ariz. Ct. App. 1990); People v. Reed, 604 N.E.2d 1107, 1108 (Ill. App. Ct. 1992); State v. Reed, 703 P.2d 756, 759-60 (Kan. 1985); State v. White, 397 A.2d 299, 301 (Md. Ct. Spec. App. 1979); People v. Chambers, 421 N.W.2d 903, 909 (Mich. 1988); State v. McGuire, 860 P.2d 148, 149-50 (Mont. 1993); State v. Blevins, 394 N.W.2d 663, 664 (Neb. 1986); Oquendo v. Quinones, 738 N.Y.S.2d 398, 400 (N.Y. App. Div. 2002); State v. White, 481 N.E.2d 596, 598 (Ohio 1985); Segnitz v. State, 7 P.3d 49, 52 (Wyo. 2000); but cf. State v. King, 145 P.3d 1224, 1230 (Wash. Ct. App. 2006) (implying that a state court could order a sentence to run consecutively to an anticipated sentence when the court noted that "Mr. King was not under sentence when he committed the [second] offense. . . [T]he sentencing judge has absolute discretion to impose consecutive sentences"). *Setser* does not seem to have altered the general consensus that state courts lack authority to order a sentence to run concurrently or consecutively to an anticipated sentence. See State v. Taylor, 319 P.3d 1256, 1259 (Kan. 2014); Olmsted Falls v. Clifford, 12 N.E.3d 515, 517-518 (Ohio Ct. App. 2014).

There is no consensus when it comes to distinguishing anticipated sentences from existing sentences. Some courts hold that an "existing sentence" must not only have been ordered but also imposed by the time that the court orders the new sentence served consecutive to the existing sentence. See Newman v. State, 409 So. 2d 514, 514 (Fla. Dist. Ct. App. 1982); *Olmsted Falls*, 12 N.E.3d at 517-518; Commonwealth v. Holz, 397 A.2d 407, 408 (Pa. 1979). That is, in order for a court to order new sentence *x* served concurrent or consecutive to sentence *y*, sentence *y* must be "a sentence then being served (or unequivocally scheduled to be served)." DiPietrantonio v. State, 487 A.2d 676,

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678 (Md. Ct. Spec. App. 1985). Some courts define "existing sentence" as including sentences "in suspension but with ever-present potentiality for the lifting of that suspension." *White*, 397 A.2d at 300-301. At least two states go so far as to allow "[a] court [to] order a sentence to run consecutive to any prior convictions, even where sentencing on those convictions has not yet occurred but is anticipated in an upcoming parole revocation proceeding." People v. Byrd, 673 N.E.2d 1071, 1078 (Ill. App. Ct. 1996); see also *Reed*, 604 N.E.2d at 1108.

These state courts often based their holdings on statutory interpretation and a fear of imposing "an indefinite sentence with a beginning date impossible to determine at the time of the imposition of the sentence." *Blevins*, 394 N.W.2d at 664; see also *King*, 802 P.2d at 1043 ("[T]he statute does not authorize the court to order that a sentence run consecutively to a sentence that has not yet been imposed. . . . [S]uch sentences are too indefinite to be implemented."). Courts also noted a fear of interfering with the discretion of the court imposing the future sentence. See *White*, 481 N.E.2d at 598; *King*, 802 P.2d at 1043; *McGuire*, 860 P.2d at 150. More recently, some state legislatures have updated their statutes to allow courts to order a sentence to run consecutively or concurrently with a sentence currently being served by the defendant, but not an anticipated sentence. See Conn. Gen. Stat. § 53a-37 (2015); N.Y. Penal Law § 70.25(1), 70.25(4) (McKinney 2009); N.C. Gen. Stat. § 15A-1354(a) (2011); Or. Rev. Stat. § 137.123(1) (2003) ("A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant.").

c. Limits on sentences of probation. Like § 7.04(3), the federal sentencing guidelines limit the imposition of both probation and incarceration, authorizing dual imposition only with short terms of confinement. U.S. Sentencing Guidelines Manual § 5B1.1 cmt. n.1 (U.S. Sentencing Comm'n 2010) (authorizing a sentence of probation where "the minimum term of imprisonment specified in the . . . guideline range is [between] one [and] nine months"). Both conceptualize this dual imposition as a limited period of incarceration ordered as a condition of probation. Id. And both suggest that a court wishing to impose a "split sentence" simply provide "that a defendant serve a term of imprisonment followed by a period of supervised release," rather than imposing sentences of incarceration and probation concurrently or consecutively. Id. at cmt. Thus, despite the fact that the federal sentencing guidelines and § 7.04(3) effectively abolish the practice of split sentencing, they do not require that inmates be released without supervision, a practice that has been criticized. The Pew Charitable Trust, *Max Out: The Rise in Prison Inmates Released Without Supervision* 2 (2014). Instead, courts have the option of ordering supervision after the offender's release from prison, a practice that may potentially "reduce both recidivism and overall corrections costs." Id. Likewise, New York courts may order a term of probation or conditional discharge to run concurrent to up to 60 days of imprisonment (for misdemeanors) or six months of imprisonment (for felonies). N.Y. Penal Law § 60.01(2)(d) (McKinney 1984). The sentence of imprisonment is considered "a condition of" the probation or conditional discharge. Id. If more than 60 days (or six months, for felonies) of imprisonment are ordered, probation cannot be imposed. Id. However, New York courts have allowed a term of probation to be ordered when the defendant has already served more than 60 days in jail before being convicted, reasoning that a sentence of "time served" is a sentence of the statutory maximum—that is, 60 days—and thus probation can still be legally imposed. See People v. Cortese, 913 N.Y.S.2d 383, 386 (N.Y. App. Div. 2010); People v. Conley, 897 N.Y.S.2d 135, 136-37 (N.Y. App. Div. 2010). Other courts, however, treat a "sentence of 'time served' as an unambiguous pronouncement of . . . the amount of time actually served." United States v. D'Oliveira, 402 F.3d 130, 132 (2d Cir. 2005); accord United States v. Rodriguez-Lopez, 170 F.3d 1244, 1246 (9th Cir. 1999).

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Some statutes give courts authority to impose probation sentences consecutive to imprisonment. See, e.g., Wash. Rev. Code § 9.94A.589(5) (2002) ("In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement. . . ."); Fla. Stat. § 948.012 (2014); Wis. Stat. 973.15(2m)(b) (2009). Some jurisdictions allow courts broader authority to order probation sentences served concurrent or consecutive to terms of imprisonment. See, e.g., State v. Clapper, 144 P.3d 43, 46 (Idaho Ct. App. 2006); People v. Horell, 919 N.E.2d 952, 957 (Ill. 2009) (finding that a sentence of probation, ordered to commence after the defendant's imprisonment but during defendant's mandatory supervised release on another count, was proper).

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§ 7.07. Sentencing Proceedings; Presentence Investigation and Report. [131]

(1) Before imposing sentence, the court shall order a presentence investigation whenever a defendant has been convicted of a felony and the court is contemplating a sentence of incarceration or a period of probation in excess of the time served by the defendant while awaiting conviction and sentencing on the felony offense.

(2) The court may order a presentence investigation in any other case, sua sponte or at the request of one or more parties.

(3) With the agreement of the parties, the court may order a presentence investigation to be completed before the entry of a judgment of conviction.

(4) The presentence investigation report may include an analysis of the applicable sentencing guidelines, the circumstances attending the commission of the crime, the effect of the crime on any identified victim, the defendant's criminal history, physical and mental condition, family situation and background, and any other matters that the court deems relevant to assessing an appropriate sentence for the crime of conviction. In cases involving suspected mental illness or impairment, or in cases involving sexual offenses or sexually motivated crimes, the court may order a mental-health or psychosexual evaluation by a licensed mental-health professional to be conducted as part of the investigation, although the defendant may not be compelled to make any statement in connection with the presentence investigation.

(5) The presentence investigation report shall be prepared, presented, and used as provided by the rule of court, except that the court shall provide the defendant or attorneys in the case with a copy of the complete report and recommendations at least [10] days before sentencing. Before making the report available to the parties, the court may issue an

[131] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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1 **appropriate protective order regarding sensitive information for the safety of witnesses or**
2 **to limit the disclosure of otherwise-protected confidential information.**

3 **(6) Within a reasonable time after the production of the presentence investigation**
4 **report, and prior to sentencing, the parties shall be given fair opportunity to controvert or**
5 **supplement factual information contained in the report. When a factual issue relevant to**
6 **the sentence is raised by either party, the government shall bear the burden of proving the**
7 **disputed fact by clear and convincing evidence. The court shall make findings resolving**
8 **factual disputes relevant to the sentence, and order the report to be corrected, clarified, or**
9 **supplemented accordingly prior to imposing sentence.**

10 **(7) After sentencing, a copy of the final version of the presentence investigation report**
11 **and any mental-health examination shall be transmitted to the correctional agency to**
12 **whose custody the defendant is committed. A copy of the report, redacted in accordance**
13 **with any court-issued protective order, shall also be provided to the defendant.**

14 **(8) If, after sentence has been imposed, a contested fact not relevant to the sentencing**
15 **proceedings becomes relevant for correctional purposes, including security classification or**
16 **program assignment, the defendant may petition the sentencing court for correction of the**
17 **alleged factual error.**

18 **(a) In any proceeding under this subsection, the defendant bears the burden of**
19 **proving by a preponderance of the evidence that an alleged fact is erroneous.**

20 **(b) If, after a review of the written record or an evidentiary hearing, the court**
21 **determines that one or more errors exist, the court shall order that the report be**
22 **amended, and that the correctional agency update its records accordingly.**

23 **Comment:**

24 *a. Scope.* This provision updates and expands upon § 7.07 of the original Model Penal Code,
25 addressing the creation and use of presentence investigation reports. Subsection (1) requires the
26 court to order a presentence report whenever it contemplates imposing a sentence of probation or
27 imprisonment on a convicted felon in excess of time served, and subsection (2) authorizes the
28 court to order a presentence investigation in any other case. Subsection (3) allows the court to
29 order a presentence investigation before the entry of a judgment of conviction with the consent
30 of the parties. Subsection (4) describes the content of the presentence report, which must include
31 information about the relevant sentencing guidelines as well as a description of the crime and its
32 attendant circumstances, the effect of the crime on victims, the defendant's criminal history and
33 personal narrative, and "any other matters that the court deems relevant" in determining an
34 appropriate sentence. It also authorizes the court to order mental-health examinations in cases
35 where mental health (not competency) is a suspected factor in the crime or concern in the case.
36 Subsection (5) sets forth the procedure for affording the parties fair opportunity to review the
37 report prior to sentencing, with provision made for the protection of sensitive information, and

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subsection (6) sets forth the basic procedure for contesting and correcting factual information contained in the report at the time of sentencing. Subsection (7) provides that a copy of the presentence investigation report and any mental-health examination be provided to the correctional agency to which the defendant is committed. Recognizing that the correctional agencies specified in subsection (5) may deem relevant facts that were not relevant to the court or parties at the time of sentencing, subsection (8) provides a process by which a defendant may later seek correction of factual errors in the report that were not amended at the time of sentencing.

b. When a report is needed. The original Model Penal Code required the court to order a presentence report in all felony cases and in all other cases when the defendant faced incarceration or imprisonment or was under the age of 22. This revision softens those requirements, mandating that a presentence report be produced in any felony case in which incarceration or probation in excess of time served is an option being considered by the court, while eliminating the requirement of a presentence report in misdemeanor cases. Subsection (2) permits the court to order presentence reports in any case, either sua sponte or upon request from one or both parties, where the report would assist the court in imposing sentence. Subsection (2) does not require a report in non-felony cases, regardless the age of the defendant.

c. Content of the investigation report. Although subsection (5) leaves the details of producing the report to court rule, subsection (4) sets forth the basic content of the report, which includes analysis of the applicable sentencing guidelines, discussion of the circumstances attending the commission of the crime, a statement on victim impact, and a recounting of the defendant's criminal history (which may include both juvenile proceedings and involvement in the adult criminal-court system). The report should also contain information to help the court develop a better sense of the defendant as an individual, including facts relating to the defendant's physical and mental condition, family situation and background, and any other relevant concerns, such as employment, addiction, or educational needs. Subsection (4) permits, but does not require, the court to order a mental-health or psychosexual evaluation in cases in which mental illness or serious mental impairment is suspected, or in cases involving sexual offenses or sexually motivated crimes. In such cases, the evaluation should be carried out by a licensed mental health professional.

The presentence interview by a probation officer or the examination of the defendant by a mental health professional pursuant to court order may reveal information harmful to the defendant. In light of that reality, and in recognition of the fact that some jurisdictions do not permit counsel to participate in presentence interviews or evaluations, subsection (4) emphasizes that the defendant may not be compelled to make any statement in connection with the presentence investigation.

d. Access to the report and recommendations. The presentence report is one of the most important documents in any felony case. It contains information on relevant mitigating and

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1 aggravating factors, assists in the calculation of the governing guideline range, and often
2 contains a recommendation from the probation agency of a sentence that agency thinks proper in
3 the case. Despite the central relevance of the presentence report to the sentencing proceeding, it
4 is sometimes treated more like a confidential communication between the court and the
5 correctional agency than as a document subject to adversarial testing by the interested parties.
6 Like the original Model Penal Code, the revised provision favors disclosure of the presentence
7 report to the parties for review and, when appropriate, contestation. Subsection (5) requires that
8 the parties in the case be provided with a copy of the complete report and recommendations at
9 least 10 days before sentencing. When there is concern that the report may endanger the safety of
10 witnesses or unnecessarily reveal confidential information about the defendant or third parties,
11 the court may issue an appropriate protective order.

12 *e. Confidentiality.* There are several layers to the confidentiality concerns raised by
13 presentence reports. First is the fact that the report may contain statements from confidential
14 informants or other sources that might threaten the safety of the informants should their
15 cooperation with the government be revealed to the defendant. A second concern is that
16 background information provided by third parties may reveal sensitive information about the
17 defendant and others that should be shielded from needless public disclosure. In some
18 jurisdictions, these concerns have been allowed to trump the defendant's right of access to the
19 report, limiting the defendant's ability to review the report, except through counsel, or retain a
20 copy of it. Although the default position under this Section favors disclosure of the complete
21 report, including any sentence recommendation contained in it, to the parties, there will be
22 instances when revealing information in the report to the defendant may imperil a witness or
23 make public sensitive information about third parties. In these cases, subsection (5) permits the
24 court to issue an appropriate protective order regarding such information before providing it to
25 the defendant or defense counsel. When making such an order, the court should state for the
26 record the reasons for the protective order. If the court orders the sensitive information redacted
27 from the report, the court should explain the general nature of the information being withheld
28 and, upon request, allow the defendant's attorney to review the redacted information.

29 *f. Opportunity for correction.* Given the importance of the PSI to the calculation of the
30 relevant guideline range and the sentence ultimately imposed by the court, it is essential that the
31 information contained in the report be accurate. Consequently, subsection (6) requires that the
32 court allow the parties to challenge facts contained in the presentence report, or supplement
33 relevant facts contained in the report with additional relevant information. When the parties seek
34 to modify the presentence report, the court must resolve any factual disputes that are relevant to
35 the sentence and order that the report be corrected, clarified, or supplemented as appropriate.
36 Although subsection (6) does not require the court to resolve factual disputes that are not
37 relevant to the sentence, the court would be wise to make findings on any disputed fact that has
38 foreseeable correctional implications, since a failure to resolve those disputes may otherwise lead
39 to later proceedings pursuant to subsection (8).

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g. Use of report by correctional agency. Subsection (7) leaves unchanged the original provision that requires a copy of the report to be sent to the correctional agency responsible for overseeing the defendant's sentence. Presentence reports contain a wealth of information that is helpful to determining a defendant's security classification, medical needs, and need for various educational, vocational, and therapeutic program interventions. Allowing the correctional agency to have access to the presentence report ensures that this relevant, but often difficult-to-access, information will be available to custodians during the execution of the sentence.

h. Later correction of disputed facts. It will sometimes be the case that factual errors in the presentence report that were not directly relevant to sentencing later become relevant to correctional decisions. For example, an incorrect reference to the frequency of a defendant's drug use may have been immaterial to sentence on the defendant's fraud charge, but later result in placement in a drug-treatment program for which the defendant has no need. A mistaken identification of a relative who abused the defendant in childhood might result in a supportive aunt being prohibited from visiting the defendant in prison. These erroneous facts can have a profound impact on the place and manner in which a defendant serves his sentence, and should be as accurate as possible. Subsection (8) therefore creates a mechanism by which the defendant may petition the court for the correction of erroneous facts that become relevant to correctional agency decisions. In such proceedings, the defendant bears the burden of proving by a preponderance of the evidence that the contested facts are in error. When that burden is met, the court must order the report corrected and direct the correctional agency to update its records accordingly.

REPORTERS' NOTE

a. Scope. This provision updates § 7.07 of the original Code. While leaving many matters to court rule, the provision sets forth basic rules governing presentence investigation reports, including when they must be ordered, what they may contain, and how their accuracy may be checked by the parties, both at sentencing and in later proceedings. Although this provision retains many aspects of the original Code provision, it eliminates the requirement that presentence reports be completed for youthful offenders in misdemeanor cases, and creates a new post-sentencing mechanism for challenging inaccurate facts overlooked at sentencing that later become relevant to correctional decisions.

b. When a report is needed. There is no consensus on when a presentence investigation report should be required. This provision aims to require presentence investigation reports whenever they will prove useful while avoiding depletion of resources on low-level offenders who have already served the prescribed punishment. Rhode Island has adopted a rule most closely related to this provision, which focuses on the length of incarceration. 12 R.I. Gen. Laws § 12-19-6 (1972) (requiring a presentence investigation report in every case with a maximum sentence of more than one year imprisonment except where the mandatory sentence is death or life imprisonment). This provision recognizes that the defendant may have served more or less than one year imprisonment while awaiting conviction and sentencing and thus requires a presentencing investigation report whenever the conviction is a felony and the report could impact the amount of additional imprisonment time the defendant faces.

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1 Some jurisdictions leave presentence investigation reports to the sentencing court's discretion. See, e.g., Ark.
2 Code Ann. § 5-4-102(a) (2013) ("If punishment is fixed by the court, the court may order a presentence
3 investigation before imposing sentence."); Del. Super. Ct. R. Crim. P. 32(c)(1) (2003) (allowing a court to order a
4 presentence investigation report "after considering the benefit of immediate sentencing and whether there is in the
5 record information sufficient to enable a meaningful exercise of sentencing authority"); Wis. Stat. § 972.15 (2013)
6 ("After a conviction the court may order a presentence investigation . . . ."). Other jurisdictions impose a
7 presumption that presentence investigation reports shall be ordered while allowing the court or the defendant to
8 waive this requirement. See Vt. R. Crim. P. 32(c)(1) (2010) (requiring a presentence investigation report unless the
9 offense is a misdemeanor, the defendant has two or more felony convictions, the defendant waives the presentence
10 report, or it is impractical to verify the defendant's background); W. Va. R. Crim. P. 32(b) (1996) (requiring
11 presentence investigation report unless the defendant waives it and the court explains on the record that there is
12 enough information in the record for the court to "meaningfully exercise its sentencing authority"). Still other
13 jurisdictions require presentence investigation reports for specific types of offenses. See Mo. Rev. Stat. § 217.762(1)
14 (2014) (requiring a presentence investigation "[p]rior to sentencing any defendant convicted of a felony which
15 resulted in serious physical injury or death to the victim"); Nev. Rev. Stat. § 176.135 (2007) (requiring a presentence
16 investigation report in all felony cases except when the defendant is convicted of a non-sexual offense and the
17 sentence is fixed by the jury or a presentence investigation report has been made on the defendant within the past
18 five years); Okla. Stat. tit. 22, § 982(A) (2014) (requiring a presentence investigation report for all convictions of
19 violent felony offenses "except when the death sentence is available as punishment").

20 *c. Content of the investigation report.* Jurisdictions vary widely in their requirements for the content of the
21 presentence investigation report. See, e.g., Ark. Code Ann. § 5-4-102(b)(1) (2015) (requiring an analysis of the
22 circumstances of the crime and "[t]he defendant's [criminal history], physical and mental condition, family . . .
23 background, economic status, education, occupation, and personal habits"); Mich. Comp. Laws § 771.14(2) (2012)
24 (requiring "a prognosis for the [defendant's] adjustment in the community," a victim impact statement (if requested
25 by the victim), a sentencing recommendation from the department of corrections, an analysis of the sentencing
26 guidelines, and diagnostic opinions); Mo. Rev. Stat. § 217.752(1)-(2) (2014) (requiring "a victim impact statement if
27 the defendant caused physical, psychological, or economic injury to the victim" but otherwise leaving the contents
28 of the report to the board of probation and parole); Vt. R. Crim. P. 32(c)(2) (2010) (requiring information
29 concerning the defendant's criminal history, "characteristics, . . . financial condition, and the circumstances affecting
30 his behavior"). Subsection (4) lists a number of content requirements while allowing the sentencing court to order
31 the inclusion of any other content deemed relevant to assessing an appropriate sentence for the defendant.

32 The Supreme Court has made clear that Fifth and Sixth Amendment rights attach to psychological
33 examinations of the defendant during the sentencing investigation. Estelle v. Smith, 451 U.S. 466, 469 (1981).
34 *Estelle* held that "a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any
35 psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a
36 capital sentencing proceeding." Id. at 468. Lower courts have constrained *Estelle* to its facts, finding that it does not
37 apply to noncapital cases or examinations not used to prove aggravating factors. See, e.g., United States v. Graham-
38 Wright, 715 F.3d 598, 602 (6th Cir. 2013); Halley v. Thaler, 448 F. App'x 518, 522 (5th Cir. 2011); Baumann v.
39 United States, 692 F.2d 565, 576 (9th Cir. 1982). Subsection (4) broadens *Estelle*'s rule, barring the compulsion of

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any defendant to make *any* statement connected to the presentence investigation, regardless of how the statement may be used at sentencing.

Following *Estelle* and a majority of courts, subsection (4) does not mandate the presence of counsel during presentence investigation interviews. *Estelle*, 451 U.S. at 470 n.14; United States v. Archambault, 344 F.3d 732, 736 n.4 (8th Cir. 2003); United States v. Leonti, 326 F.3d 1111, 1119-1120 (9th Cir. 2003); United States v. Tyler, 281 F.3d 84, 96 (3d Cir. 2002); United States v. Hicks, 948 F.2d 877, 885 (4th Cir. 1991); State v. Kauk, 691 N.W.2d 606, 609 (S.D. 2005); State v. Knapp, 330 N.W.2d 242, 245 (Wis. Ct. App. 1983). But see State ex rel. Russell v. Jones, 647 P.2d 904, 906-907 (Or. 1982) (en banc) ("[J]ust as a sentencing hearing to determine a defendant's future liberty is a stage of prosecution at which the assistance of counsel cannot be denied, so is a presentence interview."); In re Carter, 848 A.2d 281, 301 (Vt. 2004) ("[A] Sixth Amendment right to counsel attaches to the [presentence] interview."). Although subsection (4) recognizes the majority rule and thus does not require the presence of counsel during such interviews, it also recognizes that statements made by the defendant during the presentence interview may be "central in the . . . prosecutor's sentencing recommendations." *Carter*, 848 A.2d at 301. As a result, subsection (4) emphasizes that the defendant may not be compelled to make any statements relating to the presentence investigation.

d. Access to the report and recommendations. The concerns that surround access to and use of presentence investigation reports by the parties have not changed much since the original Code was drafted:

> The terms of the debate are fairly easily understood. On the side of nondisclosure, it is argued that information will be more difficult to obtain if informants know that what they report will be made available to the defendant. Also thought to be a problem is delay of proceedings in order to resolve in an adversary setting disputes over what may be merely tangential parts of the report. And there is the concern that certain diagnostic information would be harmful to the defendant if disclosed to him personally or, in some cases, would adversely affect his relationship with others during the course of serving his sentence.
>
> The other side of the debate makes points that go mainly to the fairness of the process. Reports and rumors about the defendant can be enormously distorting, and complete reliance cannot be placed on the adroitness with which the probation officer can screen out the distortion. The law does not, for example, rely on the ability of the police office in this sense with regard to the process of determining guilt, in spite of the fact that, like the probation officer, the police have an obligation to seek the truth. In most contexts, information collected through an official process is made subject to some form of testing for accuracy if that information is to be used to the serious disadvantage of an individual. The fact that the individual in this instance has been adjudicated a criminal should not, in this view, divert attention from the basic point that fairness demands an opportunity to identify and controvert facts on which a decision as central as the sentencing determination will be made.
>
> A balance of these new considerations falls clearly on the side of disclosure of presentence or psychiatric reports insofar as they purport to be factually descriptive of the defendant or of other relevant matters. This objective can be accomplished, however, without adoption of the rigid position that the entire report must be disclosed in all cases. This section does not require that the full text of the report be made available to the defendant, although that in most instances may be the most efficient way to proceed.

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1 The revised provision takes a similar position to the original Code, weighing the competing interests and
2 allowing for protection of information that might endanger witnesses or reveal sensitive information about third
3 parties. It rejects, however, the expansive view of confidentiality embraced by the federal rules of criminal
4 procedure and some state codes. See, e.g., Fed. R. Crim. P. 32(d)(3) (requiring that the presentence report exclude
5 "(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program; (B) any sources of
6 information obtained upon a promise of confidentiality; and (C) any other information that, if disclosed, might result
7 in physical or other harm to the defendant or others"); Or. Rev. Stat. § 137.079(2) (2013) (excepting from disclosure
8 "parts of the presentence report . . . which are not relevant to a proper sentence, diagnostic opinions which might
9 seriously disrupt a program of rehabilitation if known by the defendant, or sources of information which were
10 obtainable with an expectation of confidentiality"); S.D. Codified Laws § 23A-27-7 (1997) (allowing the court to
11 "exclude any recommendation as to sentence, and other material that, in the opinion of the court, contains a
12 diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a
13 promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise,
14 to the defendant or other persons").

15 *e. Confidentiality.* Presentence reports are generally viewed as confidential. United States v. Charmer
16 Industries, Inc., 711 F.2d 1164, 1171 (2d Cir. 1983); see also United States v. Martinello, 556 F.2d 1215, 1216 (5th
17 Cir. 1977) (per curiam); Untied States v. Greathouse, 484 F.2d 805, 807 (7th Cir. 1973); In re Nichter, 949 F. Supp.
18 2d 205, 208 (D.D.C. 2013). Yet as courts have recognized, disclosure of reports to the defendant's attorney "is
19 important because a defendant has a due process right to be sentenced upon accurate information." State v. Melton,
20 834 N.W.2d 345, 353 (Wis. 2013); accord Charmer Industries, 711 F.2d at 1171. Thus, this provision allows for an
21 *appropriate* protective order regarding sensitive information. When the trial court determines that redaction is
22 appropriate, comment c prompts the court to follow a procedure similar to Idaho Criminal Rule 32(g)(2), which
23 requires a trial court to "state for the record the reasons for its action, inform the defendant and defendant's attorney
24 that information has not been disclosed, and explain the general nature of the information being withheld." Idaho
25 Crim. R. 32(g)(2) (2015); see also Mich. Comp. Laws § 771.14(3) (2012) (requiring a statement of the reasons for
26 redaction on the record and subjecting the court's decision to appellate review). Rule 32(g)(2) also mandates that the
27 court allow the defendant's attorney, upon request, "to review any information in the presentence report which is so
28 withheld from disclosure so as to allow the attorney a full opportunity to explain and rebut the information contained
29 therein." Id.

30 *f. Opportunity for correction.* A host of scholarly articles has documented the ways in which inaccuracy in the
31 presentence investigation report can lead to inappropriate sentences and even less appropriate correctional
32 interventions. A key refrain is the need for greater transparency between the court and the parties with respect to the
33 contents of presentence reports, and the need for formal mechanisms for correcting error. See, e.g., Gregory W.
34 Carman and Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 St.
35 John's L. Rev. 1 (2004); Alan Ellis et al., *Federal Prison Designation and Placement: An Update*, 15 Crim. Just. 46,
36 46 (2000); Timothy Bakken, *The Continued Failure of Modern Law To Create Fairness and Efficiency: The*
37 *Presentence Investigation Report and Its Effect on Justice*, 40 N.Y. L. Sch. L. Rev. 363, 364 (1996); Keith A.
38 Findley and Meredith Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under*

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Julian *and the Sentencing Guidelines*, 1989 Wis. L. Rev. 837, 837-838; Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 Yale L.J. 1225 (1982).

Most states provide the parties with the opportunity to review the presentence report and challenge facts contained in it at sentencing. See, e.g., State v. Melton, 834 N.W.2d 345, 353 (Wis. 2013) ("A defendant has the right to challenge a PSI he or she believes is 'inaccurate or incomplete.'" Many recognize that the imposition of a sentence based on false material violates the defendant's right to due process. See United States v. Charmer Industries, Inc. 711 F.2d 1164, 1171 (2d Cir. 1983). However, many do not permit the parties to retain a copy of the document to study, or offer adequate time to the parties before sentencing to prepare a challenge to the facts contained in the report. See, e.g., Ark. Code Ann. § 5-4-102 (2013); Mich. Comp. Laws § 771.14(5)-(6) (2012). A number of states authorize substantial redaction to the report, further weakening the ability of the parties to challenge information that may be, or may later become, relevant to the sentence and its execution. Section 7.07 guards against inaccuracy by ensuring timely disclosure of the report to the parties, *see* subsection (4), with subsequent opportunity to challenge contested facts at the time of sentencing, *see* subsection (5), and at any later time when allegedly erroneous facts contained in the presentence report become relevant to correctional decisions, *see* subsection (7). Section 7.07 provides robust mechanisms for correcting error.

Most states do not establish a clear burden of proof regarding disputed facts within the presentence report. See, e.g., Mich. Comp. Laws § 771.14(6) (2012) ("At the time of sentencing, either party may challenge, on the record, the accuracy of relevancy of any information contained in the presentence investigation report. . . . If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken.") This provision follows Findley and Ross's recommendation by placing "the burden of proof on the government to prove disputed facts by clear and convincing evidence." Findley and Ross, supra, at 871; cf. United States v. Rosales-Bruno, 676 F.3d 1017, 1023 (11th Cir. 2012) (requiring the government to establish a fact in the presentence investigation report once the defendant raises a clear, specific objection to it).

g. Use of report by correctional agency. There is disagreement among courts regarding whether the court or probation department retains ultimate control over the report. Compare In re Nichter, 949 F. Supp. 2d 205, 208 (D.D.C. 2013) ("PSRs are court documents, and the district court may release them at its discretion.") and United States v. Gomez, 323 F.3d 1305, 1307 n.3 (11th Cir. 2003) with In re Siler, 571 F.3d 604, 609 (6th Cir. 2009) ("PSRs . . . are released to the court for the limited purpose of sentencing, but are otherwise in the custody of the U.S. Probation Office. . . .") and United States v. Moussaoui, 483 F.3d 220, 236-237 (4th Cir. 2007).

This provision places the presentence report firmly within the court's control: the court orders the presentence investigation, outlines the information to be included in the report, implements rules regarding the report's preparation, presentation, and use, and decides whether limited disclosure of confidential information within the report is appropriate. However, subsection (7) also acknowledges that the presentence report has uses beyond the confines of sentencing and thus requires the court to release the report to the jail, prison, or probation agency that will be overseeing the execution of a defendant's sentence. There, the report may be used for security classification, program assignment, institution designation, and release planning, for example. Subsection (5) also requires the court to give a copy of the report to the defendant. Although this provision does not explicitly limit distribution of

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the report beyond these parties, the court could limit distribution through a protective order under subsection (5). See Ark. Code. Ann. § 5-4-102(3) (2013) (ordering a copy of the report "transmitted immediately to the Department of Correction" or other institution where the defendant is imprisoned). But see Idaho Crim. R. 32(h)(1) (2015) (barring any person authorized by the sentencing court to receive a copy of the presentence report from releasing it to another other person or agency); Wis. Stat. § 972.15(4) (2014) (mandating that the report remain confidential and "not be made available to any person except upon specific authorization of the court").

h. Later correction of disputed facts. The problem of factual errors discovered after sentencing is one recognized by state courts, but often left unremedied due to a lack of statutory authority for permitting amendments to the presentence report after the time of sentencing. See, e.g., State v. Boulier, 716 A.2d 134, 136 (Conn. App. Ct. 1998) (concluding that the court has no jurisdiction to correct presentence report after sentencing).

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§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law. [132]

(1) The court shall impose sentence within a reasonable time following a defendant's conviction of a felony or misdemeanor. Sentencing proceedings shall be governed by the rules of criminal procedure, in conformity with this Article.

(2) At sentencing, the court may rely upon facts necessary to the conviction, facts admitted by the defendant, and facts in the presentence report that are not contested by the parties.

(3) Additional findings of fact and conclusions of law at sentencing shall be made by the court at sentencing, except as provided in § 7.07B. The court shall provide on the record an explanation of the reason for its resolution of any disputed matters of fact or law relevant to the sentence.

(4) The burden of proof for contested factual issues at sentencing shall be a preponderance of the evidence, except as provided in § 7.07B.

(5) At the conclusion of sentencing proceedings or within [20] days thereafter, the court shall rule upon any remaining issues submitted by the parties, provide an explanation on the record of the reasons for its rulings, and enter an appropriate order.

The Reporters' proposed changes in this provision, already approved by the Council, are indicated below:

[132] This Section was originally approved in 2007; see Tentative Draft No. 1. This draft adds amendments recommended by the Reporters as indicated above, which have been approved by the Council.

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§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law.

(1) ~~Following a defendant's conviction of a felony or misdemeanor,~~ The court shall impose sentence within a reasonable time following a defendant's conviction of a felony or misdemeanor. Sentencing proceedings shall be governed by the rules of criminal procedure, in conformity with this Article.

(2) At sentencing, the court may rely upon facts necessary to the conviction, facts admitted by the defendant, and facts in the presentence report that are not contested by the parties.

(3) Additional findings of fact and conclusions of law at sentencing shall be made by the court at sentencing, except as provided in § 7.07B. The court shall provide on the record an explanation of the reason for its resolution of any disputed matters of fact or law relevant to the sentence.

(4) The burden of proof for contested factual issues at sentencing shall be a preponderance of the evidence, except as provided in § 7.07B.

(5) At the conclusion of sentencing proceedings or within [20] days thereafter, the court shall rule upon any remaining issues submitted by the parties, provide an explanation on the record of the reasons for its rulings, and enter an appropriate order.

~~(6) The court shall provide an explanation of its reasoning on the record in every case in which the court imposes a sentence that departs from presumptions set forth in the sentencing guidelines.~~

REPORTERS' NOTE in support of recommended changes

Resolution of disputed legal and factual issues; explanation of decision. The revised provision eliminates former subsection (6), which required the court to explain its rulings on contested issues only when the court imposed a sentence that departed from the guidelines. Subsection (3) now includes a requirement that the court provide explanation on the record for its resolution of factual and legal matters relevant to the sentence. Providing such an explanation improves the legitimacy of the sentencing decision, and also reduces the risk that later consumers of the sentencing decision—who include appellate courts, correctional officials, crime victims, and the defendant—will misunderstand the court's findings and the implications of those findings. Explanation need not be lengthy or detailed, but some justification for each finding of fact and conclusion of law is proper when the facts and law are being used to justify the punishment imposed on the defendant.

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Comment: [133]

a. Scope. This provision and § 7.07B address factfinding procedures at judicial sentencing hearings, the court's obligation to apply relevant legal standards, and the necessity of making a record of the reasons for the court's decisions. The provisions are responsive to considerations of fairness, rationality, transparency, and constitutional mandate. They are also driven by the fundamental policy goal to preserve judicial sentencing discretion to individualize sentences within a framework of law; see § 1.02(2)(b)(i).

Sections 7.07A and 7.07B do not address a host of subjects best left to the rules of criminal procedure, such as the assignment of a judge to sentence proceedings, the timing of a sentencing hearing, discovery, procedures for the presentation of evidence, the defendant's right of allocution, the possibility of consolidating multiple outstanding cases in a single sentencing proceeding, and victims' participation in sentencing proceedings.

Subsection (1) sets forth the general principle that sentences should be imposed, including timely imposition and compliance with the rules of criminal procedure. Subsection (2) describes categories of fact that the court is constitutionally permitted to find without the assistance of a jury. These include facts necessary to the conviction, facts admitted by the defendant, and facts relayed in the presentence report that are not contested by the parties. Subsections (3) and (4) permit courts to make additional findings of fact by a preponderance of the evidence, so long as the factual finding is not one delegated to a jury pursuant § 7.07B, and the finding is explained on the record. Subsection (3) also requires explanation of any relevant conclusion of law. Subsection (5) requires the court to make findings with respect to any matters not resolved at the sentencing hearing, such as the amount of restitution due.

b. Reference to rules of criminal procedure. Subsection (1) signals that the bulk of procedural regulations applicable to sentencing proceedings are the proper subject for procedural rule rather than statute. Only fundamental matters are addressed in §§ 7.07A and 7.07B.

c. Facts established prior to sentencing proceedings. In all cases that proceed to sentencing, some factual issues will be resolved in advance, and need not be relitigated. Subsection (2) specifies the categories of factual information that meet this description, including facts necessary to the underlying conviction, facts admitted by the defendant before sentencing, and facts in the presentence report that are uncontested or that have been found by the court under § 7.07(6).

d. General principle of court-determined sentences. Subsection (3) states a general rule, subject only to exceptions under § 7.07B, that the trial court at sentencing proceedings shall make all findings of fact and conclusions of law necessary for the imposition of sentence. This provision reflects the Code's philosophy that the judiciary should be the most important

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institutional agency in the sentencing process. The exceptions in § 7.07B, which creates a mechanism for limited jury factfinding at sentencing, are confined to those required by the Constitution.

Under current constitutional law, there is no question that sentencing judges may be empowered to make all *legal* findings predicate to criminal punishment, including determinations of applicable law and the application of legal rules to the facts of a particular case. The general rule in subsection (3) concerning conclusions of law is not subject to exceptions under § 7.07B.

Most findings of fact at sentencing remain the province of the trial court, even following the Supreme Court's landmark cases on the Sixth Amendment jury-trial right at sentencing in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005). Trial courts may still determine all facts that mitigate a sentence, and there is no constitutional rule that requires a jurisdiction to impose any particular burden of proof on these factual questions—though concerns of fairness to the prosecution suggest that parity in the burden between mitigating and aggravating circumstances is proper. Most, but not all, facts in aggravation of sentence may also be determined by courts at sentencing. Sentencing judges may make findings of aggravating circumstances used to select between penalties within presumptive ranges or other presumptive rules laid out in guidelines or statutes. They may find aggravating facts used to raise a minimum sentence within a preexisting penalty ceiling. They may find aggravating facts used to select between concurrent and consecutive sentences following a defendant's conviction on multiple charges. They may make findings concerning the existence of a defendant's prior convictions. Only "penalty-ceiling enhancement facts," as defined in § 7.07B(1), fall outside the court's constitutional factfinding power at sentencing, and must, in the absence of waiver by the defendant, be determined by juries using a reasonable-doubt standard.

e. General burden of proof at sentencing. With the exception of penalty-ceiling enhancement facts as defined in § 7.07B, the Constitution requires no burden of proof for the resolution of factual issues at sentencing. A jurisdiction, consistent with existing federal constitutional law, may select any burden it wishes, or may designate no formal burden at all, leaving the issue to the discretion of sentencing courts.

Subsection (4) adopts the policy choice on this issue of the overwhelming majority of states that have adopted presumptive sentencing systems similar to the one recommended in the revised Code. These states have specified a general burden of proof of a preponderance of the evidence at sentencing proceedings.

The propriety of this burden must be evaluated in light of the factual considerations that are eligible for resolution at sentencing. Under the Code, alleged criminal acts other than those for which convictions have been obtained may not be urged by the government in sentencing proceedings; see § 6B.06(2)(b). Thus, factfinding at sentencing is "interstitial"—it cannot stray

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from the formal conviction to unconvicted criminal conduct, but must work within the parameters of the current conviction along with the defendant's prior convictions.

f. Findings of fact and conclusions of law. In a sentencing system committed to a rational process for the rendering of criminal punishment, it is essential that the court's reasons for imposition of a particular sentence be transparent and reviewable. Subsections (3) and (5) ensure that this will occur in all instances where the court's reasoning might otherwise be opaque by requiring an on-the-record explanation for all relevant findings of fact and conclusions of law made at sentencing and shortly thereafter.

REPORTERS' NOTE [134]

b. Reference to rules of criminal procedure. Consistent with subsection (1), many jurisdictions set out detailed procedures for sentencing in court rule rather than in statute. See Ala. R. Crim. P. 26 (2015); Md. R. §§ 4-341 to -343 (2015); Mich. Ct. R. Crim. P. 6.425(E) (2014); Minn. R. Crim. P. 27.03 (2015); Ohio R. Crim. P. 32 (2013); Pa. R. Crim. P. 700-06 (2013); Tenn. R. Crim. P. 32 (2006); Utah R. Crim. P. 22 (2008).

e. General burden of proof at sentencing. Except for factfinding subject to the Sixth Amendment jury-trial guarantee at sentencing, see § 7.07B, many states impose the preponderance-of-the-evidence standard for factual determinations at sentencing hearings. See Alaska Stat. § 12.55.025(i) (2013); Ariz. Rev. Stat. Ann. § 13-701(F) (2014); N.C. Gen. Stat. § 15A-1340.16(a) (2015); Pa. Sentencing Guidelines Standards 67 (2005); Wash. Rev. Code § 9.94A.530(2) (2008); see also ABA Standards for Criminal Justice: Sentencing § 18-5.18(a)(i) (1994) (recommending preponderance standard).

f. Findings of fact and conclusions of law. American jurisdictions sometimes require that the court's resolution of issues presented during sentencing proceedings must be explained in writing, but it is more common to allow the court the option of stating its reasoning on the record. See Kan. Stat. Ann. § 21-6817(a)(2) (2011) (allowing either method); Minn. Stat. § 244.10 subdiv. 1 (2009) (requiring "written findings of fact and conclusions of law"); 204 Pa. Code § 303.1(d) (2015) (requiring a statement of the reasons for a sentencing decision "in open court"); Wash. Rev. Code § 9.94A.500(1) (2014) (requiring "written findings of fact and conclusions of law"); Wis. Stat. § 973.017(10m) (2014) (requiring a statement of the reasons for a sentencing decision "in open court" unless a written statement better suits the defendant's interests). Under subsections (3) and (5), either method would suffice.

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[134] This Reporters' Note has not been revised since § 7.07A's approval in 2007, except for changes relevant to the provision's 2016 amendments. All Comments will be updated for the Code's hardbound volumes.

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1 **§ 7.07B. Sentencing Proceedings; Jury Factfinding.** [135]

2 **(1) "Jury-sentencing facts," for purposes of this Section, are facts that, under the**
3 **federal or state constitution, must be found by a jury before those facts may serve as a basis**
4 **for a sentencing decision.**

5 **(2) Except as provided in subsection (8), unless admitted by the defendant, a jury-**
6 **sentencing fact may not form the basis of a sentencing decision unless it is first tried to a**
7 **jury and proven beyond a reasonable doubt.**

8 **(3) The government must provide prior written notice to the defendant of its intention**
9 **to establish one or more jury-sentencing facts.**

10 **(a) Notice must be given no later than [20] days before trial or entry of a guilty**
11 **plea, although later notice may be permitted by the court upon a showing of good**
12 **cause for delay. The timing of notice must in all cases allow the defendant reasonable**
13 **time to prepare for the proceeding at which the existence of the jury-sentencing fact**
14 **will be determined**

15 **(b) The court may foreclose presentation of evidence on an alleged jury-sentencing**
16 **fact if the court finds that, even if the fact were proven, it would not affect the court's**
17 **sentencing decision.**

18 **(4) Factual issues under this Section may be determined along with guilt or innocence**
19 **in a bifurcated sentencing factfinding proceeding or in bifurcated jury deliberations at**
20 **trial, as the court determines in the interest of justice.**

21 **(a) The jury shall be instructed to return a special verdict as to each alleged jury-**
22 **sentencing fact.**

23 **(b) In a case that has gone to trial, the sentencing proceeding ordinarily should be**
24 **conducted before the trial jury as soon as practicable after a guilty verdict has been**
25 **returned. In addition to evidence presented by the parties at the bifurcated proceeding,**
26 **the jury may consider relevant evidence received during the trial.**

27 **(c) When necessary, the court shall impanel a new jury for a bifurcated**
28 **proceeding. The selection of jurors shall be governed by the rules applicable to the**
29 **selection of jurors for the trial of criminal cases.**

30 **(5) The law and rules of criminal trial procedure and pretrial discovery shall apply at a**
31 **bifurcated proceeding.**

[135] This Section was originally approved in 2007; see Tentative Draft No. 1. This draft adds amendments recommended by the Reporters as indicated above, which have been approved by the Council.

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(6) Determination of the existence of a jury-sentencing fact shall not control the court's decision as to whether a specific penalty is appropriate under applicable legal standards. Discretion as to the weight to be given the jury-sentencing fact remains with the court.

(7) The court may on its own motion raise any factual consideration that would be open to the government under subsection (3). If the court elects to do so, the court shall invite the parties to present evidence and arguments on the issue at trial or at a bifurcated proceeding, consistent with subsections (4) and (5), and may on its own motion, when sufficient evidence has been presented, instruct the jury to make a finding under subsection (4)(a). The court shall allow the parties reasonable time to prepare for the proceeding at which the existence of the fact will be determined.

(8) The defendant may waive the right to jury determination of facts under this Section, provided the waiver is knowing and intelligent. The rules of procedure that govern a defendant's waiver of the right to a jury trial on the issue of guilt shall apply to a waiver of a defendant's rights under this provision. Upon receipt of a defendant's waiver, the court shall make findings of fact under this Section. For facts not admitted by the defendant, the court shall employ the reasonable-doubt standard of proof.

The Reporters' proposed changes in this provision,
already approved by the Council, are indicated
below:

§ 7.07B. Sentencing Proceedings; Jury Factfinding.

(1) "Jury-sentencing facts," for purposes of this Section, are facts that ~~subject to a defendant's right~~, under the federal or state constitution, ~~to trial by~~ must be found by a jury before those facts may serve as a basis for a sentencing decision.

(2) Except as provided in subsection (8), unless admitted by the defendant, a jury-sentencing fact may not form the basis of a sentencing decision unless it is first tried to a jury and ~~Jury-sentencing facts must be tried to a jury unless the right to jury determination is waived by the defendant. They must be~~ proven beyond a reasonable doubt ~~unless admitted by the defendant~~.

(3) The government must provide prior written notice to the defendant of its intention to establish one or more jury-sentencing facts.

(a) Notice must be given no later than [20] days before trial or entry of a guilty plea, although later notice may be permitted by the court upon a showing of good cause for delay. The timing of notice must in all cases allow the defendant reasonable time to prepare for the proceeding at which the existence of the jury-sentencing fact will be determined.

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~~**(b) In seeking an aggravated departure from a presumptive penalty ceiling in the sentencing guidelines, the government shall not be limited to aggravating factors enumerated in the guidelines. The court shall rule on the legal sufficiency of nonenumerated aggravating factors put forward by the government.**~~

(b~~c~~) The court may foreclose presentation of evidence on an alleged jury-sentencing fact if the court finds that, even if the fact were proven, it would not affect the court's sentencing decision.

(4) Factual issues under this Section may be determined along with guilt or innocence in a unitary trial, in a bifurcated sentencing factfinding proceeding, or in bifurcated jury deliberations at trial, as the court determines in the interest of justice. The court shall hold a bifurcated proceeding when consideration of a jury-sentencing fact at trial would be unfairly prejudicial to the defendant or the government.

(a) The jury shall be instructed to return a special verdict as to each alleged jury-sentencing fact.

(b) If the court determines that a bifurcated proceeding is appropriate in a case that has gone to trial, the proceeding ordinarily should be conducted before the trial jury as soon as practicable after a guilty verdict has been returned. In addition to evidence presented by the parties at the bifurcated proceeding, the jury may consider relevant evidence received during the trial.

(c) When necessary, the court shall impanel a new jury for a bifurcated proceeding. The selection of jurors shall be governed by the rules applicable to the selection of jurors for the trial of criminal cases.

(5) The law and rules of criminal trial procedure and pretrial discovery shall apply at a bifurcated proceeding.

(6) Determination of the existence of a jury-sentencing fact shall not control the court's decision as to whether a specific penalty is appropriate under applicable legal standards. Discretion as to the weight to be given the jury-sentencing fact remains with the court.

(7) The court may on its own motion raise any factual consideration that would be open to the government under subsection (3). If the court elects to do so, the court shall invite the parties to present evidence and arguments on the issue at trial or at a bifurcated proceeding, consistent with subsections (4) and (5), and may on its own motion, when sufficient evidence has been presented, instruct the jury to make a finding under subsection (4)(a). The court shall allow the parties reasonable time to prepare for the proceeding at which the existence of the fact will be determined.

(8) The defendant may waive the right to jury determination of facts under this Section, provided the waiver is knowing and intelligent. The rules of procedure that govern

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a defendant's waiver of the right to a jury trial on the issue of guilt shall apply to a waiver of a defendant's rights under this provision. Upon receipt of a defendant's waiver, the court shall make findings of fact under this Section. For facts not admitted by the defendant, the court shall employ the reasonable-doubt standard of proof.

Comment: [136]

a. Scope. This provision appends a procedure for jury factfinding at sentencing onto the general procedural rules set forth in § 7.07A, designed to ensure that defendants' rights under the Sixth Amendment are safeguarded with respect to jury-sentencing facts, while preserving judicial discretion in all cases to fix punishment based on the factual record. The jury factfinding process is limited to those instances where it is required by the Constitution. The need for jury factfinding proceedings is eliminated when a defendant admits relevant facts or waives the right to jury factfinding, allowing the court to find all necessary facts to the requisite degree of certainty. Experience in the states suggests that defendants may waive this right with some frequency.

Subsection (1) introduces the term, "jury-sentencing facts" to define facts relevant to sentencing that fall within the Sixth Amendment right to trial by jury. Subsection (2) provides that jury-sentencing facts must be tried to a jury under the reasonable-doubt standard, unless the facts are admitted by the defendant or the right to a jury trial is waived. Subsection (3) requires the government to provide adequate notice of its intention to prove facts that give rise to the jury-trial right at sentencing, and clarifies that there is no need for a jury proceeding if the court finds that the disputed facts are irrelevant to the court's sentencing decision. Subsection (4) provides several options for presenting information to the jury for factual resolution, including the submission of the disputed factual question during the guilt phase of trial, or in a separate proceeding at or after trial. Regardless of the method chosen, the jury proceedings should be held expeditiously. The jury must return a special verdict form for every relevant contested fact. Subsection (5) specifies that in any bifurcated proceeding, the ordinary rules of pretrial discovery and trial procedure are applicable. Subsection (6) emphasizes that the jury's resolution of a disputed issue does not control the judge's sentencing decision. The court remains free to assign as much or as little weight to the facts found by the jury as the court deems proper. Subsection (7) allows the court to raise additional factual questions for jury resolution not raised by the government. In doing so, the court must ensure that the defendant is given adequate notice before the factfinding proceeding. Subsection (8) allows the defendant to waive the right to jury determination of facts under this Section, provided the waiver is knowing and intelligent. The court will then make findings of fact, employing the reasonable-doubt standard of proof for facts not admitted by the defendant.

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[136] This Comment has not been revised since § 7.07B's approval in 2007, except for changes relevant to the provision's 2016 amendments. All Comments will be updated for the Code's hardbound volumes.

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b. Factfinding covered by this provision. Most factfinding at sentencing is best performed by the sentencing court. The Sixth Amendment requires an exception to this general rule in one circumstance: Whenever the government, following conviction for an offense that triggers the Sixth Amendment right to a jury trial, must prove a fact in order to expose the defendant to a greater penalty for an offense than would otherwise be permitted in statute, sentencing guidelines, or other state-law limitations, the defendant has the right to have that sentencing fact proven to a jury beyond a reasonable doubt. (Currently, the only exception to this rule is proof of a defendant's prior convictions, which current Supreme Court law does not require be submitted to a jury.) Subsection (2) defines jury-sentencing facts to be coextensive with governing constitutional cases so that § 7.07B's coverage will remain reflective of the breadth of Sixth Amendment doctrine, even if future rulings from the Court add or subtract from the categories of facts that must be tried to a jury at sentencing.

Under current Sixth Amendment law, the factual basis for an aggravated departure from a presumptive sentence or other presumptive rule contained in sentencing guidelines will often qualify as a jury-sentencing fact. See § 7.XX(2)(a). Likewise, the factfinding prerequisites for an extraordinary upward departure from a heavy presumption created by the legislature or courts will ordinarily be governed by this provision. See § 7.XX(3)(a). Under current federal law, however, if either kind of departure is based on the defendant's criminal history, factual inquiry into the existence of prior convictions is governed by § 7.07A.

c. Notice to the defendant. Subsection (3) does not require that jury-sentencing facts must be alleged in an original charging document. The Supreme Court has held that jury-sentencing facts are the "functional equivalent" of elements of offenses for purposes of the Sixth Amendment jury-trial guarantee, but the Court has never held that they are elements of offenses for other purposes. Consistent with all state legislation on the subject, § 7.07B does not treat jury-sentencing facts as elements of offenses. The provision does assume, however, that due process guarantees in federal and state law will require that the defendant receive timely notice of any alleged jury-sentencing fact in the case, and be given adequate opportunity to prepare to challenge the existence of the fact in a jury proceeding.

The government seldom concludes its investigation of a criminal case with the filing of charges, but generally completes its inquiry in advance of trial. While it would impose heavy new burdens on prosecutors, particularly in state systems, to allege jury-sentencing facts in original charging documents, it is not unduly onerous, as a general rule, to require written notice of such facts within a reasonable interval before the trial. Subsection (3), in bracketed language, suggests 20 days before trial as a feasible deadline for all parties in most cases.

Subsection (3)(a) further recognizes that the general deadline for notice will not be workable in all cases. In some instances, the government may become aware of important sentencing considerations shortly before trial, during the trial, or shortly afterward. Subsection (3)(a) grants the courts leeway, upon a showing of good cause for delay, to permit notice of jury-sentencing

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facts later than normally envisioned in the subsection. Good cause should be held not to exist whenever the government or court knew, or should have known, of the jury-sentencing fact at an earlier time.

The final sentence of subsection (3)(a) imposes a critical limitation upon the permissible delay: The timing of notice must in all cases allow the defendant reasonable time to prepare for the proceeding at which the existence of a jury-sentencing fact will be determined. In some instances, this may necessitate a continuance of the trial date, an order of a bifurcated-jury sentencing proceeding not originally contemplated by the court, or the continuation of a bifurcated proceeding.

d. Preemptive orders by the court. There is no reason to engage in a jury factfinding process at sentencing where it would be an idle exercise. Subsection (3)(b) gives the court authority to cut short proceedings on allegations of jury-sentencing facts when the court concludes that an alleged jury-sentencing fact, even if proven by the government, would have no influence on the final sentencing determination in the case. Perhaps the alleged fact is trivial; perhaps there are overwhelming mitigating circumstances in the case that outweigh the alleged aggravating factor; perhaps there are independent aggravating factors that have already been admitted by the defendant or that do not require jury factfinding at sentencing. In instances like these, if the court concludes that the existence of the alleged fact would not change the result, there is no reason to convene jury factfinding proceedings.

e. Unitary versus bifurcated proceedings. Section 7.07B calls for bifurcated jury deliberations following trial, first on the issue of guilt, and second on the question of jury-sentencing facts. No new evidence need be received prior to the jury's second deliberation; see subsection (4)(b). Bifurcated deliberations avoid over-long instructions at either stage, head off the possibility that "sentencing instructions" may convey to the trial jury that the defendant's guilt has been assumed in advance, and avoid placing the defendant in the uncomfortable position of contesting guilt at trial while, in the alternative, arguing that he committed the crime in a manner that does not justify an enhanced penalty.

f. Jury procedures borrowed from trial practice. Section 7.07B relies on familiar jury procedures, and imports preexisting rules into the sentencing factfinding context. Indeed, for most cases tried before a jury, § 7.07B borrows the trial jury itself to serve as sentencing factfinder. The trial jury will perform this function at a bifurcated sentencing proceeding held "as soon as practicable" after the return of a verdict of guilt.

Under subsection (4)(a), the jury shall be instructed as to the jury-sentencing facts it is asked to determine, and required to return a special verdict as to each alleged fact.

The second sentence of subsection (4)(b) recognizes that, where a bifurcated proceeding follows a jury trial, much or all of the evidence relevant to the existence of a jury-sentencing fact may already have been received at trial. Therefore, the jury is permitted to consider relevant evidence it has already heard, together with any additional evidence the parties choose to present

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1 at the bifurcated hearing. In some cases, this will allow for brief presentations of evidence at the
2 bifurcated proceeding. It will sometimes be the case that no new evidence need be presented at
3 all. In such instances, the bifurcated proceeding will consist of new instructions to the jury, and a
4 second round of deliberations for the resolution of jury-sentencing facts.

5 Subsection (4)(c) recognizes that it may be necessary on occasion to impanel a wholly new
6 jury for sentencing factfinding proceedings. It authorizes trial courts to do so, and imports the
7 rules otherwise applicable for the selection of jurors for the trial of criminal cases.

8 *g. Trial rules borrowed for bifurcated sentencing proceedings.* Subsection (5) ensures that
9 constitutional and subconstitutional trial protections for criminal cases will apply with equal
10 force to a bifurcated sentencing proceeding. The drafters intend subsection (5) to embrace
11 constitutional trial safeguards, statutory law of trial procedure, rules of criminal procedure, and
12 rules of evidence.

13 *h. Preserving judicial sentencing discretion.* Subsection (6) makes clear that the jury's role
14 at sentencing extends only to factfinding that is required by the Constitution, and does not
15 intrude upon the court's ultimate discretion to determine an appropriate penalty based on the
16 factual record. A sentencing court's discretion can be exercised only in the context of applicable
17 legal standards. For example, a jury finding of the existence of an aggravating factor may be a
18 legal prerequisite for the imposition of an aggravated sentence, but the jury's finding does not
19 oblige the judge to impose an aggravated penalty. Under the Code's sentencing scheme, an
20 aggravating factor supplies a basis for an upward departure from the guidelines only when it is a
21 "substantial circumstance," measured against the purposes of sentencing and corrections in
22 § 1.02(2), that takes the case "outside the realm of an ordinary case within the class of cases
23 defined in the guidelines." See § 7.XX(2) and (2)(a). It remains the judge's province to apply all
24 relevant legal analyses to the facts of each case.

25 Further, the determination of jury-sentencing facts is only one small part of the total
26 factfinding at sentencing proceedings. In a typical case, most of this factfinding will be
27 performed by the judge under § 7.07A, including all mitigating factors present in the case, and
28 all aggravating factors that do not trigger Sixth Amendment protections. The jury's resolution of
29 a subset of factual controversies at sentencing can play only a fractional role in the total process.

30 Finally, and most importantly, a driving philosophy of the Model Penal Code: Sentencing
31 revision is that the judiciary should be the central and most powerful institution within the
32 multilevel, multi-actor system for criminal sentencing. Sentencing discretion is better entrusted
33 to judges than other actors in the system, including legislatures, commissions, prosecutors,
34 probation officers, corrections officials, and parole boards—and ultimate discretion for imposing
35 sentences is better entrusted to judges than juries.

36 *i. Judge-initiated jury factfinding at sentencing.* Before the Supreme Court's cases creating
37 Sixth Amendment rights in the sentencing process, all American states allowed trial courts to
38 respond to aggravating factors at sentencing beyond those formally urged by the government.

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Some have thought this an important check on prosecutorial power in the sentencing process. Without judicial authority to initiate consideration of an aggravated penalty, the relevant gatekeeping decisions devolve solely to prosecutors.

The mandate of jury factfinding at sentencing could work as an intrusion upon judges' authority to consider aggravating circumstances not raised by the government. The requirement of advance notice to the defendant of an alleged jury-sentencing fact, which ordinarily must occur before trial (see subsection (3)), cannot in most cases be satisfied by the court. Indeed, the trial court is most likely to develop an independent theory of aggravation only after hearing the evidence in the case, receiving a guilty-plea colloquy, or studying a presentence report or victim impact statement. In all of these instances, a fixed requirement of pretrial notice to the parties of the court's intention to consider an aggravating circumstance would preclude the court's consideration altogether.

Subsection (7) preserves the sentencing court's authority to initiate the departure process, and retains as closely as possible the status quo before *Blakely*. The subsection provides an open-ended timeline in which the court may notify the parties of the court's intention to consider the existence of one or more jury-sentencing facts not raised by the parties. Subsection (7) includes the same functional limitation as imposed upon the latest possible governmental notice under subsection (3): The timing of the court's notice must allow the parties reasonable time to prepare for the proceeding at which the existence of a jury-sentencing fact will be determined. Given the realities of judicial participation in the process, a court-initiated determination of a jury-sentencing fact will usually occur at a bifurcated factfinding proceeding, and may in some cases necessitate a continuance of sentencing proceedings.

Subsection (7) allows the court on its own motion to raise any factual issue that the government could have raised under subsection (3). This includes factors in aggravation of sentence that are enumerated in sentencing guidelines, and nonenumerated factors deemed legally sufficient by the court under the overarching purposes of § 1.02(2).

Under subsection (7), the court can do no more than invite the parties to present evidence concerning a jury-sentencing fact identified by the court. It cannot force the government to put on a case—and the presentation of an unenthusiastic prosecutor may fall short with a sentencing jury. Indeed, in some cases the government may feel constrained against putting on evidence by the terms of a plea agreement. All of these considerations, however, existed in presumptive sentencing systems before the advent of new Sixth Amendment requirements. They did not then, and do not now, extinguish the prospect of substantial judicial participation in the factfinding process.

First, a judge-initiated proceeding for the determination of a jury-sentencing fact may be grounded in evidence the jury has already heard at trial. In such a case, the court's invitation to the parties under subsection (7) would extend to any additional evidence they may wish to bring forward. Even in the absence of supplemental submissions by the parties, the evidence at trial

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may be sufficient to support an instruction to the jury under subsection (4)(a). In cases where the defendant has waived the right to a jury at sentencing (see subsection (8)), the judge-initiated process, leading to a finding under subsection (4)(a), may be based on facts already developed at trial, in guilty-plea proceedings, or a presentence report. See § 7.07A(2).

Second, prosecutors will often be willing to present additional evidence at the court's invitation. In many instances, the court's notice under subsection (7) will be a welcome event from the government's perspective.

j. Waiver. Just as the overwhelming majority of criminal defendants waive their right to a jury on the issue of guilt or innocence, most can be expected to waive their Sixth Amendment right to jury resolution of jury-sentencing facts. Subsection (8) recognizes this reality and provides a procedural framework for Sixth Amendment waivers at sentencing that borrows from the rules applicable to Sixth Amendment waivers at trial.

A defendant's choice to waive Sixth Amendment rights at trial is a separate matter from the waiver decision at sentencing. Subsection (8) does nothing to link the two forms of waiver. Under the revised Code, it is possible for a defendant to waive a jury at trial, or to plead guilty, while preserving the right of jury resolution of facts at sentencing. It is likewise possible for a defendant to insist upon a jury trial on the issue of guilt, while waiving the jury or admitting to jury-sentencing facts for purposes of sentencing proceedings.

Subsection (8) allows for two degrees of waiver. A defendant may waive the right to jury determination of factual issues without admitting the existence of those facts. In such a case, jury-sentencing facts may be determined by the court under the reasonable-doubt standard. The court's factual determinations may be made in unitary or bifurcated proceedings pursuant to subsection (4), and must be made under the reasonable-doubt standard. Alternatively, a defendant may admit the existence of jury-sentencing facts as part of a knowing and intelligent waiver consistent with subsection (8).

Under subsection (8), a defendant may elect to waive Sixth Amendment rights at sentencing with respect to some jury-sentencing facts but not others. Subsection (2) excepts facts waived or otherwise admitted by the defendant from the jury factfinding requirement. This exception only applies to facts admitted by the defendant in court. A defendant's admission to law-enforcement officers must still be found true beyond a reasonable doubt by a jury in order to be used as the basis for an aggravated sentence.

k. States choosing an advisory-guidelines system. Under the current Sixth Amendment jurisprudence, factfinding under advisory sentencing guidelines does not raise Sixth Amendment jury-trial concerns at sentencing. Even so, states choosing to adopt advisory guidelines have good reason to adopt this provision. First, the Supreme Court's Sixth Amendment doctrine, which changed substantially over a brief period in the early 2000s, may someday enlarge to impose jury-trial requirements on some categories of factfinding in advisory systems that now appear to be exempt. Second, some states may have statutory or common-law sentence

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1 enhancements—independent of their advisory guidelines—that trigger the Sixth Amendment
2 jury-trial guarantee. This provision operates as a safety net whenever a legislature has not
3 foreseen a specific area of Sixth Amendment difficulty. At the same time, the generic, and
4 mutable, definition of "jury-trial facts" in subsection (1) ensures that the provision will lie
5 dormant in the absence of constitutional imperative.

6 **REPORTERS' NOTE**[137]

7 *a. Scope.* The Supreme Court has recognized a Sixth Amendment guarantee of jury factfinding at sentencing
8 applicable to certain categories of facts under presumptive sentencing guidelines or presumptive statutory sentencing
9 schemes. See Cunningham v. California, 549 U.S. 270, 275, 293 (2007) (holding that, under California statutory
10 sentencing scheme, defendant has right to jury determination of aggravating circumstance beyond reasonable doubt
11 if establishment of the circumstance is legally required before judge may impose a penalty above the statutory
12 presumptive penalty); United States v. Booker, 543 U.S. 220, 224 (2005) (holding that, under federal sentencing
13 guidelines, defendant has right to jury determination of facts beyond reasonable doubt if the establishment of those
14 facts is legally required before judge may impose increased penalties under the guidelines); Blakely v. Washington,
15 542 U.S. 296, 303-305 (2004) (holding that, under Washington sentencing guidelines, defendant has right to jury
16 determination of aggravating fact beyond reasonable doubt if establishment of the fact is legally required before
17 judge may impose a penalty above the presumptive-guidelines range).

18 The constitution requirement of jury factfinding at sentencing has many exceptions: (1) Proof at sentencing of
19 the fact of a defendant's prior conviction is exempt from the Sixth Amendment jury-trial requirement. See *Blakely*,
20 542 U.S. at 301; Almendarez-Torres v. United States, 523 U.S. 224, 243-244 (1998). (2) Factfinding at sentencing
21 required for imposition of a mitigated punishment is outside the Sixth Amendment. See *Blakely*, 542 U.S. at 301;
22 Patterson v. New York, 432 U.S. 197, 207-208 (1977). (3) Judicial factfinding at sentencing raises no Sixth
23 Amendment issues when used to fix a penalty within the broad statutory ranges typically found in indeterminate
24 sentencing systems. See *Blakely*, 542 U.S. at 304-305; Williams v. New York, 337 U.S. 241, 252 (1949). (4) An
25 otherwise sharply divided Court in *Booker* was in unanimous agreement that the Sixth Amendment jury-trial
26 guarantee did not apply to judicial factfinding at sentencing under advisory sentencing guidelines. United States v.
27 Booker, 543 U.S. 220, 233 (2005) (Stevens, J., opinion of the Court); id. at 259 (Breyer, J., opinion of the Court).

28 The *Blakely* decision in 2004 prompted many states to conclude that their sentencing systems ran afoul of new
29 Sixth Amendment requirements. See Jon Wool and Don Stemen, Aggravated Sentencing: Blakely v. Washington:
30 Practical Implications for State Sentencing Systems, Vera Inst. of Just. St. Sent'g & Corrections Police & Prac.
31 Rev., Aug. 2004, at 3, available at http://www.vera.org/sites/default/files/resources/downloads/PPR82004.pdf
32 (reporting 13 state sentencing systems "fundamentally affected by Blakely" and eight "possibly affected by
33 Blakely"). A number of states responded with legislation that created jury factfinding procedures for determination
34 beyond a reasonable doubt of facts that increase the maximum penalty to which a defendant is exposed. See Alaska
35 Stat. §§ 12.55.155(f) (2014); Minn. Stat. § 244.10, subdiv. 5 (2009); Minn. R. Crim. P. 27.03 (2015); N.C. Gen.

[137] This Reporters' Note has not been revised since § 7.07B's approval in 2007, except for changes relevant to the provision's 2016 amendments. All Comments will be updated for the Code's hardbound volumes.

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Stat. § 15A-1340.16(a1) (2013); Wash. Rev. Code §§ 9.94A.535, 9.94A.537 (2013). Colorado has achieved a similar result through judicial ruling. See Lopez v. People, 113 P.3d 713, 716 (Colo. 2005) (en banc).

The states that have created a jury factfinding mechanism for sentencing decisions have designed the new process to apply only when it is constitutionally required. In most of these states, very few cases are affected. Shortly after *Blakely* was decided in 2004, sentencing commissions across the country produced data on the numbers of sentence proceedings potentially subject to the new requirement of jury factfinding. David Boerner, Chair of the Washington Sentencing Commission (and an Adviser to the Model Penal Code revision), reported the following for Washington State: In the year prior to *Blakely*, there had been only 628 aggravated departures among the 27,000 felony cases sentenced in the state. A mere 101 of those were contested cases that might have called for a factfinding jury at sentencing. See Laurie P. Cohen & Gary Fields, Court Ruling Causes Tumult in Sentencings, Wall Street J., June 28, 2004, at B1 (quoting Boerner), available at http://online.wsj.com/articles/SB108837351099048581. Sentencing commissions in other states likewise concluded that only tiny percentages of sentences would fall within the new Sixth Amendment requirements. See, e.g., Minn. Sentencing Guidelines Comm'n, The Impact of *Blakely v. Washington* on Sentencing in Minnesota: Long Term Recommendations (2004), available at http://mn.gov/sentencing-guidelines/images/Long%2520Term.pdf.

These findings comported with actual experience in Kansas, where a Sixth Amendment jury factfinding procedure had been mandated by a state supreme court decision that accurately anticipated *Blakely* three years before the Supreme Court's ruling. See State v. Gould, 23 P.3d 801 (Kan. 2001). Kansas legislation, enacted in 2002, created a limited jury factfinding process when constitutionally required at sentencing. Kan. Stat. Ann.§§ 21-6815(b), 21-6817(b) (2015). In the ensuing years, the Kansas sentencing system suffered little disruption from the new jury factfinding procedure. Only a small minority of all criminal cases were affected, most of these were resolved in plea bargaining, and the few cases that actually used the new procedures were resolved with little added time and effort. See Adam Liptak, Justices' Sentencing Ruling May Have Model in Kansas, N.Y. Times, July 13, 2004, at A12, available at http://www.nytimes.com/2004/07/13/politics/13legal.html; Brief of Kansas Appellate Defender Office as Amicus Curiae in Support of Petitioner at 6-7, Blakely v. Washington, 542 U.S. 296 (2004) (No. 02-1632). In July 2004, the Reporter and Judge Richard Walker, a Kansas trial-court judge, former Chair of the Kansas Sentencing Commission, and an Adviser to the Model Penal Code revision, undertook an informal investigation of the Kansas experience. In telephone interviews with judges, prosecutors, and defense counsel across the state, we did not find anyone who believed that the post-*Gould* statutory changes had had appreciable effect on the operation of the Kansas sentencing system. Even in light of subsequent changes to Kansas law that potentially require more jury factfinding, see State v. Horn, 238 P.3d 238, 246 (Kan. 2010) (finding a strict application of § 21-4718(b) (recodified at § 21-6817(b)), mandating that the court find departure facts when defendant waived trial jury, unconstitutional); State v. Astorga, 324 P.3d 1046 (Kan. 2014) (finding unconstitutional Kansas statute that permitted court to find facts necessary to trigger mandatory-minimum penalty), there are no reports that the state has had difficulty meeting constitutional expectations in the area of jury sentencing proceedings.

A decade after *Blakely*, most state sentencing systems have adapted fully to Sixth Amendment jury factfinding requirements at sentencing. Nearly all states with systems similar in structure to the recommendations in the revised Model Penal Code have enacted legislation similar to § 7.07B. The near-consensus in legislative response reflects

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the view that the benefits of a well-designed sentencing system outweigh the small and manageable costs of a limited jury factfinding procedure at sentencing.

b. Factfinding covered by this provision. The definition of "jury-sentencing fact" is adapted from Oregon law. See Or. Rev. Stat. § 136.760(2) (2005) ("'Enhancement fact' means a fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime."). The Code's definition is stated in more open-ended terms than the Oregon example, to allow for the possibility that future Supreme Court decisions may extend the right to jury trial at sentencing beyond facts necessary "to increase the sentence that may be imposed" following conviction.

Other state legislation speaks to categories of sentencing factfinding believed to fall within *Blakely* requirements, with no reference to constitutional mandates. See Kan. Stat. Ann. § 21-6815(b) (2013) ("[A]ny fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt."); Minn. Stat. § 244.10, subdiv. 5 (2009) (creating jury-trial sentencing procedure for "cases where state intends to seek an aggravated departure" from presumptive-guidelines sentence); Wash. Rev. Code § 9.94A.537(1), (3) (2007) (providing that facts subject to new jury-trial procedure are "aggravating circumstances" necessary to support "a sentence above the standard sentencing range" in the guidelines).

The drafters considered an alternative version of subsection (1), which would have defined the facts subject to § 7.07B as "facts determined at sentencing that expose the defendant to a greater punishment for an offense than would otherwise be legally permissible," excluding "[t]he existence of a defendant's prior conviction." See Model Penal Code: Sentencing § 7.07B(1) (Discussion Draft, 2006). This formulation would have restated current Supreme Court precedent. See Comment *a* above. The Institute ultimately rejected this approach out of concern that future Supreme Court rulings might expand or contract the categories of sentencing facts that must be tried to a jury. The final version of subsection (1) was designed to preserve the closest possible fit between statutory and constitutional definitions of jury-sentencing facts.

c. Notice to the defendant. No jurisdiction has treated jury-sentencing facts as full-blown "elements" of offenses that must be set out in the underlying charging documents. In some post-*Blakely* legislation, this is explicit. See Alaska Stat. § 12.40.100(c) (2005) ("An indictment that complies with this section and with applicable rules adopted by the supreme court is valid and need not specify aggravating factors set out in AS 12.55.155."); N.C. Gen. Stat. § 15A-1340.16(a4) (2013) ("Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument.").

Instead, consistent with subsection (3)(a), many jurisdictions have adopted procedures outside of the charging instrument to ensure that the government gives adequate notice to the defendant that a jury-sentencing fact will be raised. See Minn. Stat. § 244.10, subdiv. 5 (2009) (prosecutor must provide "reasonable notice" of intent to seek aggravated sentence through proof of jury-sentencing fact); N.C. Gen. Stat. § 15A-1340.16(a6) (2013) ("The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial or the entry of a guilty or no contest plea."); see also Alaska Stat. § 12.55.155(f)(2)(A), (C) (2014); Kan. Stat. Ann. § 21-6817(b)(1) (2011); Wash. Rev. Code § 9.94A.537(1) (2007).

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e. Unitary versus bifurcated proceedings. For examples of provisions setting out the alternatives of unitary or bifurcated proceedings for the determination of jury-sentencing facts, see Kan. Stat. Ann. § 21-6817(b)(2), (4) (2011); Minn. Stat. § 244.10, subdiv. 5(b) (2013); N.C. Gen. Stat. § 15A-1340.16(a1) (2013); Or. Rev. Stat. § 136.770(1), (4) (2013); Wash. Rev. Code § 9.94A.537(4) (2007). The option of bifurcated jury deliberations—when no new evidence is taken at the second factfinding proceeding—is explicitly recognized in section 244.10 of the Minnesota Statute, subdivision 5(b)(2).

A special verdict is generally required for the jury's determination of a Sixth Amendment sentencing fact. See Kan. Stat. Ann. § 21-6817(b)(7) (2011); Minn. Stat. § 244.10, subdiv. 5(b)(2) (2013); Wash. Rev. Code § 9.94A.537(3) (2007).

f. Jury procedures borrowed from trial practice. For the rare instances in which a new sentencing jury must be impaneled, state law typically provides that jury selection take place under the rules for jury selection at trial. See Kan. Stat. Ann. § 21-6817(b)(4) (2011); N.C. Gen. Stat. § 15A-1340.16(a1) (2013).

g. Trial rules borrowed for bifurcated sentencing proceedings. Most post-*Blakely* legislation does not speak to this question. At least one code provides limited guidance concerning the equivalence between trial rules and those applicable at a bifurcated sentencing proceeding. See Kan. Stat. Ann. § 21-6817(b)(5) (2011) ("Only such evidence as the state has made known to the defendant prior to the upward durational departure sentence proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible.").

h. Preserving judicial sentencing discretion. A jury finding of fact that renders an aggravated penalty legally permissible should not bind the sentencing court to impose the aggravated sentence. Post-*Blakely* legislation and guidelines uniformly preserve judicial discretion to weigh the significance of a jury-sentencing fact against the factual record as a whole before imposing sentence. See Minnesota Sentencing Guidelines & Commentary § 2.D.1 (2014); N.C. Gen. Stat. § 15A-1340.16(a), (b) (2013); Or. Rev. Stat. § 136.785(5) (2014); Wash. Rev. Code § 9.94A.537(6) (2007).

i. Judge-initiated jury factfinding at sentencing. Most post-*Blakely* legislation is silent on this question. Kansas follows the approach recommended in subsection (7). See Kan. Stat. Ann. § 21-6817(a)(3) (2011) ("If the court decides to depart on its own volition, without a motion from the state or the defendant, the court shall notify all parties of its intent and allow reasonable time for either party to respond if requested. The notice shall state the type of departure intended by the court and the reasons and factors relied upon."); § 21-6816(b) ("In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement."); Kansas State Sentencing Guidelines Desk Reference Manual 88 (2013) ("Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines.").

j. Waiver. The Court has been clear that a defendant may waive the right to a jury determination of facts leading to an aggravated or enhanced sentence. See Blakely v. Washington, 542 U.S. 296, 310 (2004) ("[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding."). Procedures for waiver of Sixth Amendment jury-trial rights at sentencing have been specified in every state that has created a jury factfinding procedure at sentencing. Normally, these borrow from or incorporate

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the procedures for waiver of the right to a jury trial on the issue of guilt. See Kan. Stat. Ann. § 21-6817(b)(4) (2011); Minn. Stat. § 244.10, subdiv. 7 (2013); Minn. R. Crim. P. 15.01, subdiv. 2 (2012); N.C. Gen. Stat. § 15A-1340.16(a1) (2013) (incorporating the procedures in § 15A-1022.1); Or. Rev. Stat. § 136.770(1)(b) (2013); Wash. Rev. Code § 9.94A.537(3) (2007).

A waiver of the right to jury determination of facts at sentencing is independent of the decision whether to waive the right to a jury at trial. Although implicit in subsection (8), this disjunction is sometimes underscored through explicit language in state codes. See N.C. Gen. Stat. § 15A-1340.16(a2), (a3) (2013) (providing for jury trial on question of guilt even if sentencing facts are admitted and jury trial at sentencing even if defendant pleads guilty to underlying offense). But see Or. Rev. Stat. § 136.776 (2005) ("When a defendant waives the right to a jury trial on the issue of guilt or innocence, the waiver constitutes a written waiver of the right to a jury trial on all enhancement facts whether related to the offense or the defendant.").

Courts are split on whether courts may base "upward sentencing departures . . . on facts admitted at a sentencing hearing, a plea hearing, or in a plea agreement, without requiring an express waiver of the right to a jury determination of aggravating sentencing factors." State v. Dettman, 719 N.W.2d 644, 653 (Minn. 2006). Some state courts have held that "*Blakely* does not permit sentencing courts to use 'facts . . . admitted by the defendant' in the absence of a waiver of rights by the defendant" (except for prior convictions). People v. Issacks, 133 P.3d 1190, 1195 (Colo. 2006) (en banc) (citations omitted) (quoting Blakely v. Washington, 542 U.S. 296, 303 (2004)); see also *Dettman*, 719 N.W.2d at 650-652. In support of this holding, the Colorado Supreme Court referenced *Blakely*'s language that "[i]f appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Blakely*, 542 U.S. at 310, quoted in *Issacks*, 133 P.3d at 1195.

Subsection (2) follows a number of federal and state courts in allowing "sentencing enhancements. . . based on facts admitted by the defendant when the defendant has not executed a constitutionally sufficient wavier of the right to jury trial on those facts." *Issacks*, 133 P.3d at 1195; see, e.g., United States v. Bartram, 407 F.3d 307, 314-315 (4th Cir. 2005); United States v. Murdock, 398 F.3d 491, 501 (6th Cir. 2005); United States v. Shelton, 400 F.3d 1325, 1328-1330 (11th Cir. 2005). United States v. Pittman, 418 F.3d 704, 709 (7th Cir. 2005); United States v. Monsalve, 388 F.3d 71, 73 (2d Cir. 2004); United States v. Lucca, 377 F.3d 927, 934 (8th Cir. 2004); People v. Fogle, 116 P.3d 1227, 1230 (Colo. App. 2004). These courts reason that a defendant waives his right to jury-factfinding of sentencing facts when he enters into a plea agreement. *Bartram*, 407 F.3d at 314 (citing United States v. Ruiz, 536 U.S. 622, 628 (2002) ("When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees.") and Boykin v. Alabama, 395 U.S. 238, 243 (1969) (including "the right to trial by jury" in a list of constitutional rights waived by a guilty plea)).

Comment *c*, however, limits the facts deemed to be admitted by the defendant to in-court admissions. Although no court has yet imposed this express limitation on what facts the defendant has "admitted" for purposes of sentencing, this limitation is consistent with the cases allowing sentencing enhancements based on facts admitted without a specific waiver. See, e.g., *Bartram*, 407 F.3d at 314-315 (relying on facts "admitted under the guilty plea or expressly in open court"); *Shelton*, 400 F.3d at 1328-1330 (relying on facts admitted during the plea colloquy and sentencing hearing); *Monsalve*, 388 F.3d at 73-74 (relying on facts admitted in a plea agreement); *Lucca*, 377 F.3d at 934 (relying on facts admitted in a plea agreement).

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k. States choosing an advisory-guidelines system. Under current constitutional law, a system of advisory sentencing guidelines does not raise Sixth Amendment jury-trial concerns at sentencing—even if sentencing judges in an advisory system base penalties on the same factual considerations that would trigger Sixth Amendment safeguards in a presumptive-guidelines system. See United States v. Booker, 543 U.S. 220, 233 (2005) (Stevens, J., opinion of the Court); id. at 259 (Breyer, J., opinion of the Court). Consequently, some jurisdictions have responded to *Blakely* and *Booker*'s Sixth Amendment requirements through legislation, court decision, or amendments to sentencing guidelines that have changed formerly enforceable guidelines or statutory sentencing presumptions into advisory prescriptions, thus avoiding the Sixth Amendment jury-trial guarantee. See Ind. Code § 35-50-2-1.3 (2015) (rendering formerly presumptive statutory sentences advisory); Tenn. Code Ann. § 40-35-210(c) (2010) (rendering formerly presumptive statutory sentencing guidelines advisory); *Booker*, 543 U.S. 220 (declaring the federal sentencing guidelines advisory); State v. Foster, 845 N.E.2d 470 (Ohio 2006) (declaring formerly presumptive statutory sentencing guidelines now advisory), abrogated on other grounds by Oregon v. Ice, 555 U.S. 160 (2009), and superseded by statute, Ohio Rev. Code Ann. § 2929.14(C)(4) (West 2012), as recognized in State v. Bonnell, 16 N.E.3d 659, 663-665 (Ohio 2014). In states such as these, the concerns to which § 7.07B are addressed do not arise.

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§ 7.07C. Sentencing Proceedings; Victims' Rights.[138]

(1) For purposes of this Section, a "victim" is any person who has suffered physical, emotional, or financial harm as the direct result of the commission of a criminal offense. If deceased, incapacitated, or a minor, the victim may be represented by the victim's estate, spouse, parent, legal guardian, sibling, grandparent, significant other, or other representative, as determined by the court.

(2) Upon an offender's conviction, in any prosecution for a felony or assaultive misdemeanor in which there is an identifiable victim, the prosecutor shall make reasonable efforts to notify the victim of his or her rights under this Section and that he or she may have the right to victim restitution under § 6.04A.

(3) After being contacted by the prosecutor pursuant to subsection (2), the victim must file a request with the prosecutor in order to receive further notifications under this Section. The request must include the victim's current address or other information necessary to contact the victim.

(4) Victims shall have the right to receive timely notice of and be present at any sentencing hearing in their case.

(5) Victims shall have the right to make a victim impact statement as provided below:

[138] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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(a) The victim may submit a written victim impact statement to the court prior to the sentencing hearing.

(b) The victim may submit a written victim impact statement to the officer responsible for preparing the presentence report for inclusion in the report.

(c) The victim may make an oral victim impact statement of reasonable length at the sentencing hearing.

(d) A victim impact statement may be unsworn~~,~~ unless the victim elects to provide testimony under oath.

(e) A victim impact statement may be made in a form other than those specified in subsection (5)(a) through (d) if approved by the court.

(f) In a case with multiple victims, the court may fashion an appropriate process for receipt of victim impact information at the sentencing hearing.

(6) The content of a victim impact statement shall relate solely to the impact of the crime on the victim and the victim's family. The impact statement may not address alleged criminal conduct for which the defendant has not been convicted.

(7) A victim impact statement may not include a recommendation concerning the sentence to be imposed on the defendant.

(8) Any content of a victim's impact statement not authorized in this Section shall be disregarded by the sentencing court.

(9) Any statement provided to the court prior to the sentencing hearing shall be shared with the defendant and prosecutor within a reasonable time in advance of the hearing. The court shall provide the defendant and prosecutor reasonable opportunity to challenge the factual assertions in a victim's impact statement. If necessary, the court shall adjourn the sentencing hearing to allow reasonable time for the defendant to prepare a response.

(10) If the victim has given sworn testimony at a sentencing hearing, the defendant shall have the right to cross-examine the victim.

(11) A failure to honor a victim's rights under this Section shall not be cause for invalidating a sentence or for the resentencing of a defendant.

Comment:

a. Scope. This provision is new to the Code. It governs victims' rights to be notified, be present, and participate in sentencing proceedings. It reflects the Code's general philosophy as to victims' rights in the sentencing and corrections system, as set forth in the Reporters' Memorandum, Victims' Roles in the Sentencing Process (see Appendix B of this document).

b. State constitutional guarantees. Many state constitutions speak to victims' rights in the judicial sentencing process. In some states, on some issues, constitutional law may impose limits

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on the legislature's discretion to adopt the recommendations of the revised Code. For example, several state constitutions give victims the right to read presentence reports whenever those reports are available to defendants. Such a right is not extended in § 7.07C. Also, reaching beyond the scope of this provision, some state constitutions give victims the right to attend any post-sentencing proceedings that defendants have the right to attend. In the revised Code, victims' rights at later decision points are considered one at a time, including an examination of whether victims' participation would advance the goals of the sentencing system, or would further other legitimate interests without frustrating systemic goals or important rights belonging to defendants.

c. Definition of "victim." The Code opts for a short and straightforward definition that identifies persons who qualify as crime victims under this Section. See also § 6.04A(3) and Comment *h*. In cases where a victim is incapacitated, deceased, or a minor, the courts are given authority to recognize persons who can stand in the victim's stead. Difficult factual issues can occur, as when a person claiming to represent the victim expresses views different from the victim's own, or when a deceased victim's family members are at odds with each other as to the contents of an impact statement. Rather than attempt a statutory solution to problems of this kind, discretion is reposed with the sentencing court.

d. Victims' rights to notification. State codes usually require that victims must be given notifications of their rights, and hearings and other events, at various stages of sentencing proceedings. State rules for provision of notice vary considerably. Usually it is the prosecutor who must convey required notifications, although sometimes courts and probation officers have such duties, or the courts are obliged to inquire whether notification has been made or attempted. In many states, the notice-giving official is required to make no more than reasonable efforts to contact victims. Successful communication is not required in every case.

To raise the chances of success in reaching crime victims, and to cut down the workload of notice-giving officials, many states provide that victims must file formal requests of some kind if they wish to receive notifications of sentencing proceedings. Victims are also made responsible for providing and updating their contact information as needed. So long as the notice-giving official does not make it difficult to file such requests, this approach makes eminent sense. Resources should not be expended in contacting victims who do not wish to be reached, and the state's efforts are best concentrated on victims who have affirmatively signaled their interest in remaining involved in the case. Moreover, it takes far less effort on victims' part to provide current information than it would take government officials to update or search out missing addresses and phone numbers.

The revised Code adopts a two-tiered approach to victim notification in this Section. The first notice requirement in § 7.07C(2)—immediately following an offender's conviction—mandates that prosecutors expend "reasonable efforts" to reach the victim in every case involving a felony or assaultive misdemeanor. The purpose of this initial contact is to give

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victims a roadmap of their rights under § 7.07C and alert them to their potential right to victim restitution under § 6.04A. The remaining notice requirements in § 7.07C are not triggered unless the victim has made a formal request for notification under subsection (3).

The revised Code does not require courts to inquire at sentencing whether prosecutors have fulfilled their duties under subsection (2). Such a requirement exists in some states and in Canadian law.

e. Presentence report. Many states require that portions of presentence reports must be shared with victims. A common approach is to require disclosure to the victim of any parts of a presentence report that have been provided to the defendant. Despite the ubiquity of such laws, the Code rejects this approach. Victims have no interest in viewing presentence reports that the Code is prepared to recognize. Victims' substantive contributions to the sentencing proceeding depend on their firsthand knowledge of the harms they have suffered, and the manner in which the offense was committed. They have no freestanding interest that allows them to speak to the ultimate sentence imposed by the court, and no generalized claim of access to information or recommendations contained in the report. Some readers of an early draft of this provision commented that other persons who provide information included in presentence reports have privacy interests that militate against disclosure to victims, and preparers of reports might be chilled from providing candid and neutral accounts if their reports were open to review and challenge by victims.

f. Right to be present at judicial sentencing hearing. Subsection (4), providing that victims shall have the right to be present at any sentencing hearings in their case, follows the universal or near-universal rule across American jurisdictions. In roughly half the states, the right is stated expressly in the state constitution.

The prosecutor must make reasonable efforts to notify the victim of the hearing's date and time. This notification requirement exists only for victims who have filed a request for notification under subsection (3). The prosecutor's duty to make reasonable efforts certainly includes reasonable attempts to reach the victim using contact information supplied by the victim in conjunction with a request for notification. A single unsuccessful attempt, for example, would not suffice. In addition, if a victim's contact information on file is out of date, the prosecutor should make reasonable efforts to obtain current information or otherwise contact the victim, even though the statute places a burden on the victim to keep such information updated.

The Code provides no express requirement that a sentencing hearing be reset if it is impossible for the victim to attend on the scheduled date. Given the victim's statutory right to be present at the hearing, however, it is incumbent upon the prosecutor and court to accommodate circumstances of impossibility or grave inconvenience that would prevent the victim's attendance.

g. Victim impact statement. The majority of states allow victims to provide input to the sentencing court orally, in writing, or both. Subsection (5) permits either form of

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communication, or some other format if allowed by the court. As a practical matter, in the vast majority of cases in which victim input is provided to sentencing courts, it is transmitted in writing as part of the presentence report.

Subsection (5) gives the victim a number of choices. Under subsection (5)(a) and (b), the victim may submit a written impact statement directly to the court or to the preparer of a presentence report. Under subsection (5)(c), a victim may elect to make an oral statement at the sentencing hearing. Subsection (5)(d) gives victims the option of submitting an unsworn impact statement or giving sworn testimony. Subsection (5)(e) gives courts discretion to accept victim impact statements in a form not otherwise specified in subsection (5)(a) through (d). Finally, subsection (5)(f) gives sentencing courts discretion to fashion an appropriate process for receipt of victim impact information in cases with multiple victims. In cases with more than several victims, for example, it may be appropriate for the court to limit some of the individual impact statements to written form, and to allow selected oral statements at the hearing.

One issue not expressly resolved in subsection (5) is whether a victim should be permitted to make more than one kind of impact statement to the court. For example, a victim may wish to include a written impact statement in the presentence report and also make an oral statement in open court at the sentencing hearing. Although subsection (5) always refers to the victim impact statement in the singular, it is not intended to rule out multiple submissions. The Code leaves the issue to the discretion of the sentencing court.

The majority practice in American jurisdictions is to allow for "victim allocution"—or an unsworn impact statement at a sentencing hearing. At the victim's election, a statement of this kind does not open the victim to cross-examination, although defendants are permitted to challenge the factual assertions in the impact statement in other ways.

h. Permissible content of victim impact statements. State codes diverge significantly when defining the subject areas victims are allowed to address in their impact statements to the sentencing court. Some laws include no restrictions or guidance on the statements' appropriate contents. Some statutes are more directive than this, and enumerate what may be included. Among directive jurisdictions, the breadth or narrowness of the enumerated subject matters is quite variable. Some states limit the statement closely to the facts of the crime and the injuries sustained by the victim. Other states allow victims to speak to alleged criminal conduct beyond the offenses of conviction, express their opinion about the defendant's character, and make recommendations concerning the sentence they think the judge should impose.

One drafting choice in this type of provision is whether the statutorily listed subject matters should be exclusive or, in the alternative, whether sentencing courts should have freedom to receive victim statements that go into nonenumerated subjects. Case law reveals that victims frequently offer sentence recommendations—or other nonenumerated forms of input—in the absence of statutory authorization. Some appellate courts have taken the view that the trial courts should be allowed to permit or tolerate such behavior, partly because victims' statements cannot

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always be expected to hew to precise legal guidelines, partly because the courts believe legislatures intend victims' rights to be interpreted broadly in cases of legal ambiguity, partly because the specter of frequent defense objections during a victim's statement in court is unseemly, and partly from the sense that sentencing courts are capable of disregarding impermissible opinions or information.

The revised Code closely defines the subject matters victims may address in their impact statements, and takes care to articulate that subjects beyond those enumerated may not be addressed. This approach springs from the Code's view of the underlying policies that should govern victims' rights at the many different stages of the sentencing and corrections process. Those rights should be fashioned with reference to the purposes of the sentencing system and the (additional) procedural claims victims may legitimately assert on the legal system. See Reporters' Memorandum, Victims' Roles in the Sentencing Process (Appendix B to this draft).

The limitations in subsections (6) and (7) may be enforced with a light hand so long as the victim's statement is unsworn and is not put forward by the prosecutor as evidence the court may rely upon when resolving disputed issues of fact. To allow for a degree of overbreadth in unsworn statements, subsection (8) provides that any unauthorized content in the victim's statement must be disregarded by the court.

On the other hand, if the victim gives sworn testimony at the sentencing hearing, it should be limited to testimony that is relevant to the injuries incurred by the victim and the victim's family, as required in subsection (6).

i. Victim statements beyond the "offense of conviction." Subsections (6) and (7) address two frequently recurring questions about the proper scope of a victim's impact statement. First, should the victim he allowed to offer allegations of criminal conduct that reaches beyond the offenses for which the defendant has been convicted? Second, should the victim be allowed to offer a sentence recommendation to the court?

Subsection (6) provides that an impact statement may not address alleged criminal conduct for which the defendant has not been convicted. This is consistent with the rule stated in § 6B.06(2)(b) (addressed to the sentencing commission) and § 7.03(2)(b) (addressed to sentencing courts) that alleged offenses that have not been proven or admitted in criminal proceedings cannot be the basis of sentencing determinations. It will sometimes be difficult to apply this principle rigorously to victim impact statements. Victims cannot be expected to have a lawyer's understanding of the elements of the offenses of which the defendant has been convicted. They may not understand what criminal behavior is included in a plea agreement after the dismissal of one or more counts, and what factual allegations are off the table. And in cases involving repeat victimizations, if the formal conviction does not capture all episodes, victims may have understandable difficulty describing their injuries while only making reference to the counts of conviction. If one purpose of the victim impact statement is to allow the victim to be heard, and the victim's injuries acknowledged, some overextension of the content of the

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statement should be allowable, within reason. Ultimately the question of when to stop a victim whose statement has gone too far off course resides in the discretion of the sentencing judge.

In such circumstances, subsection (8) contemplates that the most appropriate remedy may be the simple expedient of a rule barring the court from considering those portions of the impact statement.

In contrast with unsworn victim allocation, if a victim chooses to give testimony at a sentencing hearing to supplement the factual record before the court, there should be far less latitude for victims to testify about alleged but unproven crimes. Again, the Code relies on the discretion of sentencing courts to make such judgment calls.

j. Victim's sentence recommendations. States differ on the question of whether a victim should be allowed to express a sentence recommendation to the court. The Code makes this impermissible in subsection (7). Among the values and interests that support victim participation in sentence proceedings, none suggest that the victim is competent to speak to the overall penalty that should be imposed, see Reporters' Memorandum, Victims' Roles in the Sentencing Process (Appendix B to this draft). Depending on the case, victims may have valuable input to offer on issues that affect the proportionality of the sentence, including the gravity of the offense, the harm done or threatened to the victim, and the offender's culpability. Victims may also have important knowledge of the offender or the offense that can inform the consideration of the risk that the defendant will reoffend. That victims have helpful or essential information going to *some* aspects of the sentencing decision does not give them a foundation to express a view on every sentencing factor the judge must consider.

k. Defendant's right to challenge the victim impact statement. When a victim offers sworn testimony at a sentencing hearing intended to supplement the factual evidence before the sentencing court, the defendant must be provided the opportunity to cross-examine, as set forth in subsection (10). When the victim provides an unsworn statement, the defendant must still be given reasonable opportunity to challenge the content of the statement, as provided in subsection (9). Jurisdictions vary in how this is done. In some states, the defendant must be given advance notice of the contents of the victim's statement, so that a response may be prepared before the sentencing hearing. Other states make provision for adjournment of the hearing when a victim's statement raises questions of fact the defendant wishes to rebut. The revised Code adopts both approaches, with details left to the courts' discretion in individual cases. The Code states the governing principle that a sentencing court must provide the defendant with a "reasonable opportunity" to challenge factual assertions in a victim's statement.

Subsection (9) requires sentencing courts to adjourn proceedings if necessary to give defendants a reasonable opportunity to contest factual assertions that have been offered in a victim's impact statement.

l. Must the court consider the victim impact statement? A minority of states expressly require sentencing judges to "consider" the victims' impact statement when determining a

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1 defendant's sentence. No equivalent language has been included in the revised Code. In
2 commenting on an early draft, Professor Julian Roberts challenged this omission: "I am surprised
3 that there is no direction to courts to 'consider any victim impact statement.' This is a common
4 feature of victim impact statement regimes around the world . . . . Including such a clause seems
5 a benign way of underscoring the importance of the victim impact statement, and will encourage
6 victims to depose statements." This suggestion should be contemplated by the Institute. One
7 issue raised by U.S. practice is whether a duty to "consider" an impact statement should be the
8 same for sworn and unsworn statements.

9 *m. Victims' right to consult with prosecutor.* The Code adopts the majority view among the
10 states the prosecutors have no obligation to confer with victims prior to sentencing hearings. A
11 minority of state codes impose such a duty, and sometimes specifically require the prosecutor to
12 confer with the victim about any sentence recommendation the prosecutor intends to make in the
13 case. In the policy analysis used by the Code, any duty to confer should extend no further than
14 the contents of a victim impact statement and victims' colorable restitution claims.

15 *n. Sentences not invalidated for failure to provide victims their rights.* Invalidation and
16 modification of sentence is possible in a few states when a victim's right to participate in
17 sentencing proceedings has been violated. Many state codes provide exactly the opposite, that no
18 sentence may be invalidated for this reason. Among those states that make no provision one way
19 or the other, the practice of undoing a sentence is extremely rare. Subsection (11) adopts the
20 majority view.

21 **REPORTERS' NOTE**

22 *b. State constitutional guarantees.* For state constitutional provisions that speak to victims' rights during
23 judicial sentencing proceedings, see Ala. Const., Art. 1, § 6.01(a) (crime victims are entitled to the right "to be heard
24 when authorized, at all crucial stages of criminal proceedings, to the extent that these rights to not interfere with the
25 constitutional rights of the person accused of committing the crime"); Alaska Const., Art. 1, § 24 (crime victims
26 shall have "the right to be allowed to be heard, upon request, at sentencing"); Ariz. Const., Art. 2, § 2.1 (a victim of
27 crime has a right "[t]o be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and
28 sentencing" and "[t]o read presentence reports relating to the crime against the victim when they are available to the
29 defendant"); Cal. Const., Art. 1, § 28(b)(8), (11), (12) (a victim shall be entitled "[t]o be heard, upon request, at any
30 proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-
31 conviction release decision, or any proceeding in which a right of the victim is at issue." . . . "To provide
32 information to a probation department official conducting a presentence investigation concerning the impact of the
33 offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the
34 defendant." . . . "To receive, upon request, the presentence report when available to the defendant, except for those
35 portions made confidential by law."); Conn. Const., Art. 1, § 8 (A victim shall have "the right to make a statement to
36 the court at sentencing"); Idaho Const., Art. I, § 22(3), (6), (9) (A crime victim has the right "to prior notification of
37 trial court appellate and parole proceedings and, upon request, to information about the sentence, incarceration and
38 release of the defendant." . . . "To be heard, upon request, in all criminal justice proceedings considering a plea of

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1 guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result." . . . "To read
2 presentence reports relating to the crime."); Ill. Const., Art. 1, § 8.1(2), (4), (5) (crime victims shall have "The right
3 to notification of court proceedings." . . . "The right to make a statement to the court at sentencing." . . . "The right
4 to information about the conviction, sentence, incarceration, and release of the accused."); Kan. Const., Art. 15, § 15
5 (a) ("Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right . . . to be heard
6 at sentencing . . . to the extent that these rights do not interfere with the constitutional or statutory rights of the
7 accused."); La. Const., Art. 1, § 25 (a crime victim shall have "the right to review and comment upon the
8 presentence report prior to imposition of sentence"); Mich. Const., Art. 1, § 24(1) (crime victims shall have "The
9 right to notification of court proceedings." . . . "The right to attend trial and all other court proceedings the accused
10 has the right to attend." . . . "The right to make a statement to the court at sentencing." . . . "The right to information
11 about the conviction, sentence, imprisonment, and release of the accused."); Mo. Const., Art. 1, § 32.1(1), (2) (crime
12 victims shall have "The right to be present at all criminal justice proceedings in which the defendant has such a
13 right" . . . "Upon request of the victim, the right to be informed of and heard at guilty pleas, bail hearings,
14 sentencings, probation revocation hearings, and parole hearings, unless in the determination of the court the interests
15 of justice require otherwise"); Neb. Const., Art. 1, § 28(1) (a victim of crime shall have "the right to be informed of,
16 be present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional
17 release proceedings"); Nev. Const., Art. 1, § 8(2)(b), (c) (legislature shall provide rights to victims of crime to be
18 "present at all public hearings involving the critical stages of a criminal proceeding [and] heard at all proceedings
19 for the sentencing or release of the convicted person after trial."); N.M. Const., Art. II, § 24(4), (5), (7), (9) (victims
20 of enumerated crimes shall have "the right to notification of court proceedings" . . . "the right to attend all public
21 court proceedings the accused has the right to attend" . . . "the right to make a statement to the court at sentencing
22 and any post-sentencing hearings for the accused" . . . "the right to information about the conviction, sentencing,
23 imprisonment, escape or release of the accused"); N.C. Const., Art. I, § 37(1)(a), (b) (victims of crime shall have
24 "The right as prescribed by law to be informed of and to be present at court proceedings of the accused." . . . "The
25 right to be heard at sentencing of the accused in a manner prescribed by law, and at other times as prescribed by law
26 or deemed appropriate by the court."); Okla. Const., Art. 2, § 34 ("The victim or family member of a victim of crime
27 has a right to be present at any proceeding where the defendant has a right to be present [and] to be heard at any
28 sentencing or parole hearing"); Or. Const., Art. 1, § 42 (victims "in all prosecutions for crimes and in juvenile court
29 delinquency proceedings" shall have "[t]he right to be present at and, upon specific request, to be informed in
30 advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be
31 heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition" [and] "[t]he right,
32 upon request, to obtain information about the conviction, sentence, imprisonment, criminal history and future release
33 from physical custody of the criminal defendant or convicted criminal and equivalent information regarding the
34 alleged youth offender or youth offender"); R.I. Const., Art. 1, § 23 ("Before sentencing, a victim shall have the
35 right to address the court regarding the impact which the perpetrator's conduct has had upon the victim"); S.C.
36 Const., Art. 1, § 24(A)(5) (victims of crime have the right to "be heard at any proceeding involving a post-arrest
37 release decision, a plea, or sentencing"); Tex. Const., Art. 1, § 30(b)(1), (2), (5) (on request of the crime victim, the
38 victim has "the right to notification of court proceedings" . . . "the right to be present at all public court proceedings
39 related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be
40 materially affected if the victim hears other testimony at the trial" . . . "the right to information about the conviction,

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sentence, imprisonment, and release of the accused"); Utah Const., Art. 1, § 28 (victims of crime have the right "upon request, to be informed of, be present at, and to be heard in important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court"); Va. Const., Art. 1, § 8-A(3), (4) (crime victims may be accorded rights "as the General Assembly may define" including "The right to address the Circuit Court at the time sentence is imposed [and] the right to receive timely notification of judicial proceedings"); Wash. Const., Art. 1, § 35 ("Upon notifying the prosecuting attorney, a victim of crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights."); Wis. Const., Art. 1, § 9m ("This state shall ensure the crime victims have all of the following privileges and protections as provided by law: . . . the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant . . . notification of court proceedings . . . the opportunity to make a statement to the court's disposition . . . information about the outcome of the case and the release of the accused.").

c. Definition of "victim." Some jurisdictions have relatively compact definitions of who qualifies as a crime victim, see Ala. Code § 15-23-60(19) ("victim" defined as "[a] person against whom the criminal offense has been committed, or if the person is killed or incapacitated, the spouse, sibling, parent, child, or guardian of the person, except if the person is in custody for an offense or is the accused."); Ariz. Stat. § 13-4401 ("'Victim' means a person against whom the criminal offense has been committed, including a minor, or if the person is killed or incapacitated, the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person, except if the person or the person's spouse, parent, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree or other lawful representative is in custody for an offense or is the accused."); 18 USC § 3771(e) ("[t]he term 'crime victim' means a person directly and proximately harmed as a result of the commission of offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative."); Kan. Stat. § 74-7333(b) ("As used in this act, 'victim' means any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person."); Md. Code § 11-104(a)(2) ("'Victim' means a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act."); N.H. Stat. § 21-M:8-k(I)(a) ("'Victim' means a person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime. 'Victim' also includes the immediate family of any victim who is a minor or who is incompetent, or the immediate family of a homicide victim, or the surviving partner in a civil union."); N.M. Stat. § 31-26-3(F) ("'Victim' means an individual against whom a criminal offense is committed. 'Victim' also means a family member or a victim's representative when the individual against whom a criminal offense was committed is a minor, is incompetent or is a homicide victim . . . ."); 13 Vt. Stat. § 5301(4) ("'Victim' means a person who sustains

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physical, emotional, or financial injury or death as a direct result of the commission or attempted commission of a crime or act of delinquency and shall also include the family members of a minor, a person who has been found to be incompetent, or a homicide victim."); Wyo. Stat. § 7-21-101(a)(iii) ("'Victim' means an individual who has suffered direct or threatened physical, emotional or financial harm as the result of the commission of a crime or a family member of a minor, incompetent person or a homicide victim").

Some jurisdictions have much more elaborate provisions concerning who meets the definition of a victim, often including governmental entities. See Colo. Stat. § 18-1.3-602(4)(a) ("'Victim' means any person aggrieved by the conduct of an offender and includes but is not limited to the following: (I) Any person against whom any felony, misdemeanor, petty, or traffic misdemeanor offense has been perpetrated or attempted; (II) Any person harmed by an offender's criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity; (III) Any person who has suffered losses because of a contractual relationship with, including but not limited to an insurer, or because of liability under section 14-6-110, C.R.S., for a person described in subparagraph (I) or (II) of this paragraph (a); (IV) Any victim compensation board that has paid a victim compensation claim; (V) If any person described in subparagraph (I) or (II) of this paragraph (a) is deceased or incapacitated, the person's spouse, parent, legal guardian, natural or adopted child, child living with the victim, sibling, grandparent, significant other, as defined in section 24-4.1-302(4), C.R.S., or other lawful representative; (VI) Any person who had to expend resources for the purposes described in paragraphs (b), (c), and (d) of subsection (3) of this section. (b) 'Victim' shall not include a person who is accountable for the crime or a crime arising from the same conduct, criminal episode, or plan as defined under the law of this state or of the United States. (c) Any 'victim' under the age of eighteen is considered incapacitated, unless that person is legally emancipated or the court orders otherwise. (d) It is the intent of the general assembly that this definition of the term 'victim' shall apply to this part 6 and shall not be applied to any other provision of the laws of the state of Colorado that refers to the term 'victim'. (e) Notwithstanding any other provision of this section, 'victim' includes a person less than eighteen years of age who has been trafficked by an offender, as described in section 18-3-502, or coerced into involuntary servitude, as described in section 18-3-503."); Minn. Stat. § 611A.01(b) ("'Victim' means a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a crime, and for purposes of sections 611A.04 and 611A.045, also includes (1) a corporation that incurs loss or harm as a result of a crime, (2) a government entity that incurs loss or harm as a result of a crime, and (3) any other entity authorized to receive restitution under section 609.10 or 609.125. The term 'victim' includes the family members, guardian, or custodian of a minor, incompetent, incapacitated, or deceased person. In a case where the prosecutor finds that the number of family members makes it impracticable to accord all of the family members the rights described in sections 611A.02 to 611A.0395, the prosecutor shall establish a reasonable procedure to give effect to those rights. The procedure may not limit the number of victim impact statements submitted to the court under section 611A.038. The term 'victim' does not include the person charged with or alleged to have committed the crime.").

A small number of jurisdictions employ definitions of the term "victim" that narrow the class of qualifying persons, as compared with most other states. See Ky. Stat. § 421.500(1) ("As used in KRS 421.500 to 421.575, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime classified as stalking, unlawful imprisonment, use of a minor in a sexual performance, unlawful transaction with a minor in the first degree, terroristic threatening, menacing, harassing communications,

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intimidating a witness, criminal homicide, robbery, rape, assault, sodomy, kidnapping, burglary in the first or second degree, sexual abuse, wanton endangerment, criminal abuse, human trafficking, or incest."); Okla. Stat. § 142A-1(1) ("'Crime victim' or 'victim' means any person against whom a crime was committed, except homicide, in which case the victim may be a surviving family member including a stepbrother, stepsister or stepparent, or the estate when there are no surviving family members other than the defendant, and who, as a direct result of the crime, suffers injury, loss of earnings, out-of-pocket expenses, or loss or damage to property, and who is entitled to restitution from an offender pursuant to an order of restitution imposed by a sentencing court under the laws of this state.").

d. Victims' rights to notification. See Ga. Code § 17-10-1.1(a) (the prosecutor "shall notify, where practical, the alleged victim or, when the victim is no longer living, a member of the victim's family of his or her right to submit a victim impact form."); Kan. Stat. § 74-7333(4) ("Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings."); Ky. Rev. Stat. § 421.520(1) ("The attorney for the Commonwealth shall notify the victim that, upon conviction of the defendant, the victim has the right to submit a written victim impact statement to the probation officer responsible for preparing the presentence investigation report for inclusion in the report or to the court should such a report be waived by the defendant."); Minn. Stat. § 611A.037 ("The officer conducting a presentence or predispositional investigation shall make reasonable and good faith efforts to assure that the victim of that crime is provided with the following information . . . (3) the time and place of the sentencing or juvenile court disposition and the victim's right to be present; and (4) the victim's right to object in writing to the court, prior to the time of sentencing or juvenile court disposition, to the proposed sentence or juvenile dispositional alternative, or to the terms of the proposed plea agreement."); Mo. Stat. § 557.041(3) (the prosecutor "shall inform the victim or shall inform a member of the immediate family of the victim if the victim is dead or otherwise is unable to make a statement as a result of the offense committed by the defendant of the right to make a statement pursuant to subsections 1 and 2 of this section."); Okla. Stat. § 142A-2(A)(11) ("The district attorney's office shall inform the victims and witnesses of crimes of the following rights: . . . [t]o have victim impact statements filed with the judgment and sentence."); 18 Pa. Stat. § 11.213(c) ("The prosecutor's office shall provide notice of the opportunity to offer prior comment on the sentencing of an adult and disposition of a juvenile. This prior comment includes the submission of oral and written victim impact statements."); 13 Vt. Stat. § 5321 ("The victim of a crime has the following rights in any sentencing proceedings concerning the person convicted of that crime: (1) to be given advance notice by the prosecutor's office of the date of the proceedings; . . . (c) In accordance with court rules, at the sentencing hearing, the court shall ask if the victim is present and, if so, whether the victim would like to be heard regarding sentencing. In imposing sentence, the court shall consider any views offered at the hearing by the victim. If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing and shall take those views into consideration in imposing sentence."); Wyo. Stat. § 7-21-102(b) ("The notice given by the district attorney to the victim pursuant to this section shall be given by any means reasonably calculated to give prompt actual notice").

For examples of states that require victims to register, provide current contact information, or otherwise lodge a "request" in order to activate their rights to notice and participation in the sentencing process, see Ala. Code § 15-23-72(2)(c) ("If the defendant is convicted, on request, the victim shall be notified, if applicable, of the

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following: . . . [t]he right to make a victim impact statement."); Ariz. Stat. § 13-4410(A)–(B)(3) ("The prosecutor's office shall, on request, give to the victim within fifteen days after the conviction or acquittal or dismissal of the charges against the defendant notice of the criminal offense for which the defendant was convicted or acquitted or the dismissal of the charges against the defendant. If the defendant is convicted and the victim has requested notice, the victim shall be notified, if applicable, of: . . . [t]he right to make a victim impact statement under § 13-4424."); Md. Code, Crim. Proc. § 11-104(e)(1) ("the prosecuting attorney shall send a victim or victim's representative prior notice of … the right of the victim or victim's representative to submit a victim impact statement to the court [if] prior notice is practicable [and] the victim or victim's representative has filed a notification request form . . . ."); N.Y. Crim. Proc. Law § 380.50(b) ("If the defendant is being sentenced for a felony the court, if requested at least ten days prior to the sentencing date, shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence.").

Unlike the revised Code, some states require courts to inquire at sentencing whether prosecutors have fulfilled their notification duties to the victim. See Ariz. R. Crim. P. 39(f)(2) ("At the commencement of any proceeding which takes place more than seven days after the filing of charges by the prosecutor and at which the victim has a right to be heard, the court shall inquire of the prosecutor or otherwise ascertain whether the victim has requested notice and been notified of the proceeding."); Conn. Gen. Stat. Ann. § 54-91c(B) ("If no victim is present and no such written statement has been submitted, the court shall inquire on the record whether an attempt has been made to notify any such victim as provided in subdivision (1) of subsection (c) of this section . . ."); N.M. Stat. Ann. § 31-26-10.1(A) ("the court shall inquire on the record whether an attempt has been made to notify the victim of the proceeding."); Wis. Stat. Ann. § 972.14(2)(m) ("Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with s. 971.095 (2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing."). Georgia imposes an inquiry requirement upon its courts only serious offenses. See Ga. Code Ann. § 17-10-1.2(a)(5) ("the victim or a representative of the victim is not present at the presentence hearing, it shall be the duty of the court to inquire of the prosecuting attorney whether or not the victim has been notified of the presentence hearing . . .").

g. Victim impact statement. The Uniform Law Commissioners have recommended that, "at the victim's option, the victim may present a statement in writing before the sentencing proceeding, orally under oath at the sentencing proceeding, or both." See National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime Act (1992), § 216(a). See also Alaska Stat. § 12.55.023 ("A victim may submit to the sentencing court a written statement that the victim believes is relevant to the sentencing decision and may give sworn testimony or make an unsworn oral presentation to the court at the sentencing hearing."); Cal. Penal Code § 1191.15(a) ("The court may permit the victim of any crime, or his or her parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to file with the court a written, audiotaped, or videotaped statement, or statement stored on a CD Rom, DVD, or any other recording medium acceptable to the court, expressing his or her views concerning the crime, the person responsible, and the need for restitution, in lieu of or in addition to the person personally appearing at the time of judgment and sentence. The court shall consider the statement filed with the court prior to imposing judgment and sentence."); Md. Code, Crim. Proc., § 11-402(b) ("If the court does not order a presentence investigation or predisposition investigation, the

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prosecuting attorney or the victim may prepare a victim impact statement to be submitted to the court and the defendant or child respondent in accordance with the Maryland Rules."); 18 Pa. Stat. § 11.201(5) (rights of victims include "opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement."); Wyo. Stat. § 7-21-103(a) ("At any hearing to determine, correct or reduce a sentence, an identifiable victim of the crime may submit, orally, in writing or both, a victim impact statement to the court."). Many states give the victim the option to choose whether to submit an impact statement orally, in written form, or by other medium, see Ala. Code § 15-23-76 ("The right of the victim to be heard may be exercised, where authorized by law, at the discretion of the victim, through an oral statement or submission of a written statement."); Ariz. Stat. § 13-4428(B) ("victim's right to be heard may be exercised, at the victim's discretion, through an oral statement, submission of a written statement or submission of a statement through audiotape or videotape."); Minn. Stat. § 611A.038(a) ("A victim has the right to submit an impact statement to the court at the time of sentencing or disposition hearing. The impact statement may be presented to the court orally or in writing, at the victim's option. If the victim requests, the prosecutor must orally present the statement to the court. Statements may include the following, subject to reasonable limitations as to time and length."); Mo. Stat. § 557.041(1) ("[T]he court shall allow the victim of such offense to submit a written statement or appear before the court personally or by counsel for the purpose of making a statement."); Neb. Const. Art. I § 28(1) (victims have "the right to be informed of, be present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings."); N.H. Stat. § 21-M:8-k (II)(p) (victims have "[t]he right to appear and make a written or oral victim impact statement at the sentencing of the defendant . . . ."); Okla. Stat. § 142A-8 ("Each victim, or members of the immediate family of each victim or person designated by the victim or by family members of the victim, may present a written victim impact statement, which may include religious invocations or references, or may appear personally at the sentence proceeding and present the statements orally."); 13 Vt. Stat. § 5321(2)(c) ("[A]t the sentencing hearing, the court shall ask if the victim is present and, if so, whether the victim would like to be heard regarding sentencing . . . . If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing and shall take those views into consideration in imposing sentence.").

A minority of states have adopted novel procedural restrictions, not reproduced in the Code. Kentucky restricts victim impact statements to written. Ky. Stat. § 421.520(1) ("The attorney for the Commonwealth shall notify the victim that, upon conviction of the defendant, the victim has the right to submit a written victim impact statement."). New York law puts the burden on the victim to make an advance request to the court to make a statement at sentencing—and the defendant must be notified when such a request has been made; see N.Y. Crim. Proc. Law § 380.50(2)(b) ("If the defendant is being sentenced for a felony the court, if requested at least ten days prior to the sentencing date, shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence. The court shall notify the defendant no less than seven days prior to sentencing of the victim's intent to make a statement at sentencing.").

h. Permissible content of victim impact statements. For an example of state laws that include no restrictions or guidance concerning the appropriate contents of a victim impact statement at sentencing, see Ala. Code § 15-23-74 ("The victim has the right to present evidence, an impact statement, or information that concerns the criminal offense or the sentence during any pre-sentencing, sentencing, or restitution proceeding."); Alaska Stat. § 12.55.023

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(The victim may present evidence the "victim believes is relevant to the sentencing decision."); Cal. Penal Code § 1191.15(a) (The victim may express "his or her views concerning the crime, the person responsible, and the need for restitution. . ."); Kan. Stat. § 22-3424(e) ("Before imposing sentence the court shall . . . allow the victim or such members of the victim's family as the court deems appropriate to address the court, if the victim or the victim's family so requests"); N.Y. Crim. Proc. Law § 380.50(2)(b) ("the court . . . shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence."); 13 Vt. Stat. § 5321(2) (the victim at "any sentencing proceeding" has the right "to appear, personally, to express reasonably his or her views concerning the crime, the person convicted, and the need for restitution.").

Some state laws are more directive, and describe what may be included in impact statements, see Ga. Code § 17-10-1.1(b)(2) (victim impact form "may itemize any economic loss suffered by the victim as a result of the offense and may . . . [i]dentify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence; . . . [d]escribe any change in the victim's personal welfare or familial relationships as a result of the offense; and . . . [c]ontain any other information related to the impact of the offense upon the victim or the victim's family that the victim wishes to include."); Md. Code, Crim. Proc., § 11-402(e)(1)–(7) ("A victim impact statement for a crime or delinquent act shall: . . . identify the victim; . . . itemize any economic loss suffered by the victim; . . . identify any physical injury suffered by the victim and describe the seriousness and any permanent effects of the injury; . . . describe any change in the victim's personal welfare or familial relationships; . . . identify any request for psychological services initiated by the victim or the victim's family; . . . identify any request by the victim to prohibit the defendant or child respondent from having contact with the victim as a condition of probation, parole, mandatory supervision, work release, or any other judicial or administrative release of the defendant or child respondent; . . . contain any other information related to the impact on the victim or the victim's family that the court requires."); Mo. Stat. § 557.041(2) (victim statements "shall relate solely to the facts of the case and any personal injuries or financial loss incurred by the victim."); 18 Pa. Stat. § 11.201(5) (The victim impact statement is "to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family.").

i. Victim statements beyond the "offense of conviction." Most state codes do not speak to the question of whether victims' impact statements may include allegations of unproven offenses. The absence of a provision one way or another, in states that otherwise place few limits on the contents of such statements, see Comment *h* above, suggests that victims are free to address criminal behavior beyond the offenses of conviction. A handful of states have expressly codified such a rule. See Ariz. Stat. § 13-4402.01(A) ("If a criminal offense against a victim has been charged but the prosecution on the count or counts involving the victim has been or is being dismissed as the result of a plea agreement in which the defendant is pleading to or pled to other charges, the victim of the offenses involved in the dismissed counts, on request, may exercise all the applicable rights of a crime victim throughout the criminal justice process as though the count or counts involving the person had not been dismissed."); N.H. Stat. § 21-M:8-k (II-a)(b) ("The victim's impact statement shall not be limited to the injuries, harm, or damages noted in the information or indictment, but may include all injuries, harm, and damages suffered as a result of the commission or attempted commission of the crime whether or not the injuries, harm, or damages were fully determined or discovered at the time the information or indictment was filed.").

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1 Some states restrict the content of victims' impact statements to the offenses of conviction, or limit the weight
2 that may be given to information concerning nonconviction offenses. See W. Va. Code § 61-11A-2(b) ("The
3 statement, whether oral or written, must relate solely to the facts of the case and the extent of injuries, financial
4 losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced.");
5 Commonwealth v. Smithton, 631 A.2d 1053 (Pa. Super. 1993) (holding that admission of victim testimony
6 concerning charges of which defendant had been acquitted was error; remanding case for resentencing). Iowa allows
7 victim impact statements to address unproven crimes, but forbids consideration of the unproven offenses by
8 sentencing courts; see State v. Sailer, 587 N.W.2d 756, 759 (Iowa 1998) (statutory language allowing a victim's
9 statement at sentencing to include information concerning "the impact of *the offense* upon the victim" (emphasis
10 supplied) should not be interpreted to limit impact statement to the offense of conviction; victim's statement may
11 also address "the offense with which the defendant was originally charged or the offense the victim has reason to
12 believe the defendant committed"). Importantly, the *Sailer* court distinguished the question of what a victim may
13 include in an impact statement from the question of what the trial court may properly consider as a basis for
14 sentence:

> 15 [A] sentencing court may not consider unproven offenses in determining the appropriate sentence for a
> 16 defendant. We trust the sentencing court with the discretion and responsibility to avoid consideration of
> 17 any unproven offenses which may arise in the content of the victim impact statement. If a sentencing
> 18 court should happen to improperly consider such offenses when setting a defendant's sentence, appellate
> 19 review is available to correct the error.

20 587 N.W.2d at 761. The *Sailer* court gave several reasons for allowing the victim's impact statement to range
21 beyond factual allegations the sentencing judge would be allowed to consider.

> 22 Allowing a victim to testify fully and completely, without regard for whether particular elements of
> 23 offenses were proved or admitted would serve the objective of "fair and compassionate treatment" of
> 24 victims and would also likely aid victims "in overcoming emotional and economic hardships resulting
> 25 from criminal acts." . . . Limiting the victim to statements only about offenses admitted or proved would
> 26 likely frustrate the victim because it would deny the victim the opportunity to state the full impact of the
> 27 crime. Given the large number of plea agreements utilized in the criminal justice system, many victims
> 28 would be limited in this manner.

29 587 N.W.2d at 760-761.

30 *j. Victim's sentence recommendations.* Some state laws expressly allow victim impact statements to include the
31 victim's recommendation as to what sentence they think should be imposed on the defendant. See Ariz. Stat. § 13-
32 4426(A) ("The victim may present evidence, information and opinions that concern the criminal offense, the
33 defendant, the sentence or the need for restitution at any aggravation, mitigation, presentencing or sentencing
34 proceeding."); Ky. Rev. Stat. § 421.520(2) ("The [victim] impact statement may contain, but need not be limited to,
35 a description of the nature and extent of any physical, psychological or financial harm suffered by the victim, the
36 victim's need for restitution and whether the victim has applied for or received compensation for financial loss, and
37 the victim's recommendation for an appropriate sentence."); Minn. Stat. § 611A.038(a) (victim impact statements at
38 sentencing "may include . . . a summary of the harm or trauma suffered by the victim as a result of the crime; . . . a

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summary of the economic loss or damage suffered by the victim as a result of the crime; and . . . a victim's reaction to the proposed sentence or disposition."); Okla. Stat. § 142A-1(9) ("'Victim impact statements' means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the opinion of the victim of a recommended sentence."); Wyo. Stat. § 7-21-102(c) ("[victim's] impact statement may include but shall not be limited to the following: . . . [a]n explanation of the nature and extent of any physical, psychological or emotional harm or trauma suffered by the victim; . . . [a]n explanation of the extent of any economic loss or property damage suffered by the victim; . . . [t]he need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage; and . . . [t]he victim's recommendation for an appropriate disposition."). The Uniform Law Commissioners have also taken the position that "the victim's opinion regarding appropriate sentence" should be permitted in a victim-impact statement. See National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime Act (1992), § 216(a).

Most state codes do not address victims' rights to make recommendations as to the sentence that should be imposed. From the reported cases, it is evident that victims frequently offer sentence recommendations even in the absence of statutory authorization. See State v. Matteson, 851 P.2d 336, 339 (Idaho 1993) (holding that, while Idaho statute did not expressly authorize victim to make a sentence recommendation, it "does not contain any limitations which would prevent a victim of a crime, at sentencing, from sharing the victim's opinion of the defendant or making a sentence recommendation"); People v. Jones, 14 Cal. Rptr. 2d 9, 14 (Cal. Ct. App. 1992) (sentence upheld even though victims in child sexual abuse case, who were 11 and 9 years old, asked for maximum sentence so that the defendant "wouldn't be able to hurt other little girls").

In the United States it is a minority position among state legislatures that victims should be explicitly barred from offering their recommendations as to the sentence that should be imposed. Maryland does not allow the victim to recommend a specific sentence, although the victim impact statement at sentencing may include a "request by the victim to prohibit the defendant or child respondent from having contact with the victim as a condition of probation, parole, mandatory supervision, work release, or any other judicial or administrative release of the defendant or child respondent"; see Md. Code, Crim. Proc., § 11-402(e)(6). An alternative rule, adopted in the revised Code, is that the sentencing court should disregard that portion of an impact statement that asks for a specific sentence. See State v. Taylor, No. 20944, 2006 WL 441664, at *16–17 (Ohio Ct. App. 2006) (stating, in noncapital murder case, "[w]e agree . . . that trial courts should not be influenced by a family member's opinion on what appropriate sentences should be" and finding no evidence that court considered the victim's family's request for the maximum sentence in the instant case.)

k. Defendant's right to challenge the victim impact statement. See State v. Blackmon, 908 P.2d 10 (Ariz. Ct. App. 1995) (holding that, despite intention of legislature, defendants have a Due Process right to question victims who testify at sentencing hearings regardless of whether the statement is sworn). Arizona permits defendants to challenge victim impact statements. See Ariz. Stat. § 13-4426.01 ("The state and the defense shall be afforded the opportunity to explain, support or deny the victim's statement."). Georgia allows victims to testify at sentencing hearings subject to cross-examination by the defense. See Ga. Code § 17-10-1.2(a)(5) ("In all cases other than those

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in which the death penalty may be imposed, prior to fixing of the sentence as provided for in Code Section 17-10-1 or the imposing of life imprisonment as mandated by law, and before rendering the appropriate sentence, including any order of restitution, the court shall allow the victim, as such term is defined in Code Section 17-17-3, the family of the victim, or such other witness having personal knowledge of the crime to testify about the impact of the crime on the victim, the family of the victim, or the community. Except as provided in paragraph (4) of this subsection, such evidence shall be given in the presence of the defendant and shall be subject to cross-examination."); id. § 17-10-1.2(c) ("The court shall allow the defendant the opportunity to cross-examine and rebut the evidence presented of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community"); Md. Code, Crim. Proc., § 11-402(c)(1), (2) ("If the victim or the victim's representative is allowed to address the court, the defendant or child respondent may cross-examine the victim or the victim's representative. . . . The cross-examination is limited to the factual statements made to the court"). New York allows victims to make "statements" at sentencing proceedings. See N.Y. Crim. P. Code § 380.50(2)(b). The defendant shall have the right to rebut any statement made by the victim." There is an elaborate procedure in New York law for cases in which the victim's statement "includes allegations about the crime that were not fully explored during the proceedings or that materially vary from or contradict the evidence at trial." There must be an adjournment of sentencing proceedings, with a later opportunity for the defendant "to present information to rebut the allegations by the victim." In addition, the defendant is allowed "to present written questions to the court that the defendant desires the court to put to the victim. The court may, in its discretion, declined to put any or all of the questions to the victim. Where the court declines to put any or all of the questions to the victim it shall stay its reasons therefor on the record."

In accord with the revised Code, the Uniform Law Commissioners have recommended that, "if the victim-impact statement includes new, material factual information upon which the court intends to rely, the court shall adjourn the sentencing proceeding or take other appropriate action to allow the defendant adequate opportunity to respond." See National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), Uniform Victims of Crime Act (1992) § 216(c).

Some states have codified that a victim impact statement cannot be subject to cross-examination, see N.H. Stat. § 21-M:8-k (II)(p) ("No victim shall be subject to questioning by counsel when giving an impact statement."); Okla. Stat. § 142A-8 ("Any victim or any member of the immediate family or person designated by the victim or by family members of a victim who appears personally at the formal sentence proceeding shall not be cross-examined by opposing counsel.").

l. Must the court consider the victim impact statement? A small number of states expressly require sentencing judges to "consider" victim input when determining a defendant's sentence. See Cal. Stat. § 1191.15 ("The court shall consider the statement filed with the court prior to imposing judgment and sentence."); Ga. Code § 17-10-1.1(e)(3) ("The court shall consider the victim impact form that is presented to the court prior to imposing a sentence or making a determination as to the amount of restitution"); Ky. Rev. Stat. § 421.520(3) ("The victim impact statement shall be considered by the court prior to any decision on the sentencing or release, including shock probation, of the defendant."); Md. Code, Crim. Proc., § 11-402(d) ("The court shall consider the victim impact statement in determining the appropriate sentence or disposition and in entering a judgment of restitution for the victim"); 18 Pa. Stat. § 11.201(5) ("Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.); 13 Vt. Stat. § 5321(2)(c) ("In imposing sentence, the court shall

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consider any views offered at the hearing by the victim. If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing and shall take those views into consideration in imposing sentence."); Wash. Code § 9.94A.500(1) ("The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed."); Wyo. Stat. § 7-21-10(b) ("Any victim impact statement submitted to the court pursuant to this section shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant or in determining whether there should be a correction or reduction of sentence").

m. Victims' right to consult with prosecutor. Fewer than 20 states have statutory provisions requiring prosecutors to consult with crime victims prior to sentencing. See Peggy M. Tobolowski, Mario T. Gaboury, Arrick L. Jackson, and Ashley G. Blackburn, Crime Victim Rights and Remedies, Second Edition (2010), at 94 ("the express victim right to be heard regarding sentencing has primarily been adopted through provision of a victim's opportunity to be heard by the court rather than the prosecutor."). For an example of a state laws that does require prosecutors to confer with victims prior to sentencing proceedings, see Ala. Code § 15-23-64 ("The prosecuting attorney shall confer with the victim prior to the final disposition of a criminal offense, including the views of the victim about a nol pros, reduction of charge, sentence recommendation, and pre-trial diversion programs."); N.H. Stat. § 21-M:8-k(II)(f) ("The right to confer with the prosecution and to be consulted about the disposition of the case, including plea bargaining.").

n. Sentences not invalidated for failure to provide victims their rights. Must there be a resentencing if a victim was not notified of the sentencing hearing or was deprived of the opportunity to appear or make a statement? Held no: People v. Pfeiffer, 523 N.W.2d 640 (Mich. Ct. App. 1994). This appears to be the majority view among states. See Ala. Code § 15-23-76 ("The absence of the victim at the proceeding of the court does not preclude the court from going forth with the proceeding."); Ga. Code § 17-10-1.1(g) ("No sentence shall be invalidated because of failure to comply with the provisions of this Code section. This Code section shall not be construed to create any cause of action or any right of appeal on behalf of any person."). In Georgia, victims' rights to have input at the *paroling* stage exist only when they were "not allowed an opportunity" to make a victim impact statement at the judicial sentencing phase; see Ga. Code § 17-10-1.1(f) ("If for any reason a victim was not allowed an opportunity to make a written victim impact statement, the victim may submit a victim impact statement to the State Board of Pardons and Paroles in any case prior to consideration of parole."). In a separate provision, Georgia law provides that, "if the court intentionally fails to comply with this Code section, the victim may file a complaint with the Judicial Qualifications Commission" See Ga. Code § 17-10-1.2(d); N.Y. Code Crim. Proc. § 380.50(2)(f) ("If the victim does not appear to make a statement at the time of sentencing, the right to make a statement is waived. The failure of the victim to make a statement shall not be cause for delaying the proceedings against the defendant nor shall it affect the validity of a conviction, judgment or order."); 13 Vt. Stat. § 5321(b) ("Sentencing shall not be delayed or voided by reason of the failure to give the victim the required notice or the failure of the victim to appear.); Wyo. Stat. § 7-21-103(c) ("Any failure to comply with the terms of this chapter shall not create a cause for appeal or reduction of sentence for the defendant, or a civil cause of action against any person by the defendant.").

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Modification of sentence is a possible outcome in a handful of jurisdictions when a victim's right to participate in sentencing proceedings has been violated. See Ariz. Stat. § 13-4436 ("The failure to comply with a victim's constitutional or statutory right is a ground for the victim to request a reexamination proceeding within ten days of the proceeding at which the victim's right was denied or with leave of the court for good cause shown. After the victim requests a reexamination proceeding and after the court gives reasonable notice, the court shall afford the victim a reexamination proceeding to consider the issues raised by the denial of the victim's right. Except as provided in subsection B, the court shall reconsider any decision that arises from a proceeding in which the victim's right was not protected and shall ensure that the victim's rights are thereafter protected."); Md. Code, Crim. Proc., § 11-103(e)(3) ("A court may not provide a remedy that modifies a sentence of incarceration of a defendant or a commitment of a child respondent unless the victim requests relief from a violation of the victim's right within 30 days of the alleged violation."). In Maryland victims can also seek interlocutory appeals on claims that their rights as victims are being violated. See Md. Code, Crim. Proc., § 11-103. ("Application for leave to appeal denial of victim's rights").

With respect to the suggestion that subsection (11) be expanded to provide remedies to victims whose rights have not been observed in trial court proceedings, one possible model is 18 U.S.C. § 3771(d)(3), which provides as follows:

> (d) Enforcement and limitations. . . .
>
> (3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

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§ 7.08. Sentence Modification.[139]

(1) At any time from the imposition of a sentence through its termination, after giving prior notice to the parties, the court may reduce a sentence to correct an arithmetical, technical, or other clear error in recording or calculating the sentence, either *sua sponte* or upon motion of the parties or the department of corrections.

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[139] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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(2) Upon the government's motion made prior to the termination of sentence, the court may reduce a sentence if the defendant provided substantial assistance in investigating or prosecuting another person's crime or criminal case when the assistance, or its full value, was not known to the court at the time of sentencing. A sentence reduction under this subsection may reduce the sentence to a level below any otherwise-applicable mandatory-minimum term of imprisonment under state law.

(3) Except as otherwise specified by the legislature, when doing so advances the purposes of sentencing set forth in § 1.02(2), the court may at any time prior to the termination of sentence, upon petition by either party or the department of corrections reduce the sentence of a defendant who is:

> **(a) serving a term of confinement, probation, or postrelease supervision based on a guideline sentencing range that has subsequently been lowered by the sentencing commission and made retroactive;**
>
> **(b) serving a sentence for violation of a criminal statute that has subsequently been repealed by the legislature or interpreted by [the State Supreme Court or the United States Supreme Court] not to reach the conduct for which the defendant was convicted.**

(4) Whenever an original sentence has been modified pursuant to this Section, the government and any crime victims who have registered for such notice as required by § 7.07C(3) are entitled to notice.

Comment:

a. Scope. The original Model Penal Code did not address the subject of altering lawfully imposed sentences during their execution. The vast majority of jurisdictions provide a mechanism by which sentencing courts may alter a lawfully imposed sentence for at least a brief interval following sentence. This provision recognizes three circumstances in which sentence reduction is authorized. Subsection (1) allows the court to reduce a sentence to correct an arithmetical, technical, or other clear error. Subsection (2) allows for a similar reduction when a defendant has provided substantial assistance in investigating or prosecuting another person's crime or criminal case. Finally, subsection (3) confers discretionary authority on the court to lower the sentence of any defendant serving a sentence for which the recommended or maximum penalty has been reduced through a retroactive change in the statutory guideline range, or repeal of the underlying statute. The court is permitted to modify a sentence pursuant to subsection (3) on petition from the parties or the department of corrections, but may only do so when the reduced sentence advances the purposes of sentencing. Under § 7.08, a motion to modify sentence may be made at any time before the expiration of the sentence. Either party, the department of corrections, or the court acting *sua sponte*, may move to reduce a sentence on the ground that it is the result of clear error, while the government alone may move for a sentence reduction based on substantial assistance. Subsection (4) requires that the government and crime

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victims who have requested notice pursuant to § 7.07C(3) be notified of modifications made to sentences under this Section. This Section does not require advance notice.

b. Grounds for sentence modification. Under this Section, a court may modify an already-imposed sentence for only three reasons: to correct an unintended or clear error in sentence at any time during the execution of the sentence, to reward a defendant for providing substantial assistance to the government, or to recalibrate a sentence in light of a subsequent reduction in the applicable guideline range for the offense when such changes are made retroactive, and when the statute for which the person is serving his or her sentence has been repealed or declared unconstitutional. Section 7.08 does not permit the court to change the sentence for any other reason, including rehabilitation or mere reconsideration. Sentence reductions due to advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons are governed by § 306.7, while sentence reductions for sentences of long duration are governed by § 306.6.

Most states and the federal government make some provision for sentence modification in cases involving clerical errors or assistance to the government, usually through a rule of criminal procedure. Few states provide a mechanism for reducing sentences in light of changes to sentencing guideline ranges, or repeal of a criminal statute. The most notable exception is the federal system, which authorizes courts to modify sentences when Congress makes retroactive a subsequent reduction in the applicable guideline penalty range—an occurrence that has repeated itself several times in recent years. The lack of legislation relating to reductions in penalty ranges may be explained by the fact that for four decades, legislatures have not busied themselves with reducing penalties or repealing statutes. In more recent years, states have begun to experiment with repeal and amelioration, particularly in the area of lower-level drug offenses. Should that trend continue, mechanisms like the one set forth in subsection (3) may become important ways of ensuring equality in sentencing for individuals sentenced to lengthy sentences for behavior no longer deemed criminal at all.

c. Duration of the court's jurisdiction. At common law, the jurisdiction of a court to change its sentence lasted only during the term in which the sentence was imposed. As courts gradually abandoned the practice of holding set terms, rules of criminal procedure began to specify the time during which a court retained jurisdiction over its sentence. While this Section strictly limits the reasons for which a court can change a sentence, it extends jurisdiction over motions for sentence modification for the full duration of the sentence to account for the fact that clear errors in recording a sentence may not come to light until long after a sentence has been imposed, when the correctional agency notifies a convicted person of his or her release or discharge date. Similarly, cooperation with the government may take time to yield an indictment, conviction, or other proof of substantial assistance sufficient to justify a motion to modify sentence. Placing artificial time limits on sentence modification on the grounds authorized by this Section advances no clear purpose and could result in the miscarriage of justice. Even though this provision extends trial courts' jurisdiction over motions for sentence modification for

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the full duration of the sentence, trial courts should generally stay such motions pending direct appeal, unless the interests of justice demand otherwise.

d. Sentence reduction only. Calculation errors at sentencing can favor the defendant or the government. Nevertheless, subsection (1) only permits the court to reduce a clear sentencing error. Double jeopardy attaches soon after a sentence has been announced and consequently, even when a mistake has been made, a decision in the defendant's favor is not subject to correction in the same way as a mistake that lengthens the sentence. Sentence reductions made pursuant to subsection (2) are not constrained by otherwise-applicable mandatory-minimum sentencing provisions.

e. Petition by the department of corrections. Under § 7.08, the department of corrections, as well as the parties, are authorized to petition the court for correction of a clear error under subsection (1), or for a reduction in sentence pursuant to subsection (3). The reasons for this are twofold. First, as the agency entrusted with calculating sentence credit due to the defendant, the correctional agency is the entity most likely to catch discrepancies in the judgment of conviction or other obvious sentencing errors. Allowing the department to flag those alleged errors increases sentence accuracy. Second, because defendants have no right to counsel in postconviction proceedings, the ability of the defendant to petition for error correction or for a sentence reduction due to a change in applicable penalties will be wholly dependent on the defendant's personal capacity. In some cases, particularly those involving defendants who are mentally ill or otherwise diminished in their ability to access the courts pro se, injustice may be done by relying solely on the defendant to vindicate his right to petition pursuant to subsection (1) or (3). By allowing the department to petition on behalf of those prisoners, § 7.08 increases the odds that meritorious cases will reach the court.

f. Notice to victims. The circumstances that justify sentence modification under this provision—clerical error, assistance to the government, and changes in the applicable penalties and guidelines—are not ones to which victims can contribute relevant information. Consequently, victims are not entitled to prior notice of sentence-modification proceedings. They are, however, entitled to notice of any sentence modification so long as they have indicated a desire to receive such notice pursuant to 7.07C(3).

g. Right to counsel. This Section does not require the appointment of counsel at sentence-modification hearings.

REPORTERS' NOTE

a. Scope. Sentence modification is a practice with origins in the common law. In the days when trial courts did not hold session year-round, but instead divided their work into terms, when a court imposed sentence, it retained unlimited power to change the disposition throughout the term in which the order was entered. Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 145 (Mass. 1861) ("It seems to have been recognized as one of the earliest doctrines of the common law, that the record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered."). So long as the term remained in session, the defendant's

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sentence could be altered. See Dist. Att'y v. Superior Court, 172 N.E.2d 245, 247-249 (Mass. 1961) (summarizing the common-law cases on this topic). Once the term expired, however, the court lost jurisdiction over the sentence and could no longer modify any of its lawfully imposed provisions for any reason. Fine v. Commonwealth, 44 N.E.2d 659, 662 (Mass. 1942).

In 1946, the federal government enacted the first version of Federal Rule of Criminal Procedure 35(b), a rule that would become the model for later state provisions governing modification of lawfully imposed sentences. In its original form, the rule provided that a court could reduce a sentence for any reason within 60 days of its imposition, either on motion by the defense or *sua sponte.* After 60 days, the court lost jurisdiction over the sentence entirely and could no longer change its length or conditions, regardless of whether the court's term had ended. Fed. R. Crim. P. 35(b) (1946).The statute was later revised to expand the time for filing motions for sentence reduction from 60 to 120 days, and to clarify that courts were required to rule on motions "within a reasonable time" after their filing. Fed. R. Crim. P. 35(b) (1966) (increasing the time within which the court may act from 60 to 120 days); Fed. R. Crim. P. 35(b) (1985) (making clear that so long as a defendant's motion is filed within 120 days, the court may rule on it within a reasonable time thereafter). The rule remained substantially static until changes prompted by the Sentencing Reform Act of 1984 led to substantial revisions in the statute, making sentence reduction available solely a means of correcting clear error or rewarding defendants for offering the United States substantial assistance in criminal prosecutions. *See* Fed R. Crim P. 35(b) (1991). Some states followed suit, amending their procedural rules to allow for sentence modification only in cases of clear error or substantial assistance arising after trial. See, e.g., W. Va. R. Crim. P. 35 (1996).

Beginning shortly after Rule 35(b)'s original enactment, states began to adopt similar rules, imposing short time limits within which sentences could be reduced. Steven Grossman and Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. Balt. L. Rev. 1, 10 (2003) (reporting that five states impose a time limit of 30 to 75 days on motions for sentence modification, five others impose a 90-day limit, 10 states impose a 120-day limit, and eight states permit modification for a period between 180 days and 1 year). Despite criticism that these provisions created a form of "judicial parole"—or perhaps because of that fact—many state statutes continue to authorize judicial sentence modification for any reason within the designated period following sentencing.

Only a few states provide the court with authority to modify for the full length of the sentence, as does § 7.08. The State of Indiana recently expanded its sentence modification statute to increase the time within which a court may alter its sentence from 365 days to the full duration of the sentence. See, e.g., Ind. Code § 35-38-1-17 (2015). The State of Wisconsin has long held that its courts possess "inherent authority" to modify sentences, though case law has limited the circumstances in which that authority can be exercised. See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465, 506-09 (2010). Many states with shorter modification periods allow modification for any reason within the authorized modification period, whereas § 7.08 closely circumscribes the grounds for sentence modification. See, e.g., Vt. Stat. Ann. tit. 13, § 7042(a) (2014) (allowing sentence reduction for any reason within 90 days of sentencing). Permitting a more expansive period of modification for error correction is consistent with the court rules of several states. See, e.g., Fla. R. Crim. P. 3.800 (2015) ("A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief . . . ."); Or. Rev. Stat.

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§ 138.083(1)(a) (2013) ("The sentencing court retains authority irrespective of any notice of appeal after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. The court may correct the judgment either on the motion of one of the parties or on the court's own motion after written notice to all the parties.").

b. Grounds for sentence modification. Jurisdictions allowing sentence modification upon a showing of "clear error" have defined the standard in a variety of ways. The comments to this provision most closely follow the Fifth Circuit's conclusion that clear error does not permit a court "to withdraw a reasonable sentence and impose what is, in its view, a more reasonable one." United States v. Ross, 557 F.3d 237, 243 (5th Cir. 2009); see also United States v. Houston, 529 F.3d 743, 761 (6th Cir. 2008) (Clay., J., dissenting) (claiming that unreasonable sentences, including those where the court didn't consider all sentencing factors, should be corrected as clear error); United States v. Galvan-Perez, 291 F.3d 401, 406-407 (6th Cir. 2002) (finding that the clear error standard does not allow a court to alter a discretionary decision because of a "change of heart"). In comparison, some jurisdictions have required a defendant's objection for a finding of clear error. See, e.g., United States v. Fields, 552 F.3d 401, 405 (4th Cir. 2009) (concluding that under the clear error standard, "[a] district court may only correct an 'acknowledged and obvious mistake'" (quoting United States v. Cook, 890 F.2d 672, 675 (4th Cir. 1989))); *Houston*, 529 F.3d at 748-753 (finding that the clear error standard does not allow a sentence to be modified based on new information when the defendant failed to object to the adequacy of the court's explanation for the original sentence).

This provision follows Fed. R. Crim. P. 35 in allowing a sentence reduction upon the government's motion when the defendant provides substantial assistance in investigating or prosecuting another person. Like Rule 35, this provision permits sentencing judges to reduce sentences for substantial assistance below the level otherwise required by mandatory minimum sentencing laws.

Finally, this provision allows a sentence reduction following a change in the applicable sentencing guidelines when such changes have been made retroactive, or a repeal of the statute criminalizing the underlying offense. Although the Supreme Court in Dorsey v. United States, 132 S. Ct. 2321 (2012), set up a presumption that such legislative measures apply prospectively only, when changes are made retroactive, this provision specifically authorizes judges to determine how such retroactive changes should be given effect. Cf. Harol J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. Mich. J. L. Reform 53 (2013). Subsection (3) also allows judges to reduce sentences in response to legislation eliminating penalties for certain crimes or behaviors except in cases where the legislature has provided otherwise. Examples of such a prohibition might include situations in which the legislature adopts an automatic or administrative process to retroactively reduce sentences, or decides not to permit retroactivity at all.

This provision does not allow for a sentence reduction in light of the offender's rehabilitation. Indiana's Purposeful Incarceration program has recently begun experimenting with such reductions for rehabilitation with the hope of "reduc[ing] recidivism and improv[ing] offender's successful re-entry into society." *Purposeful Incarceration*, Ind. Dep't of Corr., http://www.in.gov/idoc/2798.htm (last visited Sept. 14, 2016). Initial data suggest the program is being found to reduce recidivism by participants. Id.

c. Duration of the court's jurisdiction. The time during which a court retains jurisdiction over its sentence varies greatly in different jurisdictions. In some states, the trial court loses jurisdiction immediately after the

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1 judgement and sentence are entered. See, e.g., Sanders v. State, 638 N.E.2d 840, 841 (Ind. Ct. App. 1994); State ex
2 rel. Johnston v. Berkemeyer, 165 S.W.3d 222, 224 (Mo. Ct. App. 2005); State v. Carlisle, 961 N.E.2d 671, 673
3 (Ohio 2011). In others, the trial court retains jurisdiction only until the sentence is put into effect, see, e.g., Harmon
4 v. State, 876 S.W.2d 240, 242 (Ark. 1994); Cobham v. Comm'r of Corr., 779 A.2d 80, 85 (Conn. 2001), for the
5 remainder of the term of court, see, e.g., Walters v. State, 933 So. 2d 313, 315 (Miss. Ct. App. 2006), or for a set
6 number of days after the imposition of the sentence or the direct appeal, see, e.g., Ga. Code Ann. § 17-10-1(f)
7 (2015); Commonwealth v. Rohrer, 719 A.2d 1078, 1080 (Pa. Super. Ct. 1998); Gomez v. State, 311 P.3d 621, 623-
8 624 (Wyo. 2013). Courts may provide exceptions to these rules. See Commonwealth v. Holmes, 933 A.2d 57, 65-66
9 (Pa. 2007) (holding that the statute limiting a trial court's jurisdiction over a sentence "was never intended to
10 eliminate the inherent power of a court to correct obvious and patent mistakes in its orders, judgments and decrees."
11 (quoting Commonwealth v. Cole, 263 A.2d 339, 341 (Pa. 1970)).

12 Some jurisdictions specifically divest the trial court of "jurisdiction to rule on the motion to modify sentence
13 while a direct appeal [is] pending." State v. Williams, 780 So. 2d 1031, 1032 (Fla. Dist. Ct. App. 2001); see also Fla.
14 R. Crim. P. 3.800(c) (2015); People v. Smith, 867 N.E.2d 1150, 1153 (Ill. App. Ct. 2007). Although § 7.08 does not
15 automatically strip a trial court of jurisdiction during a direct appeal, Comment *c* notes that a trial court should
16 ordinarily stay a motion to modify sentence until the direct appeal is complete.

17 *d. Sentence reduction only*. The Supreme Court has not directly held that the Double Jeopardy Clause would
18 bar an increase in the imposition of a legal sentence that has already commenced; however, it has suggested as much
19 in dicta. In United States v. Benz, 282 U.S. 304, 306-307 (1931), the Court cited a line of authority suggesting that a
20 court loses power to increase a sentence once service has commenced even during the same term of court, and
21 explained that the rule "is not based upon the ground that the court has lost control of the judgment in the latter case,
22 but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same
23 offense in violation of the [Double Jeopardy Clause]." Id. Therefore, although "[t]he Double Jeopardy Clause does
24 not provide the defendant with the right to know at any specific moment in time what the exact limit of his
25 punishment will turn out to be," United States v. DiFrancesco, 449 U.S. 117, 137 (1980), at the same time, most
26 jurisdictions agree that once a legal sentence has commenced, increasing it would be improper. Lee R. Russ,
27 Annotation, *Power of State Court, During Same Term, To Increase Severity of Lawful Sentence—Modern Status*, 26
28 A.L.R. 4th 905, § 3 (1983). What constitutes the commencement of the sentence varies widely, however, ranging
29 from oral pronouncement of sentence by the court to arrival at the prison where a custodial sentence will be served.
30 Id. §§ 7-8.

31 *e. Petition by the department of corrections.* Like subsection (3), the federal statute governing sentence
32 reduction for retroactive changes in guideline range permits the Bureau of Prisons to petition the court on behalf of
33 an inmate for a reduction in sentence when the sentencing guidelines are lowered pursuant to 28 U.S.C.
34 § 994(o). 18 U.S.C. § 3582(c)(2) (2002).

35 *f. Right to counsel.* Comment *g* follows the majority of federal courts by concluding that "there is no
36 [constitutional] right to appointed counsel in sentence modification proceedings" in criminal cases. United States v.
37 Harris, 568 F.3d 666, 669 (8th Cir. 2009); see also, e.g., United States v. Myers, 524 F. App'x 758, 759 (2d Cir.
38 2013); United States v. Carrillo, 389 Fed. App'x 861, 863 (10th Cir. 2010); United States v. Forman, 553 F.3d 585,

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590 (7th Cir. 2009); United States v. Webb, 565 F.3d 789, 794 (11th Cir. 2009); United States v. Taylor, 414 F.3d 528, 536 (4th Cir. 2005); United States v. Townsend, 98 F.3d 510, 512-513 (9th Cir. 1996). This follows from the Supreme Court's conclusion that the Sixth Amendment right to counsel applies to direct appeal when that appeal is provided as a matter of right, but not to other postconviction proceedings. Coleman v. Thompson, 501 U.S. 722, 755-757 (1991); see also, e.g., *Townsend*, 98 F.3d at 512-513. And many circuit courts have found that "neither the Constitution's equal protection guarantees nor due process guarantee provide criminal defendants a right to effective assistance of counsel" during federal sentence modification hearings. *Taylor*, 414 F.3d at 536.

Some state courts have found that the right to counsel, under the federal or a state constitution, extends to sentence modification hearings, but often only in the context of correcting illegal sentences or offering protections against newly imposed postrelease restrictions—not modifying sentences that have been lawfully imposed. See, e.g., Jordan v. State, 143 So. 3d 335, 338 (Fla. 2014) ("[A] defendant has a right to be present and to be represented by counsel at an resentencing proceeding from a rule 3.800(a) motion [to correct an illegal sentence.]" (quoting Acosta v. State, 46 So. 3d 1179, 1180 (Fla. Dist. Ct. App. 2010)); Avery v. Batista, 336 P.3d 924, 928 (Mont. 2014) ("[A] criminal defendant has a constitutional right to counsel at sentence review [under the Montana constitution]."; State v. Schleiger, 21 N.E.3d 1033, 1036 (Ohio 2014) ("[T]he right to counsel attaches at a resentencing hearing conducted for the limited purpose of imposing statutorily mandated postrelease control . . . ."); see also State v. Wade, 873 P.2d 167, 168-169 (Idaho Ct. App. 1994) ("A criminal defendant has a right to counsel at all critical stages of the criminal process, including pursuit of a Rule 35 motion [to modify sentence, except when] the trial court finds the motion to be frivolous."); State v. Pierce, 787 P.2d 1189, 1193 (Kan. 1990) (concluding that appointment of counsel is not necessary for a motion to modify sentence but that "counsel should be appointed to represent the defendant in preparing for an participating in the hearing," if the court orders such a hearing).

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§ 7.09. Appellate Review of Sentences.[140]

(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that preserves substantial judicial discretion to individualize sentences within a framework of law.

(2) An appeal from a sentence may be taken by the defendant or the government on grounds that a sentence is unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of the purposes stated in § 1.02(2)(a). The right to appeal from a sentence shall be as of right on the same terms as a first appeal from a criminal conviction.

(3) A sentence that is the same as a specific sentence recommended by the defendant or the government, or is the same as a specific sentence agreed upon by the defendant and the

[140] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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government, may not be appealed by a party that made the recommendation or entered the agreement, unless the sentence is unconstitutional, outside the court's jurisdiction to impose, or outside the range of statutory penalties authorized for the offense(s) of conviction. A defendant must also have an opportunity, through direct appeal or collateral review, to challenge a sentence that is the product of ineffective assistance of counsel.

(4) No waiver of the right to take an appeal from sentence shall be permitted or honored by the appellate courts if the waiver is contained in a plea agreement or is otherwise obtained prior to sentencing proceedings in the case. This provision does not apply to waivers of appellate issues that occur at sentencing proceedings through procedural default.

(5) The standard of review of sentencing decisions in individual cases shall be as follows:

(a) The appellate courts shall exercise de novo review of claims of errors of law. Whether a particular consideration is a legally permissible ground for departure from the sentencing guidelines is a question of law within the meaning of this Section. The permissibility of a departure factor shall be determined in light of the purposes in § 1.02(2).

(b) The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.

(c) Findings of facts made by the sentencing court or a jury at sentencing proceedings shall not be overturned unless clearly erroneous.

(d) When based on a legally permissible departure consideration, the appellate courts shall uphold sentencing courts' decisions to depart from sentencing guidelines and the appropriate degree of departures unless such decisions lack a substantial basis in the record demonstrating defensible grounds for departure. The appellate courts shall uphold sentencing courts' decisions to impose presumptive-guidelines sentences unless the failure to depart in an individual case was clearly unreasonable and an abuse of discretion in light of the purposes in § 1.02(2).

(e) The appellate courts shall exercise de novo review of sentencing courts' decisions to make extraordinary departures from sentencing guidelines as defined in §§ 6B.01 and 7.XX(3).

(f) The appellate courts may reverse and remand any sentence not supported by an explanation of the sentencing court's reasoning as required in § 7.XX(4) or (5).

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(6) When authorized under the terms of this provision, an appellate court may affirm or reverse a sentence pronounced by a sentencing court, remand a case for resentencing, or order that the sentencing court fix sentence as directed by the appellate court.

(7) The appellate court shall issue a written opinion whenever it reverses, remands, or modifies the judgment of the sentencing court. The appellate court should issue a written opinion in any other case in which the court believes that a written opinion will provide needed guidance to sentencing judges, the sentencing commission, or others in the sentencing and corrections system.

(8) The appellate courts may provide by rule for summary disposition of cases arising under this Section when no substantial question is presented by the appeal, provided the summary disposition contains a statement of why the questions presented are not substantial.

(9) When appellate courts reverse, remand, or modify the judgments of sentencing courts, prosecutors shall make reasonable efforts to notify victims who have requested such notification under § 7.07C(3).

Comment:

a. Scope. This Section is one of three cornerstone provisions that define the relative powers of the sentencing commission, the trial courts, and the appellate judiciary within the revised Code's sentencing structure. The others are § 6B.04 (defining the legal force of sentencing guidelines promulgated by the commission) and § 7.XX (defining trial-court discretion to depart from guidelines and other sentencing provisions). All three Sections must be read together in order to appreciate the interrelationships of authority envisioned in the revised Code. The Code's underlying philosophy is that there should be collaboration and dialogue between the commission and the judiciary in the continuous development of a common law of sentencing, but the judiciary should hold ultimate dispositive power over most issues; see § 6B.04, Comment *b*. The "balance of power" among commission, trial courts, and appellate courts is a critical design element of a guidelines system to ensure that sentencing guidelines enjoy a moderate degree of legal enforceability, but not so much as to choke off the appropriate sentencing discretion of trial courts in individual cases.

The role of the appellate courts is addressed in a cursory way in existing legislation in most American states. Over decades of experimentation with guidelines systems in the United States, this has led to great divergence in appellate practice in jurisdictions with otherwise-similar authorizing legislation. At one extreme, some appellate benches have conceived their role primarily as enforcers of the literal terms of sentencing guidelines. On this view, there may be little room for trial-court discretion or substantive contribution to a common law of sentencing from the trial or appellate bench. In a small number of systems over the past several decades, guidelines have taken on the aspect of relatively fixed rules through an appellate-court

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jurisprudence of tight enforcement, with the trial courts reduced to technocratic application of the guidelines' terms.

At the opposite extreme, a number of appellate judiciaries have taken a "hands off" approach to sentence appeals, thus depriving guidelines of legal force—even the relatively modest "presumptive" force envisioned in § 6B.04. In a hands-off regime, individual sentencing courts are free to apply idiosyncratic philosophies of sentencing, there is no unifying judicial voice to communicate needed changes in guidelines to the sentencing commission, and the appellate bench plays no creative role in the accrual of a common law of sentencing. This approach deprives the jurisdiction of the coordinating benefits of appellate lawmaking.

Section 7.09 charts a middle course that avoids the extremes of (1) overly restrictive guidelines enforcement and (2) the absence of enforcement and judicial lawmaking. Substantively, § 7.09 constructs a meaningful yet moderately deferential standard for the appellate review of sentences under sentencing guidelines; see Comment *f*, below.

The behavior of the appellate judiciary is a critical variable in any sentencing system, with great power to skew the structure's operation, yet existing state and federal codes have done an inadequate job of imagining or describing the intensity of appellate sentence review that is wanted. Section 7.09 therefore devotes special care to the delineation of the appellate courts' functions. It is more detailed than existing legislation on the subject and incorporates principles borrowed from case law in numerous states. When in doubt, the drafters of § 7.09 have erred in favor of elaborated rather than streamlined content in § 7.09, to best clarify the provision's meaning—on the theory that the operation of the sentencing system as a whole will be unpredictable if the role of the appellate courts is not carefully defined. It is a central mission of the revised Code to design the best possible sentencing structure based on current knowledge and experience, not a structure with unknown distributions of authority as between the sentencing commission and the courts.

b. Appellate-court discretion in light of legislative purposes. Subsection (1) provides that the appellate bench's powers must be exercised in conformity with the general purposes of the sentencing system as laid out in § 1.02(2). This reflects the revised Code's effort to give greater prominence and effect to the "purposes provision" than in most states and in the 1962 Code, see § 1.02(2), Comment *a*. Parallel provisions, grounding all decisionmaking in the purposes provision, are addressed to sentencing courts (see § 7.XX(1)), and the sentencing commission (see § 6A.01(2)(e)).

The second sentence of subsection (1) is a statement of legislative intent included to reinforce the desired construction of § 7.09 by the courts. Aspirational declarations of this kind should be used sparingly. Normally, a legislature's intent is best conveyed through the "primary" operational terms of a statute, rather than a "secondary" description of the intended patterns of outcomes that the legislature envisions via the judicial interpretive process. In this instance, however, given the importance of the subject matter to the operation of the entire system, and the

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known dangers of miscommunication between the legislature and appellate courts (see Comment *a* above), subsection (1) spells out the legislature's expectations with unusual directness. This statement precludes a hands-off approach by the appeals courts; it asks that they address the merits of sentencing claims and assume a place, along with trial courts and the commission, as collaborators in an evolving lawmaking enterprise. See also § 6A.01(2)(b) (sentencing commission shall "collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework"). In addition, subsection (1) admonishes the appellate bench to take care to preserve substantial judicial discretion to individualize sentences within a framework of law; see § 1.02(2)(b)(i). This is meant to rule out mechanistic or literalist approaches to guidelines enforcement by the appellate judiciary. See also § 6B.03(4) (the commission shall recognize the importance of judicial discretion to individualize sentences in specific cases, and shall not act to foreclose the exercise of that discretion).

c. Symmetrical rights of sentence appeal by defendant and government. Subsection (2) affords parallel rights to appeal sentences to the government and defendant. This follows the practice of the great majority of American guidelines jurisdictions. Some jurisdictions provide the government with a more limited right to take an appeal from sentence than that given to the defendant. The Institute rejects this approach on grounds of public policy. Where societal interests necessitate a punishment more severe than that imposed by the trial court, either on utilitarian grounds or grounds of disproportionate lenity, errors in favor of the defendant should be correctable under law.

The general right to appeal is expressed in sweeping terms. It includes claims that a sentence is unlawful or was imposed in an unlawful manner, but also allows substantive challenges of the trial court's discretionary choices. Subsection (2) adds that a particular sentence may be challenged as too severe or too lenient, or as otherwise inappropriate in light of the purposes of sentencing in individual cases. This provision is intended to work a significant change in the laws of many states. Most American jurisdictions allow little or no room for substantive appeals of the merits of individual sentences, so long as they are within the statutory maximum penalties for the offenses of conviction and are not infirm on constitutional grounds.

The second sentence of subsection (2) grants either party a first appeal as of right from a sentencing decision commensurate with the right to take a first appeal from conviction. Although the scope of authorized appeals varies, the equivalency given to sentence appeals and other appeals from conviction reproduces the law in most American guidelines systems that allow for substantive sentence review.

Many jurisdictions do not allow appeals from sentences that are consistent with guidelines' recommendations, preferring to focus the appellate courts' resources and attention on departure sentences. The revised Code endorses the minority view that appeals should be authorized even from sentences not classified as departures. This conclusion follows from the conceptualization of departures in the revised Code. Great importance is placed throughout the Code on judicial

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discretion to individualize sentences within a legal framework. Although the commission enjoys unique competence to set benchmarks for punishment in ordinary cases, it would be improper for sentencing courts to blindly follow guidelines in cases that differ materially from the norm. A sentencing system should encourage departures in appropriate cases or else face the dangers of excessive uniformity. As stated, for example, in § 6B.03(4):

> [T]he best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.

In similar spirit, § 6A.05, Comment *g*, advises the commission to define sentences that are "in compliance with the guidelines" to include any sentence that is "consistent with an applicable presumptive sentence, rule, or standard set forth in the guidelines, *or a departure from any presumptive provision of the guidelines that is grounded in the purposes of § 1.02(2)(a)*" (emphasis supplied). This language signals that departures in appropriate circumstances are welcomed in a well-ordered sentencing system.

d. No appeal from sentence recommended or agreed upon by a party. The Code follows the majority rule among sentencing guidelines jurisdictions in the U.S. that there can be no appeal from a sentence that is exactly the same as that recommended or agreed upon by the appealing party. In certain circumstances of fundamental error, however, this rule of non-appealability is set aside. Subsection (3) provides exceptions for cases in which the recommended or agreed-upon sentence is unconstitutional, outside the court's jurisdiction to impose, or outside the range of statutory penalties authorized for the offense(s) of conviction.

The last sentence of subsection (3) also excepts claims of ineffective assistance of counsel from the general rule of non-appealability. States differ in the extent to which ineffectiveness claims are heard via direct appeals or through collateral review. The final sentence of subsection (3) preserves defendants' rights to press such claims regardless of the procedural pathways that exist in a particular jurisdiction.

Subsection (3)'s rule extends only to recommendations or agreements as to a "specific sentence." Thus, an advance agreement that the sentence must be below a designated ceiling, or must be within a designated range, is not included in subsection (3), and falls under the broad rule of appealability in subsection (2). See Comment *e* below.

e. Sentence appeal waivers. Subsection (4) prohibits sentence appeal waivers (SAWs) entered into by one or both parties in advance of sentencing proceedings, usually as part of a plea agreement. For the most part, such waivers are made by defendants and not prosecutors. SAWs are "preemptive" waivers in that they foreclose the waiving party's ability to challenge unknown future errors that may take place during sentencing proceedings, including judicial errors and prosecutorial misconduct.

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Like all of the Model Penal Code: Sentencing provisions, subsection (4) is addressed to state legislatures and does not speak to systemic issues unique to the federal system. See Model Penal Code: Sentencing, Report (2003); Tentative Draft No. 1 (2007). In particular, the recommendations in subsection (4) are founded on the law and practices of appellate sentence review that have developed in state sentencing guidelines systems since 1980. The federal experience of sentence appeals has been far different from that of any state.

SAWs have been upheld against constitutional challenge by the vast majority of federal and state courts that have heard such claims, although the U.S. Supreme Court has not yet ruled on their permissibility. Only in three states have courts held SAWs unenforceable as a matter of state constitutional law, although a number of additional states have created exceptions to the general rule of constitutional permissibility: for example, some state courts have held that waivers of the right to appeal on ineffectiveness grounds are unenforceable; some have held that defendants cannot waive the right to appeal a sentence above the statutory maximum; and some have held that there can be no waiver of an appellate claim that the sentencing judge relied on a constitutionally-prohibited factor such as race when passing sentence.

Subsection (4) does not address the constitutional standing of SAWs, but asks whether they should be permitted as a matter of policy in a well-ordered sentencing system. Both for reasons of fairness to individual defendants and to preserve the integrity of the sentencing system as a whole, the Code recommends that SAWs be declared impermissible and unenforceable as a matter of statutory law in every state.

On grounds of fairness, defendants should not be allowed to submit themselves to unspecified illegal treatment by the government in the future. A SAW resembles a blank check. The defendant has no way of knowing in advance whether legal errors will occur at sentencing, or what those errors might be. For example, assume that a defendant has entered a plea agreement with an agreed-upon cap of two years of incarceration. Under the agreement, the judge could impose a probationary sentence or any term of incarceration up to two years. Assume also that, as part of the plea agreement, the defendant has waived his right to take an appeal from any sentence pronounced by the court, so long as the sentence falls within the plea agreement's severity ceiling. During sentencing proceedings, the judge's decision to impose a prison term rather than a probation sentence could then rest on careless or improper reasoning—such as a miscomputation of the defendant's criminal history or a finding of aggravated circumstances unsupported in the record. Similarly, the judge might decide to impose a two-year prison term instead of a one-year term on illegal or erroneous grounds. In scenarios of this kind, the defendant would be bound by the plea agreement not to contest the unlawful sentence.

Such results are anomalous. Generally in the setting of waiver of procedural rights, post-waiver actions and decisions by government officials remain regulated by law. When criminal defendants waive the right to a jury trial, for example, the waiver does grants no immunity to government officials to commit future errors or misconduct. Instead, trial waivers sacrifice

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procedural rights in exchange for a known outcome; there is no exercise of official authority or judgment in between the acceptance of waiver and the finding of guilt.

If we were to imagine a trial-related "waiver" truly analogous to a SAW, it would take the following form: The criminal defendant would agree, in exchange for a benefit of some kind, to go to trial subject to a waiver of his right to appeal from any legal errors that might unfold at trial. The admission of inadmissible evidence could not be appealed, nor improper jury instructions, nor a conviction on insufficient evidence. To the Institute's knowledge, such preemptive insulation of trial errors has not been countenanced by American courts.

Under the Code's approach, similar preemptive waivers would be statutorily barred in the setting of sentencing litigation. In cases of agreed-upon ranges of sentences, the Institute concludes that sentencing courts should still be required to exercise their discretion in a lawful manner. For example, under the Code's scheme, it would be appealable error for a court to impose the maximum sentence within an agreed-upon range based on the court's finding that the defendant had committed an additional criminal offense for which no conviction was obtained, see § 7.03(2)(b). Although consistent with the range of penalties set out in the plea agreement, such a sentence would be inconsistent with the law.

Of equal concern with considerations of fairness, SAWs endanger the institutional integrity of the sentencing system as a whole, and its ability to effectuate public goals. Subsection (4)'s prohibition stems in part from the Code's view that a meaningful appellate-review process is an essential component of a well-functioning sentencing system; see Comment *a* above. From a perspective of system design, the relevant question is whether, and the extent to which, the parties should be allowed to render guidelines provisions unenforceable on a case-by-case basis. Since 90 percent or more of criminal cases nationwide are resolved by guilty plea, such case-by-case circumventions could have large impact on the system as a whole. The systemic interest in an evolving common law of sentencing would be forfeited if the SAWs became routine. The judiciary's expected role in the development of sentencing law could be limited or extinguished by SAWs. SAWs allow the parties on a case-by-case basis to skirt the policy-making authorities of the legislature and sentencing commission. If SAWs become widespread in a guidelines jurisdiction, for example, all of the public policies built into sentencing guidelines would fall to the mercy of the plea bargaining process.

SAWs increase the power of the plea bargaining process, at the expense of the sentencing commission and the judicial branch. If we believe that prosecutors are generally more powerful than defendants in the charging and bargaining processes, then the greatest weight of SAWs' "guidelines-circumvention" power is lodged in the government. In the Institute's view, this would be an undesirable result. Subsection (4)'s position on SAWs is supported by the Institute's general policy—voiced throughout the Code's promulgation—that a model law should avoid measures that enlarge prosecutorial control over sentencing outcomes. Particularly in sentencing

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guidelines systems, and especially when they are poorly designed, the undue transfer of sentencing "discretion" to prosecutors is a widespread criticism and fear.

Subsection (4) does not speak to "waivers" of claims on appeal that result from a party's failure to raise those claims before the trial court during sentencing proceedings. Under ordinary rules of criminal and appellate procedure, with limited exceptions, rights to appeal are foreclosed on questions not preserved below. Nothing in subsection (4) is intended to alter states' procedures governing waivers by procedural default at a sentencing hearing. Subsection (4) speaks only to preemptive waivers of appeal rights before sentencing proceedings have occurred.

f. Standard of appellate review. Consistent with the statutory law and case law in most guidelines jurisdictions, subsection (5) lays out a multi-tiered standard for appellate sentence review that attaches with differing levels of intensity depending on the nature of the issue raised on appeal. This approach differs markedly from the generalized "abuse of discretion" (or equivalent) standard used in a majority of American jurisdictions for appellate challenges to sentencing decisions rendered within statutory limits.

(1) Questions of law. Subsection (5)(a) begins with the proposition, followed in all guidelines jurisdictions, that questions of law are to be reviewed under a de novo standard. Judges never hold discretion to sentence outside the applicable statutory maximum penalty, for example; see § 7.XX(6). The Code further proscribes certain factual considerations from the trial courts' decisions going to the severity of sentences (see § 6B.06(2)), including an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, political affiliation or belief, and alleged crimes committed by the offender that have not resulted in convictions. The Constitution sometimes imposes limitations on judicially selected penalties in the absence of jury factfinding at sentencing proceedings; see § 7.07B. Trial court errors on points such as these should enjoy no deference from reviewing courts.

Often, the borderline between issues of "law" and "fact" is not sharply drawn. For example, the trial court's power to depart from sentencing guidelines in the revised Code depends on the existence of "substantial circumstances" that justify the departure. This rule can be parsed into two inquiries: First, what kinds of considerations are legally allowable to support a guidelines departure? Second, assuming the first question has been answered affirmatively, do the facts of record support a finding that the legally permissible departure factor is present in a given case, and that its dimensions are such as to supply a "substantial" reason for departure? The Code treats the first question as a matter of law to be met with de novo review under subsection (5)(a) and the second as a mixed question of law and fact; see subsection (5)(d) below (such decisions to be overturned only when lacking in "a substantial basis in the record demonstrating defensible grounds for departure").

The Code instructs the sentencing commission to author nonexclusive lists of aggravating and mitigating factors that may support departures. See § 6B.04(4) ("The guidelines shall include nonexclusive lists of aggravating and mitigating factors that may be used as grounds for

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departure from presumptive sentences in individual cases. The commission may not quantify the effect given to specific aggravating or mitigating factors."). The nonexclusive nature of these catalogs is intended to encourage the development of additional "judge-made" departure factors. Indeed, the creation of judge-made departure factors is a principal component of the evolving common law of sentencing that the Code seeks to promote. Whether a particular type of consideration is a legally permissible ground for departure from the sentencing guidelines is a question of law within the meaning of this Section, as stated expressly in subsection (5)(a). The subsection goes on to state that the legal permissibility of a departure factor must be adjudged in light of the purposes in § 1.02(2). Historically, in a small number of American guidelines jurisdictions, sentencing courts have not been allowed to deviate from sentencing guidelines on the rationale that the purposes of sentencing dictate a non-guidelines penalty. Such a restriction is antithetical to the Code's philosophy of individualized sentencing within a framework of law, and subsection (5)(a) takes care to expressly foreclose such an approach.

(2) Subconstitutional proportionality review. Subsection (5)(b) extends the scope of review as a matter of law still further. It provides that, in cases in which the penalties imposed were "disproportionately severe," the appellate courts may reverse or modify such sentences. The power expressed in subsection (5)(b) is *statutory* in origin, not constitutional. If enacted by a legislature, it would cede discretion to the courts to invalidate any otherwise-legal sentence on proportionality grounds. By the express terms of subsection (5)(b), this extends to sentences imposed under any mandatory penalty provisions that may exist in a state's laws. Although the Code elsewhere disapproves of mandatory penalties of any kind (see Tentative Draft No. 2 (2011), § 6.06(8)), subsection (5)(b) would play a crucial role in the many jurisdictions that are not in compliance with the Institute's blanket proscription.

The objective of § 7.09(5)(b) is to create a power of proportionality review in the appellate courts with significantly greater bite than the forgiving standard of "gross disproportionality" that has grown up in Eighth Amendment jurisprudence. Whatever the merits of a gross-disproportionality standard as a constitutional benchmark, it has done poor service as a policy instrument to ensure that penalties are no more severe than required to effectuate societal purposes. State legislatures are free to place lower ceilings on permissible penalties than the deferential federal standard—or the state constitutional standards that exist in most American jurisdictions. Indeed, in order to build the superstructure of institutional authority envisioned in the revised Code (the main subject of Tentative Draft No. 1 (2007)), it is necessary for legislatures to allocate power to the courts to act as final arbiters of sentence proportionality on a case-by-case basis: Throughout the Code, the courts work within a sentencing structure created at the systemic level of government, and the trial courts are subject to presumptively applicable rules that may be enforced on appellate review, but ultimately the Code envisions a scheme in which courts hold discretion to deviate from the general rules of the legal framework when called for by the facts of particular cases. According to the Code's plan, all actors in the sentencing system must honor considerations of proportionality, but the judgments of legislatures

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and sentencing commissions are "first drafts" to be ratified or amended by the courts in individual cases.

If the history of the Cruel and Unusual Punishment Clause had unfolded differently, such a judicial role may have been instantiated through the minimum requirements of federal and state constitutional law—but the failure of constitutional law to develop in a useful direction does not tie the hands of state legislatures. Proportionality in sentencing is a public policy value that deserves the careful attention of state legislatures under any constitutional regime. Indeed, such legislative responsibility is especially needed in an era in which the United States metes out aggregate punishments many times greater than those in other Western democracies. The Institute therefore recommends creation of a "subconstitutional" power of proportionality review to reach miscarriages of penalty that would survive challenge under the Cruel and Unusual Punishment Clause.

Illustration:

1. Defendant was sentenced for the current offense of theft of three golf clubs worth $1200. He had earlier convictions of robbery and burglary, entered years before commission of the current crime. Under the terms of a state statute, defendant's current offense plus his prior convictions triggered a mandatory-minimum penalty of 25 years in prison. The trial court imposed the mandatory penalty and denied the defendant's request to set aside the mandatory punishment on grounds of disproportionality. The appellate courts have authority to reverse or modify the sentence if they find on the facts of the case that the penalty is disproportionately severe.

The jurisprudence of sentence proportionality is highly underdeveloped in the United States, and the revised Code does not endorse any specific approach. Creation of a "model" statutory framework would be premature. Nonetheless, courts in this country and others have grappled with the question in useful ways. For example, the Supreme Court had begun to develop an "objective" proportionality analysis in Solem v. Helm, 463 U.S. 277 (1983) (Powell, J.), which was cut back substantially in later cases—and became a roadmap for later dissenters on the Court. Justice Powell created a three-part analysis that included: an examination of the harshness of the penalty in relation to the gravity of the offense, a comparison of the sentence in the instant cases with other sentences imposed in the same jurisdiction (e.g., for more serious crimes), and comparison with sentences imposed for the same offense in other jurisdictions.

It would be a mistake to view the *Solem* analysis as the beginning and end of useful judicial thought on the adjudication of proportionality, however. There are other conceivable approaches to proportionality review, and many questions that Justice Powell's opinion left unanswered. For example, Justice Powell proposed that the gravity of an offense should be measured in light of the harm done by the offender and the offender's blameworthiness—and he argued that little weight should be given to the defendant's criminal record because he had already paid the price for earlier convictions. Among retributivist theorists, these views are widely held but not

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universal, and they are not much help in cases of multiple counts of conviction. Moreover, as a matter of first principles, there is room for disagreement over whether proportionality is solely a matter of deontological justice and desert, or whether it must also be assessed in light of the utilitarian purposes of sentencing. The question has provoked highly visible disagreements among Supreme Court Justices and scholars alike.

This is not to say that proportionality analysis is impossible for courts to develop, or so indeterminate that it cannot function as a meaningful and administrable restraint on punitive severity. One central theme of the revised Code is that proportionality—as an operative legal doctrine—must be bolstered in American sentencing systems so that it plays a larger role in decision making at every level. This view grows out of the nation's recent history, in which considerations of proportionality were largely submerged, and reflects the Institute's view that affirmative legislative measures are required to correct the problem. Ultimately, at the case-specific level, this task is best suited to the common law process and comparative doctrinal experimentation in many states.

The Code's recommendation of subconstitutional proportionality review faces a foreseeable hurdle. State courts habituated to the constitutional doctrine of gross disproportionality may be slow to recognize that subsection (5)(b) is intended to create a judicial-review authority with sharper teeth. Accordingly, the language of the provision contains no qualifying words that only "significantly" or "unreasonably" disproportionate penalties may be reversed—or any equivalent adjectival limitations that might be imagined ("only in extraordinary circumstances" and so on). The goal of the Section is to create a power that will be used. Because it is a legislatively created power in each state, it is not subject to the calls for deference to the legislature that so often carry the day in constitutional litigation, and invokes none of the federalism concerns that have driven the Supreme Court's decisions. To further clarify the drafters' intent that subconstitutional proportionality review should not be marginalized by deferential standards of appellate review, subsection (4)(b) closes with the admonition that "[t]he appellate court shall use its independent judgment when applying this provision."

(3) Findings of fact. Subsection (5)(c) incorporates a rule generally applicable to appellate practice that findings of fact made by the trial court or jury must be accepted by an appellate tribunal unless found to be clearly erroneous. This rule recognizes the superior position of factfinders at trial to judge the weight and credibility of evidence, and the impracticality of reconstructing this first-hand perspective on appeal.

(4) Review of departures and failure to depart from guidelines. Subsection (5)(d) lays out standards of review applicable to the vast majority of trial-court decisions that involve the application of law to the facts of specific cases. Although a small number of cases will fall under the specialized review standard in subsection (5)(e), subsection (5)(d) is the heart of § 7.09. It not only defines the appellate court's authority to scrutinize most sentencing courts' actions but, within the larger operation of the system, it is a critical mechanism for ensuring a balanced

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distribution of discretionary authority as between the commission, the trial courts, and the courts of appeals.

Subsection (5)(d) contemplates appellate sentence review as a meaningful exercise of authority over the discretionary choices of trial judges about what punishment to impose. The appellate courts may not simply rubber-stamp penalties handed down within broad statutory limits. Instead, the appeals process engages on a substantive level with the application of law to the facts of individual cases, including departure decisions as well as sentences imposed within the presumptive recommendations of the guidelines.

While review under subsection (5)(d) is intended to be a meaningful exercise, it is leavened with measures of deference to trial court judgment calls. A sentencing court's departure decision must be affirmed whenever supported by "a substantial basis in the record demonstrating defensible grounds for departure," even if the appellate court's independent judgment would incline otherwise. The second sentence of subsection (5)(d) expresses an even greater quantum of deference to be afforded to trial court decisions that are within the stated terms of the guidelines. Decisions to adhere to guideline presumptions may not be overturned unless "clearly unreasonable and an abuse of discretion" in light of the general purposes of the sentencing system. Ultimately, these standards reflect the Code's judgment that the central authority in the sentencing system should be the trial court. Assuming a proper grounding in law, no decisionmaker is in a superior position to assess the weight that should be given to subjective and sometimes conflicting considerations; cf. § 7.07B(6).

The "substantial basis" standard in subsection (5)(d) reaches both the trial court's decision to make a departure and the trial court's judgment about the appropriate degree of departure. See § 6B.04(4) ("The commission may not quantify the effect given to specific aggravating or mitigating factors."). It is important to note, however, that extreme departures that exceed a doubling of the presumptive sentence are defined as "extraordinary departures" in the revised Code, and trigger the heightened standard of review in subsection (5)(e); see below. See also § 7.XX(3)(a).

In short, there is a ratcheting effect in the tiers of the standard of review built into § 7.09. For penalties consistent with guideline or other presumptions, challenges can be expected to succeed only in unusual cases. For the overwhelming majority of guidelines departures, the appellate courts will employ meaningful but deferential scrutiny. Outlier cases and decisions based on less than substantial reasoning are now subject to reversal or modification. Finally, for extreme departures, basic concerns of sentence proportionality justify the "heightened scrutiny" and the "independent judgment" standard incorporated into subsection (5)(e).

Except for the Code's treatment of "double departures," there is no differential treatment of aggravated and mitigated departures. In practice, in most state guidelines systems, defense appeals from sentences, including successful appeals, have been far more numerous than government appeals.

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1 *(5) Review of "extraordinary" departures*. Subsection (5)(e) sets forth a separate and more
2 searching standard of review for sentencing-court decisions that are classified as "extraordinary
3 departures" from "heavy presumptions" in sentencing law; see §§ 6B.01(5) and 7.XX(3)(a)-(c).
4 In the Code's structure, a sentencing rule that carries a heavy presumption can be created only by
5 the legislature or by ruling of the highest appellate court of the jurisdiction. Guidelines or other
6 rules authored by the sentencing commission may, at their most enforceable, be given ordinary
7 presumptive force—and these prescriptions are always subject to trial judges' authority to depart;
8 see § 7.XX(2). Section 7.09(5)(e) provides that extraordinary-departure decisions may be upheld
9 on appeal only if the appellate court finds itself in agreement with the sentencing judge in the
10 exercise of the appellate court's independent judgment. The appellate courts are directed to apply
11 a de novo legal standard, recognizing that extraordinary departures are appropriate only when
12 "extraordinary and compelling circumstances exist in an individual case that a sentence in
13 conformity with the heavy presumption would be unreasonable in light of the purposes in
14 § 1.02(2)(a)"; see § 7.XX(3).

15 *(6) Reversal for failure to provide reasons.* Subsection (5)(f) provides that sentences may be
16 reversed and remanded by the appellate courts whenever the trial court is required to provide an
17 explanation of the reasons for the sentence (see § 7.XX(4) and (5)), but fails to do so. This
18 provision comports with the law in nearly all American guidelines systems, including those with
19 advisory guidelines. A meaningful appeals process cannot exist in the absence of reasoned
20 decisionmaking in the lower courts. In addition, the sentencing commission is charged to
21 monitor the operation of the guidelines, and to be alert to the possible need for amendments to
22 the guidelines that are suggested by judicial practices across the state; see § 6A.05. This
23 monitoring and assessment process cannot take place without information on the reasoning
24 processes of sentencing courts in individual cases, particularly when the courts decide to depart
25 from guidelines' presumptions.

26 The principle in subsection (5)(f) reflects the public's interest in an adequate record of the
27 reasoning of sentencing courts and may not be waived by the defendant.

28 *g. Dispositions available to the appellate court.* Subsection (6) grants the appellate courts
29 authority not only to reverse, affirm, or remand a sentence under review, but also to order that a
30 sentencing court fix sentence as directed by the appellate court. The power to order a specific
31 modified sentence is included in the interest of judicial efficiency. In some circumstances, an
32 appellate court may conclude that nothing would be gained by remand, and the record on appeal
33 is sufficient to support a sentence as determined by the appellate court.

34 **Illustration:**

35 2. Defendant on appeal has successfully challenged an upward departure resulting
36 in a prison sentence three times the length of the maximum presumptive sentence for
37 the offense. The appellate court finds that adequate reasons exist on the record to
38 support a guideline departure under the "substantial circumstances" standard (see

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§ 7.XX(2)), but the reasons do not support an extraordinary departure of more than twice the upper boundary of the presumptive range (see § 7.XX(3)(a)). The appellate court may remand the case to the trial court for resentencing or may order that a sentence of twice the upper boundary of the presumptive range be imposed on the appellant.

In some jurisdictions, the dispositions available to appellate courts include affirmance, reversal, and remand for resentencing only. In such systems, appeals courts may not select the sentence to be imposed on remand.

h. When written opinions required. Subsection (7) requires written opinions by the appellate courts when they are most needed, but also provides mechanisms for lightening the courts' workload in cases where the production of opinions would serve little purpose. Whenever the judgment of a sentencing court is reversed, remanded, or modified, the appellate court must supply an opinion to explain its reasons and give guidance to other sentencing judges. However, when the sentence below is affirmed, subsection (7) works upon the assumption that the reasoning of the trial judge has been approved by the appeals court. If this is not so, and if the appellate tribunal concludes that a written opinion would provide needed guidance to sentencing judges, subsection (6) grants the appellate court discretion to produce an opinion.

i. Summary dispositions. Subsection (8) gives courts the option to develop rules for summary disposition of sentence appeals when no substantial question is presented. Such a mechanism is needed to control the workload of the appellate courts, and to allow courts to devote adequate time and resources to the most difficult and important questions that arise on their dockets. The device of summary disposition may be particularly appropriate for the bulk of appeals taken from sentencing decisions falling within the presumptive-guidelines sentences for ordinary cases.

j. States choosing an advisory-guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*. The goal of this Comment is to suggest provisions for the appellate review of sentences in advisory-guidelines schemes.

One conundrum of 21st-century law is the scope and intensity of appellate sentence review that is constitutionally permissible in a system of advisory guidelines (or other advisory benchmarks) for sentencing judges. To understand why this is a difficult question, a brief review of the constitutional law of factfinding at sentencing is necessary. Beginning in the mid-2000s, with Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U. S. 220 (2005); and Cunningham v. California, 549 U. S. 270 (2007), the U.S. Supreme Court issued a series of rulings under the Sixth Amendment Jury Trial Guarantee and the Fourteenth Amendment Due Process Clause striking down state and federal sentencing systems that made use of legally enforceable rules to guide the discretion of sentencing judges. The gravamen of

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1 these decisions was that the factfinding necessary to administer such systems cannot be done
2 entirely by judges. Instead, the Court held that jury trials are required for some categories of
3 factual determinations at sentencing, which must be proven by the government beyond a
4 reasonable doubt, just as elements of offenses must be proven at trial. Initially, the jury-trial right
5 at sentencing attached only to factual findings deemed legally necessary in a given system to
6 impose more severe penalties than authorized without those findings (commonly called
7 aggravating factors in American sentencing schemes). See Tentative Draft No. 1, § 7.07B. Nine
8 years after *Blakely*, in Alleyne v. United States, 133 S. Ct. 2151 (2013), the Court ruled that
9 factual findings at sentencing that increase minimum-sentence severity must also be made by
10 juries rather than sentencing judges, using the reasonable-doubt standard of proof.

11 The *Blakely* line of cases is convoluted and has produced many 5-4 rulings, with shifting
12 majorities controlling the outcomes of individual cases. All Justices agree, however, that the
13 constitutional principles of *Blakely* and its progeny have limited application in systems that
14 impose no legally enforceable rules on the sentencing decisions of trial judges, including
15 jurisdictions that make use of advisory guidelines (as distinguished from "presumptive"
16 guidelines or other sentencing rules that carry a measure of legal enforceability). If no factual
17 determinations are legally required to support any particular sentence within a broad range of
18 possibilities—up to the statutory maximum for the offense—then, as a matter of constitutional
19 law, the sentencing judge is free to assess the facts of the case and select any penalty within the
20 authorized range without the assistance of a jury. On precisely this reasoning, the Court held, by
21 a bare 5-4 majority in United States v. Booker, that the federal sentencing guidelines would not
22 be struck down as a whole for violations of the *Blakely* rule, but could be rendered constitutional
23 through severance of the statutory provisions that had previously vested the guidelines with legal
24 enforceability.

25 In short, advisory-sentencing-guidelines systems, the present subject of this Comment, may
26 seem to enjoy a "free pass" from the jury-trial and burden-of-proof requirements of *Blakely*. The
27 free pass may be illusory, however, in jurisdictions that incorporate appellate sentence review
28 into their advisory frameworks. If the appeals process generates rules that turn on the factual
29 records of individual cases, *Blakely* problems could ensue. For example, if an appellate court
30 were to hold that the maximum sentence for a particular crime may not be imposed in the
31 absence of especially aggravating facts (for example, an unusually severe injury to the victim or
32 an extreme measure of blameworthiness on the offender's part), then the appellate court would
33 be authoring a legal requirement that such facts must be found during sentencing proceedings in
34 order for the maximum punishment to be allowable. Going forward from that decision, if the
35 principle of *Blakely* and related cases is applied, such a legally required aggravating factor would
36 become the province of sentencing juries, not judges.

37 The same might be true if an appellate panel were to hold that a 10-year sentence in a given
38 case was adequately supported by the factual record before the trial court. The negative
39 implication of such a ruling is that, in the absence of a sufficient factual record, the 10-year

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sentence would have been struck down on appeal. Again, the minimum factual showing legally required to support a 10-year sentence, rather than a penalty of lower severity, would be subject to the jury-trial and due-process requirements recognized in *Blakely*.

On the above analysis, one plausible reading of federal constitutional law is that no appellate sentence review is allowable in advisory systems, lest those systems lose their immunity to *Blakely* jury-trial requirements. Any decision on appeal that strikes down or upholds a sentence on the circumstances of the instant case rests on stated or unstated premises that different facts might dictate different results.

The Supreme Court has not endorsed this argument, however, and instead has issued a series of decisions holding that the constitution will countenance substantive appellate review in an advisory-guidelines system so long as the guidelines themselves are not treated as legally enforceable rules, but are limited in status to "factors" that a sentencing court must consider when reaching a decision. See Rita v. United States, 551 U.S. 338 (2007); Gall v. United States, 552 U.S. 38 (2007); Kimbrough v. United States, 552 U.S. 85 (2007); Spears v. United States, 555 U.S. 261 (2009) (per curiam); and Nelson v. United States, 555 U.S. 350 (2009) (per curiam). With this adjustment in the status of the guidelines, and provided there are no other legally enforceable rules or statutory provisions in play during trial-court sentencing proceedings, appellate courts may review sentences in individual cases for overall "reasonableness" in light of the factual record of the case. So long as the sentence review process has a gestalt character that does not turn on hard decision rules, and so long as the legal adequacy of the factual record is weighed against the judgment of appellate courts rather than the criteria of some other decisionmaking body, the practice of substantive sentence review has so far been allowed to coexist with the *Blakely* immunity granted to advisory sentencing systems.

Beyond what has been specifically allowed by the Supreme Court, it is unclear how far the practice of appellate sentence review may be taken in an advisory-guidelines system without running afoul of *Blakely*. In Indiana, for example, the appellate courts frequently strike down trial-court penalties with based on the inadequacy of factual records below, yet appellate judges in the state believe they are living within the precepts of *Blakely* and *Booker*. On strictly logical grounds, some of the Indiana precedent appears constitutionally suspect (even though, on policy grounds, the Indiana practice is a good example of a system of meaningful appellate sentence review that the Code promotes). The U.S. Supreme Court has yet to pass judgment on Indiana's approach, however—and its past decisions about the allowability of appellate sentence review in the federal system do not themselves follow a strict logical map. The result, in a state like Indiana, is that the common law of sentencing must develop against a backdrop of constitutional uncertainty. Most other states with advisory sentencing rules (including New Jersey, Ohio, and Tennessee) have taken a different path from Indiana's, and have abandoned their prior practices of substantive sentence review in *Blakely's* wake.

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This legal context presents difficulties for the drafting of a model sentencing code: On policy grounds, appellate sentence review in an advisory-guidelines system should resemble as closely as possible the Code's recommendations to jurisdictions with presumptive sentencing guidelines—even accepting the fact that advisory systems are likely to claim exemption from *Blakely* requirements and are unlikely to make provision for jury factfinding at sentencing; see § 7.07B. The Code's core policies articulated in § 7.09(1) should be effectuated, if they can be, in the context of *Blakely*-exempt advisory guidelines.

From a code-drafting perspective, it is defensible to take the current state of Supreme Court case law as a firm indicator of (at least) how far an advisory jurisdiction may go in formulating fact-sensitive rules of appellate sentence review. It is also defensible—albeit riskier—to interpret the Court's precedent liberally in favor of provisions that effect important public policies. This is the tack that the revised Code takes below in recommending a provision on appellate sentence review for advisory-guidelines jurisdictions. However, it is prudent to affix a "warning label" to the Code's recommendations. Because the constitutional doctrine is in flux, and has been hotly contested by Supreme Court Justices, lower courts, and scholars alike, any plan for § 7.09 that is adapted to advisory guidelines must be provisional.

The revised Code favors a system of meaningful and substantive appellate review in both presumptive- and advisory-guidelines systems. Ideally, if constitutionally permissible, the appellate-review provision in an advisory system would be no different from a counterpart provision in a presumptive system. Based on the likelihood that the constitutional law will not stretch so far, however, the following alterations to § 7.09 should be considered by states opting to employ advisory rather than presumptive sentencing guidelines:

§ 7.09. Appellate Review of Sentences

(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that preserves substantial judicial discretion to individualize sentences within a framework of law.

(2) An appeal from a sentence may be taken by the defendant or the government on grounds that a sentence is unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of the purposes stated in § 1.02(2)(a).

(3) The right to appeal from a sentence shall be as of right on the same terms as a first appeal from a criminal conviction. No waiver of the right to take an appeal from sentence shall be permitted or honored by the appellate courts.

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(4) The standard of review of sentencing decisions in individual cases shall be as follows:

(a) The appellate courts shall exercise de novo review of claims of errors of law. Whether a particular consideration is a legally permissible ground for departure from the sentencing guidelines is a question of law within the meaning of this Section. The permissibility of a departure factor shall be determined in light of the purposes in § 1.02(2).

(b) The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.

(c) Findings of facts made by the sentencing court or a jury at sentencing proceedings shall not be overturned unless clearly erroneous.

(d) When based on a legally permissible departure consideration, the appellate courts shall uphold sentencing courts' decisions to depart from sentencing guidelines and the appropriate degree of departures unless such decisions ~~lack a substantial basis in the record demonstrating defensible grounds for departure~~ are unreasonable in light of the purposes in § 1.02(2). The appellate courts shall uphold sentencing courts' decisions to impose presumptive-guidelines sentences unless the failure to depart in an individual case was clearly unreasonable and an abuse of discretion in light of the purposes in § 1.02(2).

(e) ~~The appellate courts shall exercise de novo review of sentencing courts' decisions to make extraordinary departures from sentencing guidelines as defined in §§ 6B.01 and 7.XX(3).~~ The appellate courts shall uphold sentencing courts' extraordinary departures from sentencing guidelines as defined in § 6B.01 unless such decisions are unreasonable in light of the purposes in § 1.02(2).

(f) The appellate courts may reverse and remand any sentence not supported by an explanation of the sentencing court's reasoning as required in § 7.XX(4) or (5).

(5) When authorized under the terms of this provision, an appellate court may affirm or reverse a sentence pronounced by a sentencing court, remand a case for resentencing, or order that the sentencing court fix sentence as directed by the appellate court.

(6) The appellate court shall issue a written opinion whenever it reverses, remands, or modifies the judgment of the sentencing court. The appellate court

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should issue a written opinion in any other case in which the court believes that a written opinion will provide needed guidance to sentencing judges, the sentencing commission, or others in the sentencing and corrections system.

(7) The appellate courts may provide by rule for summary disposition of cases arising under this Section when no substantial question is presented by the appeal, provided the summary disposition contains a statement of why the questions presented are not substantial.

(8) When appellate courts reverse, remand, or modify the judgments of sentencing courts, prosecutors shall make reasonable efforts to notify victims who have requested such notification under § 7.07C(3).

REPORTERS' NOTE

b. Appellate-court discretion in light of legislative purposes. The ABA has recommended that state legislatures identify the objectives of appellate sentence review. See American Bar Association, Criminal Justice Standards (Third), Sentencing, Standard 18-8.2(a). One of these is to develop a common law of sentencing. See Standard 18-8.2(a)(iii) (one goal of the sentence appeals process is "[t]o interpret statutes, provisions guiding sentencing courts, and rules of court as applied to particular sentencing decisions and to develop a body of rational and just principles regarding sentences and sentencing procedures"). For a study of widely disparate approaches taken by courts to the task of appellate sentence review, despite substantially similar statutory mandates, see Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U. L. Rev. 1441 (1997).

c. Symmetrical rights of sentence appeal by defendant and government. Statutes granting symmetrical rights of appeal to the defendant and the state include Kan. Stat § 21-6820(a) ("A departure sentence is subject to appeal by the defendant or the state."); Minn. Stat. § 244.11, Subd. 1 ("An appeal to the Court of Appeals may be taken by the defendant or the state from any sentence imposed or stayed by the district court according to the Rules of Criminal Procedure for the district court of Minnesota"); Rev. Stat. Neb. § 29-2320 ("Whenever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the prosecuting attorney charged with the prosecution of such defendant or the Attorney General may appeal the sentence imposed if there is a reasonable belief, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient"); Or. Rev. Stat. § 138.222(7) ("Either the state or the defendant may appeal a judgment of conviction based on the sentence for a felony"); Pa. Cons. Stat. § 9781(b) ("The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals"); Tenn. Code § 40-35-401(a) ("The defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court"); id. § 40-35-402(a) ("The district attorney general in a criminal case may appeal from the length, range or manner of the service of the sentence imposed by the sentencing court"); 18 U.S.C § 3742(a) (appeal by a

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defendant); id. § 3742(b) (appeal by the government); Rev. Code Wash. § 9.94A.585(2) ("A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state"); see also American Bar Association, Standards for Criminal Justice (Third Edition), Sentencing (1994), Standard 18-8.3 ("The legislature should authorize appeals from sentence at the initiative of the offender or the prosecution.").

For examples of state laws that grant defendants broader rights of appeal from sentences than given the government, see Alaska Stat. § 12.55.120(b) ("A sentence of imprisonment lawfully imposed by the superior court may be appealed to the court of appeals by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion."); Ind. R. of App. Proc., Rule 7 ("A defendant in a Criminal Appeal may appeal the defendant's sentence. The State may not initiate an appeal of a sentence, but may cross-appeal where provided by law"); N.Y. Crim. Proc. Law § 450.30(1) & (2) ("An appeal by the defendant from a sentence, as authorized by subdivision two of section 450.10, may be based upon the ground that such sentence either was (a) invalid as a matter of law, or (b) harsh or excessive. . . . An appeal by the people from a sentence, as authorized by subdivision four of section 450.20, may be based only upon the ground that such sentence was invalid as a matter of law"). Even in jurisdictions that give coextensive rights of appeal to defendants and the state, the government tends to initiate far fewer sentence appeals than the defense; see Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U. L. Rev. 1441 (1997). For an argument against allowance of prosecutorial appeals from sentence, see Michael Tonry, 'Wrongful' Acquittals and 'Unduly Lenient' Sentences—Misconceived Problems that Provoke Unjust Solutions, in Julian V. Roberts and Lucia Zedner eds., Principles and Values in Criminal Law and Criminal Justice: Essays in Honor of Andrew Ashworth (2012) ("Wrongful acquittals and unduly lenient sentences should not be vulnerable to reconsideration or alteration. Those outcomes do not cancel out wrongdoing or bestow moral approbation. They do not exculpate; like the Scottish 'not proven' verdict, an acquittal does not imply innocence and a 'lenient' sentence does not imply that a harsher one could not have been justified. They have no implications concerning community and social judgments about the occurrence, commission, or degree of wrongdoing, or concerning social labeling and stigmatization. All that happens is that individuals are serendipitously spared the burdens of convictions or punishments they appear to have deserved.").

The majority rule in American guidelines states is that no appeal from a sentence within the presumptive-guidelines range may be taken. See Kan. Stat. § 21-6820(c)(1) ("the appellate court shall not review: . . . [a]ny sentence that is within the presumptive sentence for the crime). An appeal from a presumptive sentence may be taken in Kansas only if the trial court mistakenly believed it had no authority to depart, as in Currie (below) when the trial court believed it had no authority to depart and impose a probation sentence. State v. Warren, 304 P.3d 1288 (Kan. 2013); State v. Currie, 308 P.3d 1289, 1291-1292 (Kan. Ct. App. 2013). See also Michigan Compiled Laws § 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence"); Or. Rev. Stat. § 138.222(2)(a) ("the appellate court may not review . . . [a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission"); Rev. Code Wash. § 9.94A.585(1) ("A sentence within the standard sentence range . . . for an offense shall not be appealed").

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Consistent with the revised Code, Minnesota allows appeals from sentence without distinguishing between departure and non-departure sentences. See Minn. Stat. § 244.11, Subd. 1(b) ("On an appeal pursuant to this section, the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court"). A number of jurisdictions allow the parties to petition for review of a presumptive-guidelines sentence, subject to the discretion of the appellate courts. See Alaska Statutes § 12.55.120(e) ("A sentence within an applicable presumptive range set out in AS 12.55.125 or a consecutive or partially consecutive sentence imposed in accordance with the minimum sentences set out in AS 12.55.127 may not be appealed to the court of appeals under this section or AS 22.07.020 on the ground that the sentence is excessive. However, the sentence may be reviewed by an appellate court on the ground that it is excessive through a petition filed under rules adopted by the supreme court."); N.C. Gen. Stat. § 15A-1444(a1) ("A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari").

d. No appeal from sentence recommended or agreed upon by a party. Subsection (3) reflects the law in most guidelines jurisdictions. See Mass. Gen. Laws, Ch. 211E, § 4(c)(3) ("a sentence imposed by the court in accordance with the recommendation of either the defendant or the commonwealth may not be appealed by the party which made the recommendation; and a sentence imposed in accordance with a jointly-agreed recommendation may not be appealed by either the defendant or the commonwealth."); Ohio Rev. Code § 2953.08(D)(1) ("A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."); Or. Rev. Stat. § 138.222(2)(d) ("the appellate court may not review . . . [a]ny sentence resulting from a stipulated sentencing agreement between the state and the defendant which the sentencing court approves on the record"); 18 U.S.C. § 3742(c)(1) & (2) ("In the case of a plea agreement that includes a specific sentence . . . a defendant may not file a notice of appeal … unless the sentence imposed is greater than the sentence set forth in such agreement" and … the Government may not file a notice of appeal … unless the sentence imposed is less than the sentence set forth in such agreement"). Subsection (4) would not bar appeals from sentences imposed within a range of possibilities specified in plea agreements. In such cases, the court's discretion to sentence within the agreed-upon range must still be exercised in a lawful manner. In other words, the parties retain an interest in a legally derived sentence within the agreed-upon range. See Anglemyer v. State, 868 N.E.2d 482, 485 (Ind. 2007), clarified on reh'g., 875 N.E.2d 218 (2007) (allowing defense appeal; disapproving of lower court precedent that "once a defendant enters a plea agreement that calls for a sentencing cap, the defendant inherently agrees that such a sentence is appropriate").

The general rule of non-appealability in subsection (3) allows the parties to enter sentence agreements that will disable them from exercising the rights to appeal from sentence that would otherwise exist under the Code. Depending on the rules and practices of individual states, this could work a significant subtraction from the Code's policy of broad appealability of sentences laid out in subsection (2). It is also a de facto exception to the Code's disapproval of sentence appeal waivers in subsection (4). As such, it cedes a degree of power to the plea-bargaining

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process to circumvent the policies and priorities established by the legislature, sentencing commission, and judicial precedent. Some observers fear that such a reallocation of sentencing discretion primarily benefits prosecutors as the stronger of the two parties in plea negotiations. The above dangers are reduced, however, by the fact that recommendations or agreements only as to a "specific sentence" are rendered unappealable by subsection (3).

The inclusion of subsection (4) in the Code represents a compromise between proponents of preemptive sentence appeal waivers (SAWs) and those who would prefer to ban SAWs altogether, see Reporters' Note *e* below. As opposed to SAWs that contemplate a range of possible sentences still to be determined by the sentencing court, an agreement as to a specific sentence removes the prospect of future legal errors in the determination of sentence—errors that are unknowable at the time of agreement. There is no fairness cost to a defendant when a judge imposes the *exact* sentence requested by the defendant.

e. Sentence appeal waivers. The substance of subsection (3) represents the Institute's policy judgment that sentence appeal waivers (SAWs) should be impermissible and unenforceable as a matter of statutory law in every state. Subsection (3) is not designed to be a codification of constitutional law. All federal Courts of Appeals faced with the issue have held that SAWs do not violate the U.S. constitution. (Only one Circuit has not spoken to the issue.) Most states have not yet encountered the question as a matter of state constitutional law but, among those that have, a large majority of have found SAWs to be permissible. A handful of state courts have held that SAWs are unconstitutional—and an additional small number of states have held SAWs to be impermissible with respect to specific types of appellate claims. See generally Nancy J. King and Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L.J. 209 (2005); Nancy J. King, Plea Bargains that Waive Claims of Ineffective Assistance - Waiving Padilla and Frye, 51 Duquesne L.J. 647 (2013). Jesse Davis, Texas Law Rides to the Rescue: A Lone Star Solution for Dubious Federal Presentence Appeal Waivers, 63 Baylor L. Rev. 250 (2011). Kevin Bennardo, Post-Sentencing Appellate Waivers, 48 U. Mich. J. L. Reform 347 (2015).

Assuming the weight of authority leans heavily in the direction of SAWs' constitutional permissibility, the Model Penal Code generally aspires to incorporate best practices and aspirations that exceed minimal constitutional standards. The policy considerations in the minds of the Code's drafter have some, but very incomplete, overlap with arguments eligible in constitutional adjudication. Nor should the Code's position be seen as "contrary" to the current majority approach to the constitutional question. Virtually nothing in the Code is constitutionally required; and bare constitutional permissibility does not amount to a judgment that a practice is a good idea.

There was extended debate within the Institute over the final shape of subsection (4). The project's Advisers and Members' Consultative Group largely favored a complete ban of SAWs within the Code's framework. In the Council, however, strong differences of opinion emerged. Many Council members questioned the sweeping prohibition of subsection (4). Some members urged that the Code should allow SAWs in cases where defendants had recommended or agreed in advance to a specific sentence. Other members argued that SAWs should be allowed whenever the court's sentence fell within an agreed-upon range of possible sentences in a plea agreement. Finally, some members took the view that SAWs should be generally permitted except for narrow categories of appellate claims, such as a sentence beyond the statutory maximum or ineffectiveness of counsel.

Proponents of SAWs argued that both parties in the plea-bargaining process should have the right to use whatever leverage they possess during negotiations. In their view, SAWs are comparable to waivers of the right to

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trial (or indeed, as less momentous relinquishment of rights than a trial waiver); the ability to plead guilty carries with it the ability to benefit from a guilty plea. On this view, a ban on SAWs disadvantages defendants by removing an important bargaining chip they could otherwise use to negotiate the most favorable possible outcome.

In addition, proponents argued that SAWs facilitate interests in finality and judicial economy. Sentence appeals impose workload burdens on both trial and appellate courts. If sentence appeals are too numerous or if too many of them are frivolous, they drain away judicial resources that could be used on more important tasks. Some took the view that the current federal system was currently overwhelmed by sentence appeals, the bulk of them nonmeritorious.

In response, those disapproving of SAWs raised some of the fairness arguments that have been asserted in constitutional litigation. See, e.g., U.S. v. Medina-Carrasco, 815 F.3d 457, 464 (2016) (Friedman, J., dissenting):

> The defendant . . . knows precisely what he or she is giving up in exchange for the benefits of the guilty plea at the very moment the plea is entered—a trial and the constitutional rights that accompany it. . . . Sentencing, however, does not occur contemporaneously with the plea and waiver. It is a future event, and the mistakes from which one might have reason to appeal have not yet occurred at the time a defendant waives the right to appeal or collaterally attack the plea or sentencing proceedings. A defendant cannot know what he or she has given up by waiving the right to appeal until after the judge and counsel have reviewed a yet-to-be-prepared presentence investigation report, after the judge has considered other information not known to the defendant at the time of the plea, and after the judge has actually imposed sentence. By then it is too late, no matter how disproportionate the sentence or how egregious the procedural or substantive errors committed by the sentencing judge or the defendant's own counsel. It is hard to see how a defendant at the plea hearing can ever knowingly and intelligently—that is, with ''a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon it,'' … waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such prospective waivers in anticipation of unknown future events are inherently unknowing and unintelligent. (Citation omitted.)

In answer to the argument that SAWs provide a bargaining chip defendants can use to their advantage, some cited concerns that "appeal waivers cannot be truly voluntary when one contracting party—the government—has such a great advantage in bargaining power," id. at 464 n. 4.

Those skeptical of SAWs also argued that the public goals embedded in a state's sentencing system would be undermined if the lawful application of statutory or guidelines principles could be "bargained away." The endangered policies include, for example: uniform application of sentencing principles; overall proportionality of punishment; the reduction of racial and ethnic disparities in sentencing; vigilance over proper and improper uses of risk assessment measurements; and correctional population control. Indeed, King and O'Neill have warned that the project of sentencing reform is unlikely to succeed in the presence of SAWs:

> Rather than count on appellate review as a means of assuring consistent application of sentencing law, reformers should assume that in most felony cases in which the parties enter into agreements, appellate review of the sentence is simply not available. . . . Appellate review is as likely to be traded for

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> sentencing concessions as it is to deter or correct sentencing error. Reform should go forward, then, with serious skepticism about the ability of appellate review to ensure consistent sentencing practices.

Nancy J. King and Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L. J. 209, 259-60 (2005). See also Steven L. Chanenson, Guidance From Above and Beyond, 58 Stan. L. Rev. 175, 182 (2005) ("[T]here are larger, systemic issues at stake justifying a ban on sentence appeal waivers. How can appellate review provide a meaningful check on district courts and valuable feedback to the other sentencers if many cases have escaped review before the sentence is even imposed?"); John C. Keeney, Justice Department Memo: Use of Sentencing Appeal Waivers To Reduce the Number of Sentencing Appeals, 10 Fed. Sent. Rptr. 209, 210 (1998) (reprinting memo from acting Assistant Attorney General Keeney) ("The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines.").

Those advocating the abolition of SAWs also observed that unreasonable burdens on judicial workloads have not materialized in states that have adopted sentencing guidelines together with meaningful appellate sentence review. Compared with the federal system, the chances that any given sentence in a state guidelines jurisdiction will be appealed or reversed on appeal are very small. One reason for this is the relative simplicity of state sentencing guidelines compared to the byzantine federal guidelines. In addition, no state has produced the enigmatic combination of "advisory" guidelines that nonetheless play an essential role in the review of federal sentences for "reasonableness." The open-ended and paradoxical framework of federal sentence appeals is an invitation to the creativity of defense counsel on appeal. See Reporters' Note *i* below; Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of State and Federal Experiences, 91 Northwestern L. Rev. 1441, 1490, 1494 (1997) (in 1996, nearly 11 percent of all cases sentenced in the federal courts generated an appeal from sentence; among the four states in the study, the highest estimated rate of appeal from sentences imposed was 1.1 percent, with the other three states averaging 0.4 percent). Because the Model Penal Code is addressed to state legislatures and not to Congress, past decades of experience in state guidelines systems should be given greater weight than the dynamics of the federal sentencing system.

Finally, the meaningful participation of the appellate courts has always been a fundamental "building block" in the overall sentencing structure envisioned by the new Model Penal Cod;, see Kevin R. Reitz, A Proposal for Revision of the Sentencing Articles of the Model Penal Code (2001); Model Penal Code: Sentencing, Report (2003); § 7.09. The Code places the judiciary as first among equals in the ongoing operation and substantive development of principled sentencing law, and in every instance grants the courts power to override guidelines provisions for sound case-specific reasons that are upheld on appeal. Indeed, under the Code's scheme, the courts in individual cases can create exceptions to mandatory penalties created by the legislature. The appellate courts in particular are ceded responsibility both to enforce sentencing guidelines, with a tempered scrutiny that recognizes the desirability of trial court sentencing discretion, and to contribute to the development of a common law of sentencing. The corpus of appellate jurisprudence, in a well-designed system, crafts the substantive corpus of sentencing law every bit as much as the sentencing commission's guidelines. From a viewpoint of system design, it would be counterproductive to allow the plea-bargaining process to weaken or neuter the power of the appellate courts to perform either their enforcement or lawmaking functions.

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The final shape of subsections (3) and (4) is a compromise that takes account of the divergent views above. Subsection (3) allows either party effectively to waive their appellate rights when they recommend or agree to a specific sentence in advance of sentencing proceedings. Rather than treating this circumstance under the heading of "waiver," however, subsection (3) simply declares that specific-sentence recommendations or agreements, when followed by sentencing courts, are unappealable as a matter of statutory law. In the case of a specific-sentence recommendation or agreement, concerns about fairness to defendants are significantly attenuated. There is no exercise of trial court sentencing discretion to be examined on appeal (other than the court's decision to accept or reject the plea bargain), and therefore no potential for legal error on the part of the trial court. As with a waiver of the right to trial, the recommending or agreeing party has focused on a known outcome.

f. Standard of appellate review. For examples of multi-tiered approaches to appellate sentencing review in American guidelines jurisdictions, see State v. Blackmon, 176 P.3d 160 (Kan. 2008) ("Upon a challenge to a departure sentence, an appellate court applies a mixed standard of review. Generally, a reviewing court first examines the record to see whether there is substantial competent evidence in support of the sentencing court's articulated reasons for granting a departure. The appellate court then determines, as a matter of law, whether the sentencing court's reasons for departure are substantial and compelling reasons justifying a deviation from the presumptive sentence defined by the legislature."); People v. Smith, 754 N.W.2d 284, 290 (Mich. 2008) ("On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.") (footnotes omitted); Minn. Stat. § 244.11, Subd. 2(b) ("On an appeal pursuant to this section, the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court"). The multi-level character of appellate sentence review in guidelines jurisdictions is seldom set out in statute, and is usually elaborated by the appellate courts themselves. For one example, see, State v. Law, 110 P.3d 717, 720 (Wash. 2005).

One worry in subsection (5) is that, in the absence of legislative guidance, state courts often formulate weak standards of appellate review. The multi-tiered standard in subsection (5) stands in contrast to the unitary standard traditionally used in American states. See, e.g., State v. Iromuanya, 719 N.W.2d 263, 292 (Neb. 2006) ("The sentences imposed by the district court fell within the statutory sentencing limits for each of the four offenses of which Iromuanya was convicted. Accordingly, we review the sentences for abuse of discretion"); People v. Sidbury, 24 A.D.3d 880 (N.Y. App. Div., Third Dept. 2005) ("The sentence falls within the acceptable range of permissible sentences for the crime for which defendant was convicted and will not be disturbed unless there exists some extraordinary circumstances or an abuse of discretion which warrant modification"); Marvin E Frankel, Criminal Sentences: Law Without Order (1973).

(1) Questions of law. For examples of errors considered to be legal errors in particular states, see State v. Jones, 745 N.W.2d 845, 849 (Minn. 2008) (holding that "the reasons used for departing must not themselves be elements of the underlying crime"); State v. Womack, 319 N.W.2d 17, 19-20 (Minn. 1982) (reversing departure sentence based on trial court's conclusion that defendant had committed an offense in addition to the charge of conviction; guidelines bar consideration of nonconviction charges); State v. Schmit, 329 N.W.2d 56 (Minn. 1983) (relying on

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1 *Womack*, the supreme court disapproved the trial court's reliance on an element of a more serious offense as the
2 basis for an aggravated sentence); State v. Herrmann, 479 N.W.2d 724, 729 (Minn. Ct. App. 1992) ("The trial court
3 cannot speculate as to what future offenses appellant might commit in determining the proper length of
4 incarceration."); State v. Bluehorse, 248 P.3d 537, 547, 548 (Wash. Ct. App. 2011) ("The real facts doctrine
5 prohibits trial courts from relying on facts that constitute the elements of a more serious crime that the State did not
6 charge or prove. . . . [It appears that] the trial court impermissibly relied on its determination that the facts of this
7 case constituted the more serious uncharged, unproved crime of first degree assault").

8 The propriety of judge-made departure factors, not enumerated in statute or guidelines, is almost everywhere
9 considered a question of law subject to de novo review. See State v. Favela, 911 P.2d 792, 804 (Kan. 1996) (The
10 Kansas Supreme Court decides that the question of whether a particular set of facts qualifies as "substantial and
11 compelling reasons" for a departure is a question of law to be decided de novo by the reviewing court); State v. Law,
12 110 P.3d 717, 723 (Wash. 2005) ("we review the trial court's stated justifications for departing from the standard
13 sentencing range de novo").

14 For examples of judge-made departure factors, see State v. Trog, 323 N.W.2d 28, 31 (Minn. 1982) (stating that
15 "a defendant's particular amenability to individualized treatment in a probationary setting will justify departure in
16 the form of a stay of execution of a presumptively executed [prison] sentence"); State v. Yaritz, 791 N.W.2d 138,
17 143 (Minn. Ct. App. 2010) (quotation omitted), review denied (Minn. Feb. 23, 2011) ("[W]hether a particular reason
18 for an upward departure is permissible is a question of law, which is subject to a de novo standard of review.");
19 Tucker v. State, 799 N.W.2d 583, 586 (Minn. 2011) ("Substantial and compelling" circumstances are those showing
20 that the defendant's conduct was significantly more or less serious than that typically involved in the commission of
21 the offense in question.); State v. Pascal, 736 P.2d 1065 (Wash. 1987) (the fact that the victim was the initiator,
22 duress, and the battered-woman syndrome in a wife's killing of her husband are appropriate mitigating factors);
23 State v. Bennett, 277 P.3d 586 (Or. Ct. App. 2012) (holding that defendant's post-offense conduct may qualify as a
24 substantial and compelling departure factor).

25 Of course, not all judge-made departure factors are approved on appeal. See State v. Teixeira, 313 P.3d 351,
26 355, 359-360 (Or. Ct. App. 2013) (reversing upper departure in burglary and theft case; holding that presence of
27 multiple occupants in burglarized premises was not a "substantial and compelling circumstance" justifying
28 departure); State v. Law, 110 P.3d 717, 723 (Wash. 2005) ("Washington courts have rejected family considerations
29 as valid mitigating circumstances"); see also State v. Hodges, 855 P.2d 291 (Wash. Ct. App. 1993) ("The fact that
30 [the defendant] . . . is needed by her children does not in any way distinguish her possession and delivery of
31 cocaine."); State v. Allert, 815 P.2d 752 (Wash. 1991) (rejecting alcoholism and absence of future dangerousness as
32 mitigating factors).

33 Of all state guidelines systems, Washington may be the most restrictive of judicial creativity in fashioning a
34 jurisprudence of guidelines departures. Aggravating departure factors are limited to those enumerated in the
35 guidelines statute. See Rev. Code Wash. § 9.94A.535(3). Further, the Washington Supreme Court has been reluctant
36 to allow judge-made mitigating factors. It has interpreted the state's Sentencing Reform Act as ruling out almost any
37 kind of individualization at sentencing. Even offense-based individualization—that the harm done was de minimis,
38 for example—has been ruled an improper departure factor. See State v. Alexander, 888 P.2d 1169 (Wash. 1995)

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(rejecting peripheral participation in a drug business as a mitigating factor). See generally State v. Garcia, 256 P.3d 379, 382 (Wash. Ct. App. 2011) ("[C]ourts have found only a small number of mitigating factors outside the legislative purposes listed in RCW 9.94A.010, including instances of assistance and cooperation with the state authorities, de minimis drug possession, and factors related to domestic abuse. . . . Mitigating factors for exceptional sentences must relate to the elements of the crime or the defendant's previous record").

Contrary to the recommendations of the revised Code, the Washington Supreme Court has ruled that the *Parcher* factors may not be founded in the underlying purposes of the sentencing system. State v. Law, 110 P.3d 717 (Wash. 2005) (a judge may not depart based on a factor that was "necessarily considered by the legislature in establishing the standard sentencing range." Furthermore, the Washington Supreme Court has held that, "the purposes of the SRA were factors necessarily considered by the legislature in establishing the standard sentence range."); id. at 721-722 ("we have previously concluded that the purposes of the SRA were factors necessarily considered by the legislature in establishing the standard sentence range. . . . [W]e have consistently held that the purposes of the SRA, as stated in RCW 9.94A.010, are insufficient factors to justify a departure from the guidelines.").

(2) Subconstitutional proportionality review. The contemporary era of Eighth Amendment jurisprudence arrived with Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding mandatory sentence of life without parole imposed on first offender convicted of possessing more than 650 grams of cocaine). In Harmelin, two Justices endorsed the view that the Eighth Amendment imposes no proportionality constraint on the length of prison terms. Ewing v. California, 538 U.S. at 31-32 (separate concurring opinions of Scalia, J. and Thomas, J.). For examples of the toothlessness of proportionality review in noncapital cases under the Eighth Amendment's Cruel and Unusual Punishments Clause, see, e.g., Ewing v. California, 538 U.S. 11 (2003) (holding sentence of 25 years to life for current offense of theft of three golf clubs worth $1200 was not grossly disproportionate under Eighth Amendment); Lockyer v. Andrade, 538 U.S. 63 (2003) (finding no unreasonable application of clearly established Eighth Amendment law when state imposed mandatory prison term of 50 years to life for current offenses of two counts of petty larceny arising from shoplifting of videotapes worth approximately $150). The Illustration in Comment *e(2)* is based on *Ewing*.

For commentaries on the weakness of proportionality review under the Eighth Amendment, see Rachel E. Barkow, The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 Mich. L. Rev. 1145 (2009); Carol S. Steiker and Jordan M. Steiker, Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. Pa. J. Const. L. 155 (2008); Richard S. Frase, Limiting Excessive Prison Sentences Under Federal and State Constitutions, 11 U. Pa. J. Const. L. 39 (2008); Donna H. Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing, 40 Ariz. St. L.J. 527 (2008); Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677 (2005); Tom Stacy, Cleaning Up the Eighth Amendment Mess, 14 Wm. & Mary Bill Rts. J. 475, 477 (2005); Adam M. Gershowitz, Note, The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards, 86 Va. L. Rev. (2000); Steven Grossman, Proportionality in Non-capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment, 84 Ky. L.J. 107 (1995); G. David Hackney, A Trunk Full of Trouble: Harmelin v. Michigan, 27 Harv. C.R.-C.L. L. Rev. 262, 274-280 (1992).

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A number of writers have suggested that state courts should adopt a more searching proportionality doctrine under their own state constitutions. All agree, however, that this idea has not achieved much momentum nationwide. For discussions, see Samuel Weiss, Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions, 49 Harv. C.R.-C.L. L. Rev. 569 (2013); Julia Fong Sheketoff, State Innovations in Noncapital Proportionality Doctrine, 85 N.Y.U. L. Rev. 2209, (2010); Richard S. Frase, Limiting Excessive Prison Sentences Under Federal and State Constitutions, 11 U. Pa. J. Const. L. 39 (2008); Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. Davis L. Rev. 1025 (2004); Kathi A. Drew and R.K. Weaver, Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?, 2 Tex. Wesleyan L. Rev. 1, 24–33 (1995); Peter Mathis Spett, Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan, 24 Colum. Hum. Rts. L. Rev. 203, 228-233 (1993). Still, a small minority of state courts have held that their state constitutions provide "heightened" or "slightly heightened" protections as compared with the Eighth Amendment. See State v. Stanislaw, 65 A.3d 1242, 1250 (Me. 2013) (heightened protection); People v. Hauschild, 871 N.E.2d 1, 12 (Ill. 2007) (heightened review); State v. Wheeler, 175 P.3d 438, 446 (Or. 2007) (slightly heightened protection); State v. Dayutis, 498 A.2d 325, 329 (N.H. 1985) (slightly heightened protection); State v. Fain, 617 P.2d 720, 723 (Wash. 1980) (heightened protection).

The revised Code's recommendation in favor of statutory or "subconstitutional" proportionality review has no exact precedent in state law. Nonetheless, a concern for proportionality is ubiquitous in the jurisprudence of sentencing appeals in many states. Connecticut's sentence review division is explicitly empowered to review sentences for their proportionality, although the state supreme court has held the division is not required to do so in every case. See Connecticut Rules for the Superior Court Procedure in Criminal Matters, Chapter 43. Sentencing, Judgment, and Appeal, Practice Book 1998, § 43-28 ("The review division shall review the sentence imposed and determine whether the sentence should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended"); State v. Rupar, 978 A.2d 502, 518 (Conn. 2009) ("Although we recognize that it is permissible for the review division, in its broad discretion, to engage in similar offender proportionality review in a particular case the review division is by no means required to conduct such review across the board as a matter of law."). People v. Smith, 754 N.W.2d 284, 292 (Mich. 2008) ("The 'principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.' Hence, to complete our analysis of whether the trial judge in this case articulated substantial and compelling reasons for the departure, we must, of necessity, engage in a proportionality review. Such a review considers "whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record. . . ."28 "[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment. See also State v. Hernandez-Spinoza, 2014 WL 2441129 (Minn. Ct. App. 2014), Slip Op. at 4 (suggesting that proportionality review in Minnesota includes a survey of degree-of-departure holdings in other similar cases: "Based on our review, the sentence is also consistent with the facts of other cases involving sentencing departures in major controlled-substance crime.").

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For a short time in the 1970s, the lower federal courts were experimenting with use of the Eighth Amendment to invalidate substantively excessive sentences—albeit with intermittent disapproval by the Supreme Court: The leading case was Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (Offender was given a mandatory life sentence for "(1) writing a check on insufficient funds for $50; (2) transporting across state lines forged checks in the amount of $140; and (3) perjury"). See also Downey v. Perini, 518 F.2d 1288, 1289 (6th Cir.) vacated, 423 U.S. 993 (1975) (30–60-year sentence for possession of small amount of marijuana); Roberts v. Collins, 404 F. Supp. 119 (D. Md. 1975), aff'd, 544 F.2d 168 (4th Cir. 1976) (Imposition of consecutive 20-year sentences on two counts of common-law simple assault, where the maximum penalty for the more aggravated offense of assault with intent to murder was 15 years, was cruel and unusual punishment, but only that portion of the sentence which exceeded 15 years was unconstitutional); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978) (Sentence of 48 to 50 years for conviction for safecracking was unconstitutionally excessive constituting cruel and unusual punishment, where defendant, while unarmed, broke into unoccupied building and broke door off safe with tools found in building); Carmona v. Ward, 436 F. Supp. 1153, 1172 (S.D.N.Y. 1977), rev'd, 576 F.2d 405 (2d Cir. 1978) (district court held that New York cannot constitutionally punish either the sale of one individual dose of cocaine or possession of 3 and 3/8 ounces of cocaine by life imprisonment); Terrebonne v. Blackburn, 624 F.2d 1363, 1365 (5th Cir. 1980) on reh'g, 646 F.2d 997 (5th Cir. 1981) (Offender given a life sentence for distribution of 22 packets of heroin, Fifth Circuit lays out a three-factor test for proportionality consistent with Hart v. Coiner and remands to the district court).

(3) Findings of fact. Significant deference to findings of fact made in trial court proceedings is a familiar appellate court standard. See, e.g., State v. Huden, 179 Wash. App. 1019 (Wash. Ct. App. 2014) (not reported in P.3d), Slip Op. at 1 ("We review the fact finder's reasons for imposing an exceptional sentence under a clearly erroneous standard . . . Under this standard, we reverse the findings only if substantial evidence does not support them. . . . 'Substantial evidence' is sufficient evidence to 'persuade a fair-minded person of the truth of the declared premises.'"); Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) ("We will conclude the trial court has abused its discretion if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'") (citation omitted); State v. Ward, 256 P.3d 801 (Kan. 2011), cert. denied, 132 S. Ct. 1594 (U.S. 2012) ("Judicial discretion is abused if judicial action . . . is based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.").

In at least one state, a trial court may abuse its discretion by its failure to base a sentencing decision on factors clearly supported by the record. See Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008) ("a trial court's failure to find mitigating circumstances clearly supported by the record and advanced for consideration is an abuse of discretion and a proper basis for appellate review."); see also Anglemyer v. State, 868 N.E.2d 482, 490-491 (Ind. 2007), clarified on reh'g., 875 N.E.2d 218 (2007).

(4) Review of departures and failure to depart from guidelines. The exact language of the standard of review in § (5)(d) was suggested by Professor Richard Frase. States have arrived at a wide range of formulations in attempting to quantify the deference that should be afforded to trial courts' applications of legal principles to the facts in a given case when pronouncing sentence. See Tenn. Code § 40-35-401(d) ("review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct."); People v. Smith, 754

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N.W.2d 284, 290 (Mich. 2008) ("Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes."); State v. Hines, 294 P.3d 270 (Kan. 2013) (the question of whether the facts in a particular case add up to a substantial and compelling reason, even if they fall under the heading of an approved departure category, are reviewed under an abuse of discretion standard); State v. Ward, 256 P.3d 801 (Kan. 2011), cert. denied 132 S. Ct. 1594 (U.S. 2012) ("Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court"); State v. Garcia, 302 N.W.2d 643, 645, 647 (Minn. 1981) (affirming a departure sentence because sentencing court did not "clearly abuse its discretion"); State v. Kenyiba, 2014 WL 115825 (Neb. Ct. App. 2014), Slip Op. at 7: ("A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. . . . A judicial abuse of discretion exists only when the reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.")

The Indiana courts have perhaps taken the most care of any jurisdiction in trying to describe an attitude of moderate deference that appellate courts should afford to trial court sentencing decisions. See Halcomb v. State, 3 N.E.3d 48 (Ind. App. 2014) (table) (unpublished opinion) ("Indiana Appellate Rule 7(B) provides that we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App.2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind.2006).")

A separate family of cases addresses the question of how much deference should be afforded to trial judges' decisions concerning the degree of departure appropriate in individual cases. See, e.g., State v. Favela, 911 P.2d 792, 809-811 (Kan. 1996) (adopting a relaxed "abuse of discretion" standard with "deference" given to the trial court's judgment call about extent of departure; the court asks whether "no reasonable persons would agree with the extent of the sentence imposed on the defendant"); State v. Bluehorse, 248 P.3d 537, 548 (Wash. Ct. App. 2011) ("The trial court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons supported by the jury's aggravating factor finding. . . . 'A "clearly excessive sentence is one that is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken."'").

(6) Reversal for failure to provide reasons. Reversals for a trial court's failure to give reasons for a sentence as required by state law are commonplace. See, e.g., Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g., 875 N.E.2d 218 (Ind. 2007) ("One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all."); State v. Geller, 665 N.W.2d 514, 517 (Minn. 2003) (If the district court fails to state reasons for the sentencing departure, no departure will be allowed).

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g. Dispositions available to the appellate court. The majority rule among the states is that appellate courts may themselves determine the exact sentence to be imposed on a defendant, although a substantial minority of states and the federal system limit the appellate courts' powers to remanding cases to the trial courts for further consideration. For examples of the majority rule, see Md. Crim. Proc. Code § 8-105(d) ("If the review panel orders a different sentence, the review panel shall resentence and notify the defendant in accordance with the order of the panel."); Minn. Stat. § 244.11, Subd. 2(b) ("The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct"); Montana Code § 46-18-904(1)(a)(ii) ("the review division . . . may order a different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review, including a decrease or increase in the penalty"); 64 Neb. Rev. Stat. § 29–2308 ("the appellate court may reduce the sentence rendered by the district court against the accused when in its opinion the sentence is excessive, and it shall be the duty of the appellate court to render such sentence against the accused as in its opinion may be warranted by the evidence"), applied in State v. Iromuanya, 719 N.W.2d 263, 295 (Neb. 2006); N.H. Rev. Stat. § 651:60 ("If the judgment is amended by an order substituting a different sentence or sentences or disposition of the case, the review division or any member thereof shall resentence the defendant or make any other disposition of the case in accordance with the order of the review division"); N.C. Gen. Stat. § 15A-1447(f) ("If the appellate court finds that there is an error with regard to the sentence which may be corrected without returning the case to the trial division for that purpose, it may direct the entry of the appropriate sentence"); Ohio Rev. Code § 2953.08(G)(2) ("The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing"); Tenn. Code § 40-35-401(c)(2) ("If a sentence is appealed, the appellate court may . . . [a]ffirm, reduce, vacate or set aside the sentence imposed); id. § 40-35-402(c) ("If the sentence is appealed by the state, the appellate court may affirm, vacate, set aside, increase or reduce the sentence imposed or remand the case or direct the entry of an appropriate order"); American Bar Association, Standards for Criminal Justice (Third Edition), Sentencing (1994), Standard 18-8.4 ("The legislature should authorize reviewing courts to . . . [s]ubstitute for the sentence under review any other disposition that was available to the sentencing court.").

For instances of the minority approach, see Kan. Stat. § 21-6820(f) ("The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing."); Mich. Compiled Laws § 769.34(11) ("If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter"); Or. Rev. Stat. § 138.222(5)(a) ("The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case."); 18 U.S.C. § 3742(f) ("the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate").

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h. When written opinions required. Most codes in guidelines states are in accord with the recommendations of the revised Code, see Kan. Stat. § 21-6820(g) ("The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed. The court may issue a written opinion in any other case when it is believed that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Kansas sentencing commission."); Or. Rev. Stat. § 138.222(6) ("The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed and may issue a written opinion in any other case when the appellate court believes that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Oregon Criminal Justice Commission provided that the appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal."); Rev. Code Wash. § 9.94A.585(6) ("The court of appeals shall issue a written opinion in support of its decision whenever the judgment of the sentencing court is reversed and may issue written opinions in any other case where the court believes that a written opinion would provide guidance to sentencing courts and others in implementing this chapter and in developing a common law of sentencing within the state").

i. Summary dispositions. See, e.g., Kan. Stat. § 21-6820(g) ("The appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal."); Or. Rev. Stat. § 138.225 ("In reviewing the judgment of any court under ORS 138.010 to 138.310, the Court of Appeals, on its own motion or on the motion of the respondent, may summarily affirm, without oral argument, the judgment after submission of the appellant's brief and without submission of the respondent's brief if the court finds that no substantial question of law is presented by the appeal.").

j. States choosing an advisory-guidelines system. Many advisory-sentencing systems in the United States today are former presumptive systems. They were transformed by court decree or legislation into advisory systems in order to avoid *Blakely*'s jury-trial requirement for the factual litigation of aggravating sentencing factors. The principal Supreme Court cases establishing, restricting, and clarifying the Sixth Amendment jury-trial right at sentencing include Almendarez-Torres v. United States, 523 U.S. 224 (1998); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007); Oregon v. Ice, 555 U.S. 160 (2009); and Alleyne v. United States, 133 S. Ct. 2151 (2013).

The best-known system that conjoins advisory sentencing guidelines with substantive appellate sentence review is the current federal system, which was given its institutional shape in *United States v. Booker.* That case held, in two separate majority opinions (with only Justice Ginsburg joining both opinions), that the former federal sentencing guidelines were unconstitutional due to their legal enforceability and the absence of a jury factfinding process when constitutionally required, that the remedy would be severance of a handful of statutory provisions in order to render the guidelines "advisory" and exempt from the jury-trial requirement, and that district court sentencing decisions would remain reviewable on appeal under a "reasonableness" standard. Many questions have since been raised about *Booker's* standard of review—including doubts about the constitutionality of the standard. See Rita v. United States, 551 U.S. 338 (2007) (Scalia, J. concurring in part and concurring in the judgment) ("Under the scheme promulgated today, some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and . . . some lengthy sentences will be affirmed (i. e.,

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held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine run. The Court does not even attempt to explain how this is consistent with the Sixth Amendment.").

The Court's major rulings on the permissible contours of appellate review in such a system are: *Booker*, supra; *Rita*, supra; Gall v. United States, 552 U.S. 38 (2007); Kimbrough v. United States, 552 U.S. 85 (2007); Spears v. United States, 555 U.S. 261 (2009) (per curiam); and Nelson v. United States, 555 U.S. 350 (2009) (per curiam). There is consensus that "reasonableness review" would be unconstitutional if it were to invest the guidelines with too much legal enforceability, yet the Court has said that a federal sentence's conformity or nonconformity with the guidelines remains an important consideration in the review process, alongside the statutory "factors to be considered in imposing a sentence" in 18 U.S.C. § 3553(a). The guidelines may be given a degree of gravitational force, as it were, supplying appellate courts with reasons to affirm or reverse district judges' sentences on the records of particular cases, yet the guidelines may not be acknowledged as "presumptive" rules in their own right. Intellectually, these are difficult distinctions to grasp.

The "Bookerized" federal guidelines are still relatively new, and there are many open questions concerning appellate review within *Booker's* constitutional boundaries. See Spears v. United States, 555 U.S. 261 (2009) (Roberts, C.J., dissenting) ("*Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones."). A large secondary literature addresses the line of Supreme Court decisions on this topic, and the differences of approach that have grown up in the federal circuits. See, e.g., Nicholas A. Deuschle, Fun with Numbers: *Gall*'s Mixed Message regarding Variance Calculations, 80 U. Chi. L. Rev. 1309 (2013); Tim Cone, Substantive Reasonableness Review of Federal Criminal Sentences: A Proposed Standard, 33 N. Ill. U. L. Rev. 65 (2012); Craig D. Rust, "Reasonableness" Is Not so Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions after *Rita*, *Gall*, and *Kimbrough*, 26 Touro L. Rev. 75 (2010); Stephanos Bibas & Susan Klein, The Sixth Amendment and Criminal Sentencing, 30 Cardozo L. Rev. 775, 784 (2008); David C. Holman, Death by a Thousand Cases: After *Booker*, *Rita*, and *Gall*, the Guidelines Still Violate the Sixth Amendment, 50 Wm. & Mary L. Rev. 267 (2008); Nancy J. King, Reasonableness Review after *Booker*, 43 Hous. L. Rev. 325 (2006).

A much smaller—but thoughtful—literature has considered appellate court activity in state sentencing systems that rely upon advisory guidelines or other advisory prescriptions directed to sentencing judges. See Michael M. O'Hear, Appellate Review of Sentences: Reconsidering Deference, 51 Wm. & Mary L. Rev. 2123 (2010); John F. Pfaff, The Future of Appellate Sentence Review: Booker in the States, 93 Marq. L. Rev. 683 (2009); Michael M. O'Hear, Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences, 93 Marq. L. Rev. 751 (2009). Interestingly, the new sentencing-guidelines system in England and Wales, created by Act of Parliament in 2009, is an advisory scheme that has been established within a very active tradition of appellate sentencing review. While the English system faces none of the constitutional difficulties of *Blakely* and *Booker*, scholars have suggested that the American and English systems might have much to learn from each other in the coming years. See Briana Lynn Rosenbaum, Sentence Appeals in England: Promoting Consistent Sentencing through Robust Appellate Review, 14 J. App. Prac. & Process 81 (2013); Kevin R. Reitz, "Comparing Sentencing Guidelines," in Andrew Ashworth & Julian V. Roberts eds., Sentencing Guidelines: Exploring the English Model (2013).

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For examples of sentence-appeals decisions in Indiana that raise serious Sixth Amendment questions, see Auler v. State, 912 N.E.2d 913 (Ind. Ct. App. 2009) (table) (unpublished disposition) (trial court did not abuse discretion when it based its sentence in part on defendant's alleged criminal behavior for which no charges had been brought); Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008) (defendant was convicted in a jury trial of two counts of neglect of a dependent, for which he was sentenced to aggregate term of 34 years' imprisonment; concluding that aggregate sentence is inappropriate in light of the nature of his offense and his character, court revises his sentence to consecutive terms of nine and eight years for an aggregate sentence of 17 years.); Fry v. State, 837 N.E.2d 1012 (Ind. 2005) (reducing burglary sentence from statutory maximum because defendant was not armed and did not use violence); Neale v. State, 826 N.E.2d 635 (Ind. 2005) (reducing maximum sentence of 50 years for child molesting to 40 years in light of nature of offense and character of defendant).

The Supreme Court cases that have spoken to the standard of sentence review in the federal system include: United States v. Booker, 543 U.S. 220, 260-261 (2005) (Breyer, J., Opinion of the Court) (holding that appellate review of sentences in the post-*Booker* federal system will ask whether a sentence is "unreasonable" in light of the factors to be considered in imposing sentence set forth in 18 U.S.C. § 3553(a); stating that: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable."); Rita v. United States, 551 U.S. 338, 347, 351 (2007) ("a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines" . . . "[T]he presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate "reasonableness" review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.") (emphasis in original); Gall v. United States, 552 U.S. 38, 51 (2007) ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the §3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."); Kimbrough v. United States, 552 U.S. 85, 91 (2007) ("The question here presented is whether, as the Court of Appeals held in this case, 'a sentence . . . outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.' . . . We hold that, under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only, and that the Court of Appeals erred in holding the crack/powder disparity effectively mandatory. A district judge must include the Guidelines

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range in the array of factors warranting consideration. The judge may determine, however, that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing [in § 3553(a)]. . . . In making that determination, the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses."); Spears v. United States, 555 U.S. 261 (2009) (per curiam) (reinforcing *Kimbrough*'s holding that district courts have the "authority to vary from the crack cocaine Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."); Nelson v. United States, 555 U.S. 350, 352 (2009) (per curiam) (district court may not "presume that a sentence within the applicable Guidelines range is reasonable. . . . The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.") (emphasis in original). *Spears*, 555 U.S. at 263-264, included a useful rephrasing of the holding in *Kimbrough* that was expressly endorsed by the Court:

> "[*Kimbrough*] thus established that even when a particular defendant in a crack cocaine case presents no special mitigating circumstances—no outstanding service to country or community, no unusually disadvantaged childhood, no overstated criminal history score, no post-offense rehabilitation—a sentencing court may nonetheless vary downward from the advisory guideline range. The court may do so based solely on its view that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates 'an unwarranted disparity within the meaning of §3553(a),' and is 'at odds with §3553(a).' The only fact necessary to justify such a variance is the sentencing court's disagreement with the guidelines—its policy view that the 100-to-1 ratio creates an unwarranted disparity."

ARTICLE 305. PRISON RELEASE; CORRECTIONAL POPULATIONS EXCEEDING CAPACITY

§ 305.1. Good-Time Reductions of Prison Terms; Reductions for Program Participation.[141]

(1) Prisoners shall receive credits of [15] percent of their full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A. Prisoners' dates of release under this subsection shall be calculated at the beginning of their term of imprisonment.

(2) Prisoners shall receive additional credits of up to [15 percent of their full terms of imprisonment as imposed by the sentencing court] [120 days] for satisfactory participation in vocational, educational, or other rehabilitative programs.

(3) Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.

[141] This Section was originally approved in 2011; see Tentative Draft No. 2.

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1 **(4) Credits under this provision may only be revoked upon a finding by a**
2 **preponderance of the evidence that the prisoner has committed a criminal offense or a**
3 **serious violation of the rules of the institution, and the amount of credits forfeited shall be**
4 **proportionate to that conduct.**

5 **Comment:** [142]

6 *a. Scope.* This is a revision of § 305.1 in the 1962 Model Penal Code. The revised provision
7 creates a strong presumption that credits for good behavior will be awarded as against the full
8 lengths of prison sentences imposed by the courts, in accordance with a fixed statutory formula.
9 These allowances—usually called "good time" credits—may be forfeited only upon a finding by
10 the Department of Corrections that the prisoner has committed a serious violation of prison rules
11 or has failed to participate satisfactorily in required programming. Additional credits for
12 participation in vocational, educational, or other rehabilitative programs—often called "earned
13 time" credits—are also authorized by this provision. Although statutory law establishes a ceiling
14 for the amount of earned-time credits, more particularized judgments about the specific programs
15 that merit the award of credits, and the amounts of discounts to be attached to particular
16 activities, are delegated to the Department of Corrections.

17 The 1962 provision recommended that a credit of 20 percent be subtracted from both the
18 minimum and maximum terms of a prisoner's sentence "[f]or good behavior and faithful
19 performance of duties." An additional credit of 20 percent was available for "especially
20 meritorious behavior" or "exceptional performance" of duties. Because the meritorious- behavior
21 reduction was of a type rarely granted, the operative ceiling upon good-time credits for the vast
22 majority of prisoners under the former provision was 20 percent. This provision did not function
23 in isolation, however. The original Code also vested substantial early-release authority in the
24 parole board. Thus, a prisoner's actual release date depended upon discretionary decisionmaking
25 by the department of corrections under former § 305.1, and the parole board's supplementary and
26 greater powers under former § 305.6. The combined effects of these "back-end" release
27 authorities rendered the sentencing system in the 1962 Code a highly *indeterminate* system. That
28 is to say, at the time of the judge's pronouncement of a prison sentence, there was much
29 indeterminacy about what the punishment would actually be.

30 The revised Code reflects changed policy views, since 1962, about the configuration of
31 back-end sentencing discretion, held either by a parole agency or corrections department. Most
32 importantly, drawing on the most successful sentencing reforms of the last 30 years, the revised
33 Code recommends that the release discretion of the parole board be wholly eliminated; see
34 § 6.06(4), (5). This is a fundamental structural and institutional decision that renders the
35 sentencing system as a whole a *determinate* system, see Appendix B, Reporter's Study: The
36 Question of Parole-Release Authority (this draft). For most prison cases in a determinate system,

[142] This Comment has not been revised since § 305.1's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

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there is a predictable correspondence between the sentence imposed by the court and the time actually served by the offender. One major reason for the revised Code's preference for a determinate framework is its philosophy that sentencing should be at its core a judicial process; see § 1.02(2)(b)(i) and Comment *h*. Further, a major premise of determinate frameworks is that back-end discretion is too easily exercised in arbitrary, discriminatory, vindictive, or politically driven ways. It is an important goal of § 305.1 to effectuate the underlying policies of good time and earned time while extending as little power as possible to departments of corrections to override the judgments of sentencing courts.

Despite the Code's general policy preference in favor of determinacy, certain limited and, to the extent possible, routinized mechanisms of back-end discretion are justified in a well-ordered sentencing system. Indeed, there has never been a *pure* or *absolute* determinate sentencing regime in U.S. history. The technical definition of a determinate system is one with no parole-release authority. All judicial prison sentences, even in determinate structures, are subject to potential alteration by a number of later-in-time decisionmakers. One universal qualification to existing determinate structures is the availability of good-time and earned-time credits such as those addressed in this provision. The important policy questions, in creating such laws, include how the back-end credit allowances can best serve their functions while coexisting most comfortably within the general environment of a determinate system.

Subsections (1) and (2) define separate pragmatically-grounded mechanisms for the award of sentence credits, injecting a modest degree of indeterminacy into the Code's sentencing system. Respectively, the subsections are designed to further the goals of prison discipline and offender rehabilitation.

Subsection (1) recognizes that prison officials require a degree of authority over prison durations as a tool to manage the in-prison behavior of inmates. In recognition of the perils of back-end discretion, and to avoid undue dilution of judicial sentencing authority, this power should be granted sparingly, in an amount sufficient but not greater than needed for its purposes. For the same reasons, the power to withhold good-time credits should be narrowly defined. The credits should automatically be built into the calculation of each prisoner's release date at the outset of the prison stay. There is no magic formula for the exact quantum of available credits, but many present-day correctional systems operate with good-time discounts of 15 percent or less. Subsection (1), in bracketed language, recommends that credits in roughly this amount must be awarded to prisoners in the ordinary course, and may be forfeited only when adequate proof has established a serious disciplinary violation or new criminal offense as required in subsection (4).

Subsection (2) of revised § 305.1 encourages inmates to participate in work, educational, or other rehabilitative programming made available to them in the prison setting. The subsection's rationale is that such activities stand a reasonable chance of furthering a prisoner's rehabilitation. In empirical research, completion of in-prison programming is often correlated with a reduced

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risk of recidivism following release. We lack the tools to discern *which* inmates have benefited from a given program, or when the benefit has taken hold. Still, it remains good public policy to promote the use of rehabilitative tools known to benefit groups within the inmate population. As a concession to our present lack of knowledge, subsection (2) is open-ended on the questions of which programs should be made available, the amount of credits that should be offered for completion of one program or another, and other implementation details. Unlike subsection (1), corrections officials will necessarily exercise much case-by-case discretion in the administration of subsection (2). Over time, as evidence-based practices of in-prison rehabilitation improve, departments of corrections will be better positioned to allocate earned-time credits wisely.

There is arguably an additional policy basis for provisions like subsections (1) and (2). Some advocate the use of good-time and earned-time credits, the more the better, as a means of shortening prison sentences, reducing aggregate prison populations, and bringing down correctional costs. Indeed, historically, prison-population control has been one of the recurring functions of good-time laws. This objective, however, plays little role in the formulation of revised § 305.1. Looking to the larger institutional structure of the revised Code, correctional resource management is made a core function of the sentencing commission, and state sentencing commissions in the United States since 1980 have proven remarkably successful at discharging that responsibility; see § 6A.07 (Tentative Draft No. 1, 2007). Ceding a duplicative power to corrections officials, to be exercised as a matter of lightly regulated back-end discretion, would greatly complicate the sentencing commission's ability to do its job, and would unduly compromise the values of a determinate system.

b. Amount of credits available. The recommendation of a 15 percent good-time discount in subsection (1) is intended to be suggestive rather than directive, as signaled by the use of brackets. The available research and policy literature on good time as a correctional tool is sparse, and is inadequate to support conclusions as to best practices. A survey of American determinate-sentencing systems reveals substantial variations in approach. The federal law and some states cap the available discount at 15 percent of a prison term, although a few states allow for as much as a 50 percent reduction, depending on offense type and criminal history. Primarily out of fears of unnecessarily investing sentencing discretion in corrections officials, the revised Code opts for a suggested formula at the low end of this range.

Subsection (1) recommends that credits be calculated against the full term of the judicially imposed prison sentence, and that this calculation be made at the outset of each prisoner's term. Different counting formulas are possible even after a percentage formula is established. For example, credits might be awarded at the end of each year, based on time served to date. This practice would result in a total discount measured against the denominator of time actually served by the prisoner rather than the larger denominator of the judicially pronounced sentence, which most prisoners will not serve in full. As a general matter, the revised Code takes the view that it is good policy to resolve doubts in the application of the good-time formula in favor of the

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prisoner. The primary evil in back-end provisions is the bestowal of power to *withhold* credits on improper grounds. A clear principle of lenity works to reduce this danger.

The Institute strongly recommends that good-time credits be available to prisoners regardless of whether they are confined in a prison or jail, and should be calculated to include any term of presentence detention credited to the prisoner under § 6.06A (slated for future drafting). Some states do not grant good-time credits against jail time, and this practice has survived constitutional challenge. This restrictive approach is disfavored by the Code on policy grounds, despite its constitutional permissibility. One assumption of § 305.1 is that good-time credits will be routinely awarded in the vast majority of cases. To preserve the values of a determinate system, and to best effect the judgment and expectations of the sentencing court concerning sentence severity, the allocation of credits should be as regularized as possible. Their availability should not depend on the happenstance of where an offender serves all or a portion of his sentence—or whether an offender has served part of his sentence while awaiting trial and sentencing on the current charge.

As for earned-time credits under subsection (2), no strict rule of automatic or presumptive awards is desirable. Given our present knowledge base about offender rehabilitation and prison management, there is no clear reason to favor any definite formula in model legislation. Much depends on the evidence of success of specific programs in reducing future criminal behavior, the improving knowledge of which prisoners are amenable to specific interventions, the observed results of varying incentive systems on program enrollment, and the exploration of methods to reach subjective judgments of what should count as "satisfactory" participation by individual inmates.

The alternative bracketed options in subsection (2) reflect the uncertainties above, as well as the fact that wide differences in the administration of earned-time credits exist across U.S. jurisdictions. Subsection (2) provides for either a percentage discount or fixed-time reduction as a reward for program participation, and is agnostic about the precise amount of credit to be offered in either scenario. Care should be taken, however, that the earned-time provision does not distort the values of a determinate system. In adopting subsection (2), a state legislature potentially delegates a substantial measure of sentencing authority to its department of corrections. The Code's general concern over the possible inequities of back-end discretion militates in favor of a low ceiling on this authority, all the more so because the nature of earned time does not allow for routinization. Thus, for example, an enlightened legislature should be cautious in authorizing a percentage allowance above the 15 percent suggested in brackets in subsection (2), more so than if a similar increase were contemplated in the good-time calculation suggested in subsection (1).

An additional important concern within any system of earned-time credits is that in-prison programs are not equally available to all prisoners in all facilities. Good-quality rehabilitative interventions are in notoriously short supply, and tend to have long waiting lists where they exist.

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1 This creates many unavoidable inequities. Among them, only eligible prisoners who have access
2 to a program slot can reap the benefits of § 305.1(2). Other equally deserving prisoners are
3 excluded from the program's rehabilitative potential, and will suffer longer confinement terms
4 even if they are eager to participate. These are serious difficulties, but they cannot be resolved
5 within the four corners of the earned-time provision itself. The remedy can come only on a larger
6 scale, through the development and funding of rehabilitative opportunities for all prisoners,
7 which the revised Code identifies as a primary responsibility of the sentencing system; see
8 § 1.02(2)(b)(vi) (Tentative Draft No. 1, 2007). In drafting subsection (2), it is perhaps defensible
9 to assume that each state will provide adequate infrastructure for an equitable earned-time
10 system. Still, in the real world, universal rehabilitative opportunities will not exist in any
11 American prison system in the foreseeable future. Subsection (2) thus represents a further
12 judgment: that the unfairness visited upon inmates unable to gain access to qualifying programs
13 is outweighed by the societal benefits of maximizing participation in the programs that do exist.

14 *c. Deductions from mandatory prison terms.* The revised Code continues the Institute's
15 longstanding policy of categorical opposition to the use of mandatory-minimum terms of
16 incarceration; see § 6.06 and Comment *d*. Despite the Institute's disapproval, however, every
17 U.S. jurisdiction has enacted numerous mandatory-minimum penalties. Where such penalties
18 exist, the revised Code seeks to soften their effects. In the context of good-time and earned-time
19 credits, questions sometimes arise concerning prisoners' eligibility when serving mandatory
20 prison terms. In some legislation, eligibility is expressly withheld as part of the mandatory
21 sentence. Subsection (3) resolves any doubts that might otherwise exist in favor of prisoners
22 serving mandatory terms, while also expressing the more general policy view that mandatory
23 sentences—if a legislature must create them—should be subject to reductions under § 305.1
24 along with other prison sentences.

25 *d. Grounds for forfeiture of credits.* Because prisons tend to have many rules, governing
26 such things as personal hygiene and the times at which inmates must appear for meals, and
27 including detailed requirements of which prisoners are sometimes unaware, subsection (4)
28 specifies that only a "serious violation" of institutional rules—or a new criminal offense—may
29 support the removal of credits for good behavior. This is at base a matter of fairness and
30 proportionality: For violations of disciplinary rules that are less than serious, prisons can employ
31 lesser sanctions, or deprivations of privileges, that do not rise to a readjustment of the prison
32 sentence itself. The limiting language in subsection (4) also helps ensure that the back-end
33 discretion created in § 305.1 does not replicate the broad-based release discretion traditionally
34 exercised by parole boards.

35 Section 305.1 does not address the procedural safeguards that should attend the granting,
36 forfeiture, and restoration of good-time credits. These subjects were dealt with elsewhere in the
37 1962 Code, see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985),
38 and remain subjects for future drafting in the Code revision project. Subsection (4) does,
39 however, speak to the burden of factual proof for disciplinary allegations that may result in the

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forfeiture of good-time credits. Arguably, the evidentiary burden has as much effect on the workings of the forfeiture system as the black-letter definition of predicate acts. Today, many prison-discipline processes work with extremely low burdens. The minimum constitutionally required standard of review of good-time forfeiture decisions is that they be supported by "some evidence." Subsection (4) provides a higher floor, that the relevant facts must be established by at least a preponderance of the evidence.

e. Vesting. The Institute considered inclusion of a "vesting" provision in § 305.1, which would limit the power of corrections officials to remove good-time credits long after they were earned. For example, the following subsection might be added to the black-letter language above:

> **[Five] years after credits for good behavior are earned under this Section, the credits shall vest, and may not be lost or forfeited by the prisoner during the balance of a prison sentence.**

A vesting device along these lines would limit the possibility of vindictive removal of good-time credits that have accumulated over a period of many years, and would reinforce § 305.1's presumption that, for most prisoners, good-time credits will be reliably granted. However, no American jurisdiction in 2011 provided for the vesting of good time, and only a small number of states had ever done so. No scholarly literature analyzes the wisdom of such a proposal, or documents the supposed evil of vindictive action by corrections officials late in a prison term. The Institute concluded that too little information is available to support model legislation on the subject, but commends to states and researchers the project of studying more closely the merits of a vesting mechanism.

REPORTERS' NOTE [143]

a. Scope. Good-time and earned-time provisions are nearly universal in the United States, and are found in all determinate sentencing systems that make use of sentencing guidelines—the system type that is the institutional basis for the revised Code, see Model Penal Code: Sentencing, Report (2003), at 50-125. Beneath this apparent consensus, however, there is a bewildering diversity in approach across the states, with no easy route to the identification of best practices. See National Council of State Legislatures, Statutes Relating to Good Time/Earned Time (2009) (50-state survey); National Council of State Legislatures, Cutting Corrections Costs: Earned Time Policies for State Prisoners (2009); Nora V. Demleitner, Good Conduct Time: How Much and for Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777 (2009); Dora Schriro, Is Good Time a Good Idea?: A Practitioner's Perspective, 21 Fed. Sent. Rptr. 179 (2009).

James Jacobs has posited three categories of good-time credits: good conduct defined as compliance with institutional rules or the absence of disciplinary violations ("good time" in traditional parlance); meaningful participation in programs (often called "earned time"); and extraordinary service such as saving the life of a prison

[143] This Reporters' Note has not been revised since § 305.1's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

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guard or helping to quell a riot (sometimes known as "meritorious good time"). James B. Jacobs, Sentencing by Prison Personnel: Good Time, 30 UCLA L. Rev. 217, 221 (1982). The first two categories are incorporated into § 305.1(1) and (2). The third is addressed elsewhere, in § 305.7 of the revised Code (this draft) (creating sentence-modification power responsive to "extraordinary" circumstances).

A fourth category has been suggested for *emergency* good-time credits, awarded to reduce prison populations in times of acute overcrowding. Ellen F. Chayet, Correctional "Good Time" as a Means of Early Release, 6 Crim. Justice Abstracts 521, 524 (1994); see also National Council of State Legislatures, Cutting Corrections Costs (2009). This function is not incorporated into § 305.1, partly because prison-population control is made a core responsibility of the sentencing commission under the revised Code, see § 6A.07 (Tentative Draft No. 1, 2007), and partly out of fears of investing too much discretion over incarceration terms in corrections officials, with concomitant dangers of abuse. See Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 267-269 (expressing doubts over the use of good time as a prison-population control device). In some instances, it may be politically attractive to meet a population crisis with a back-end solution of increased good-time allowances, on the theory that such provisions have low public visibility. If credit formulas are changed permanently as a response to a short-term crisis, however, this may not result in sound long-term policy. A better solution, if the good-time apparatus is to be turned to this purpose, is to authorize the temporary suspension of the normal rules for credit allowances. See Chayet, "Good Time" as a Means of Early Release, at 524 (13 state codes authorize "supplemental" good-time-credit awards under emergency crowding conditions).

The research literature on the use and benefits of good-time and earned-time provisions is exceedingly thin. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 522 ("Despite its use in prison systems throughout the world, credit-based release is a subject that has received limited research attention."). No one knows, even roughly, what the optimum credit allowances might be in different settings—or, indeed, whether the credit systems are at all successful in promoting prison discipline or offender rehabilitation. See Demleitner, Good Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 2009 at 783; Bert Useem et al., Sentencing Matters, But Does Good Time Matter More?), Institute for Social Research, University of New Mexico, Working Paper No. 14 (1996), at 4; Melissa Pacheco, Good Time and Programs for Prisoners (Nationwide), Institute for Social Research, University of New Mexico, Working Paper No. 3 (1996), at 6 ("The general assumption is that good time systems are necessary for the maintenance of order and discipline in the prison. However, there are no systematic data to support this belief. . . . There have been no studies that confirm that good time contributes to inmate reform."). The few substantial studies that exist are decades old. Two studies of good-time practices in the 1980s found that inmates released early had recidivism rates indistinguishable from control groups. James Austin, Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy, 32 Crime & Delinq. 404, 463-469 (1986); P.A. Malak, Early Release (Colorado Division of Criminal Justice, 1984). A third study in the 1980s found no strong evidence that inmates covered by Michigan's good-time policy were less likely to commit prison infractions than inmates not covered. James G. Emshoff & William S. Davidson, The Effect of "Good Time" Credit on Inmate Behavior, 14 Crim. Just. & Beh. 335, 343-344 (1987). A balanced summary of the thin research literature on good time is found in Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 534:

> It is not clear whether good time improves the in-prison behavior of inmates, but correctional administrators and staff believe that it assists them in maintaining institutional control. There is,

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however, no evidence that good-time credits have rehabilitative benefits, although in earned release programs, under certain conditions, credits may provide inmates with an incentive to engage in self-improvement. Finally, there is significant evidence to suggest that good time contributes to disparities in sentences served and correctional treatment inequities.

b. Amount of credits available. Because the Model Penal Code's sentencing system removes parole-release discretion in prison cases, the closest state analogues to § 305.1 are found in similarly determinate systems. Relevant provisions include: Ariz. Rev. Stat. § 41-1604.07(A), (C) (granting "one day for every six days served" for most prisoners, subject to forfeiture for rules violations or failure to participate in programming); Cal. Penal Code § 2933(b) ("For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months"; this is a general rule subject to exceptions based on crime type and criminal history); id. § 2933.05(a) (additional credits for program participation available, not to exceed 6 weeks during any 12-month period of confinement); § 2935 (possibility of additional 12-month reduction in sentence for heroism or extraordinary service to safety of institution); Del. Code Ann. tit. 11, § 4381(e) (up to 100 days of "good time" credit in a year for both good behavior and participation in programming; the ceiling for good behavior alone is 36 days per year); 730 Ill. Comp. Stat. 5/3-6-3(a)(2.1) (most prisoners eligible to receive "one day of good conduct credit for each day of his or her sentence of imprisonment"); Ind. Code § 35-50-6-3 (rate of accrual of credits depends on inmate classification; most generous formula is "one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing"); id. § 35-50-6-3.3(i) (capping credit time at the lesser of 4 years or one-third of a person's "total applicable credit time"); Kan. Stat. § 21-4722(a)(2) (good time credits of 15 or 20 percent, depending on type and grade of offense); id. § 21-4722(e) (an additional credit of 60 days for program completion available to inmates convicted of less serious felonies); Me. Rev. Stat. Ann. tit. 17-A, § 1253(3) ("a person sentenced to imprisonment for more than 6 months is entitled to receive a deduction of 10 days each month for observing all rules of the department and institution"); § 1253(4), (5) (up to an additional 5 days per month may be deducted for inmates participating in various in-prison or community programs); Minn. Stat. § 244.101, subd. 1 (supervised-release term equal to 1/3 of the prison term normally results in release after 2/3 of the pronounced sentence); id. § 244.05, subd. 1b(b) (release can be delayed for disciplinary violation or refusal to participate in rehabilitative program); N.C. Gen. Stat. § 15A-1340.17(d),(e) (potential earned-time reductions vary by offense and criminal record, but do not exceed 45 percent); Ohio Rev. Code § 2967.193 (E)(3) (eligible prisoners may earn credits for participation in programs or periods they have remained in "minimum security status"; total credits not to exceed 1/3 their "minimum" or "definite" prison term); Or. Rev. Stat. § 421.120 (various rules and formulas for good-time and earned-time credits); id. § 421.121(2)(a) ("The maximum amount of time credits earned for appropriate institutional behavior, for participation in the adult basic skills development program . . . or for obtaining a diploma, certificate or degree . . . may not exceed 30 percent of the total term of incarceration"); Va. Code § 53.1-202.2 (establishing system of "sentence credits" "earned through adherence to rules, . . . program participation . . . and by meeting such other requirements as may be established by law or regulation"); id. § 53.1-202.3 (providing that no more than "four and one-half sentence credits may be earned for each thirty days served"); id. § 53.1-202.4 (State Board of Corrections to establish criteria for award of sentence credits and for their forfeiture); Wash. Rev. Code § 9.94A.729 (allowing "earned release time" for low-risk nonviolent offenders up to 50 percent of their term of sentence; for serious violent and sex offenders up to 10 percent; and for other offenders up to 33 percent). Many different good-time and earned-time formulas are found in indeterminate sentencing states,

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as well. For a recent statutory survey, see National Conference of State Legislatures, Statutes Related to Good Time/Earned Time (June 2009).

Subsection (1) provides that its credits shall be calculated against the "full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A." This language clarifies a number of possible ambiguities in the counting rules. See Barber v. Thomas, 130 S. Ct. 2499 (2010) (construing federal good-time statute to require the less generous of two alternative counting methods); McGinnis v. Royster, 410 U.S. 263 (1973) (upholding state practice of not awarding credits for jail time).

An earlier proposed version of § 305.1 capped the available credits for both good-time and earned-time at a total of 15 percent; see Discussion Draft No. 2 (2009), at 81. The current formulation was influenced by the recommendation of the ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28 (that revised § 305.1 should add to the credits available in subsection (2) "an additional 15% good time credit to be earned for participation in work and other rehabilitative activities . . . to give prison authorities tools to encourage participation in reentry programming"). See also Nora V. Demleitner, Good Conduct Time: How Much and for Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777, 792-793, 796 (2009) (suggesting a total allowance in § 305.1 of one-third of a prison sentence, split between institutional compliance and program participation).

Some states reward inmates' participation in rehabilitative programming with a fixed credit upon program completion. For example, in 2009, the Colorado General Assembly authorized the Department of Corrections to award 60 days of credit toward release to prisoners serving prison sentences for nonviolent offenses who had successfully completed in-prison programs. This credit is available only once per prison term. The 120-day allowance, bracketed in alternative subsection (2), is within the range of fixed credits currently authorized in state codes. See National Conference of State Legislatures, Cutting Corrections Costs: Earned Time Policies for State Prisoners (2009), at 2 ("The typical range for a one-time credit is between 30 days and 120 days.").

c. Deductions from mandatory prison terms. Most state good-time provisions do not speak to the question of whether credits are to be deducted from mandatory-minimum prison sentences, or do so on an offense-by-offense basis. The general rule stated in subsection (3) derives from the Institute's categorical disapproval of mandatory penalties rather than the weight of existing statutory examples. Nonetheless, subsection (3) finds precedent in at least one jurisdiction. See Iowa Code § 903A.5(1) ("Earned time accrued and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to [various provisions listed]"). Protracted litigation has occurred under some mandatory-penalty schemes when this issue is not resolved by statute. See Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. Davis L. Rev. 1025 (2004); In re Cervera, 16 P.3d 176, 178-180 (Cal. 2001).

d. Grounds for forfeiture of credits. Although there is little research on the actual behavior of prison disciplinary processes, practitioners and scholars in the field report that good-time credits are granted to most prisoners in the normal course, and that forfeiture is a relatively rare event. See Schriro, Is Good Time a Good Idea?, 21 Fed. Sent. Rptr. 179; Demleitner, Good Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 777; Jacobs,

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Sentencing by Prison Personnel, 30 UCLA L. Rev. 217. Assuming this is so, and also concluding it is a desirable state of affairs, subsection (4) reinforces the norm of routinely awarded credits by its recommendation that the substantive grounds of forfeiture should be narrowly defined.

Subsection (4) would also rule out certain questionable grounds for good-time forfeiture that exist in current American law. For instance, 13 states allow the revocation of good-time credits when a prisoner is found to have filed a frivolous lawsuit. In at least one state, forfeiture is authorized when an inmate demands DNA testing that ultimately confirms the inmate's guilt. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts 521; Tonja Jacobi and Gwendolyn Carroll, Acknowledging Guilt: Forcing Self-Identification in Post- Conviction DNA Testing, 102 Northwestern L. Rev. 263, 292 (2008); Fed. Bureau of Prisons, Legal Resource Guide to the Federal Bureau of Prisons 2008, at 14 (2008).

The subject of procedural safeguards in the prison disciplinary process is of considerable importance, but it is not taken up in this provision. The 1962 Code addressed questions of process later in Article 305, but offered few solid prescriptions; see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985). These remain potential issues for later drafting in the Code revision project; see Discussion Draft No. 2 (2009), at 117-121 ("General Plan for Revision: Parts III and IV of the 1962 Model Penal Code").

Minimum due-process requirements for good-time forfeiture are mandated by federal constitutional law. See Wolff v. McDonnell, 418 U.S. 539 (1974); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445 (1985). Nonetheless, in many prison systems, the ultimate fairness of the process has come under doubt. As James Jacobs reported in his classic study:

> Prison personnel preside over disciplinary hearings and such persons are subject to the pressures of institutional security, staff morale, and bureaucratic expediency. Despite the *Wolff* procedures, these hearings tend to be informal and perfunctory. "Not guilty" verdicts are extremely rare and, usually, the only doubtful issue is how severe the punishment will be.

Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 238 (1982); see also Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 531-533 (collecting studies).

e. Vesting. A handful of American jurisdictions at one time provided for the vesting of good-time credits, although some also provided for "liens" against future earnings of good-time credits for bad behavior. All of the vesting statutes have since been repealed. See Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 239-240; Cal. Penal Code § 2931 (vesting provision not applicable to offenders whose crimes were committed on or after January 1, 1983); Minn. Stat. § 244.04 (cancelling vesting provision for offenders whose crimes were committed after August 1, 1993).

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§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in an Appendix containing Principles of Legislation. See page 564.

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§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons.[144]

(1) An offender under any sentence of imprisonment shall be eligible for judicial modification of sentence in circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence.

(2) The department of corrections shall notify prisoners of their rights under this provision when it becomes aware of a reasonable basis for a prisoner's eligibility, and shall provide prisoners with adequate assistance for the preparation of applications, which may be provided by nonlawyers.

(3) The courts shall create procedures for timely assignment of cases under this provision to an individual trial court, and may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under the standard of subsection (7).

(4) The trial courts shall have discretion to determine whether a hearing is required before ruling on an application under this provision.

(5) If the prisoner is indigent, the trial court may appoint counsel to represent the prisoner.

(6) The procedures for hearings under this Section shall include the following minimum requirements:

(a) The prosecuting authority that brought the charges of conviction against the prisoner shall be allowed to represent the state's interests at the hearing;

(b) Notice of the hearing shall be provided to any crime victim or victim's representative, if they can be located with reasonable efforts;

(c) The trial court shall render its decision within a reasonable time of the hearing;

(d) The court shall state the reasons for its decision on the record;

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[144] This Section was originally approved in 2011; see Tentative Draft No. 2.

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(e) The prisoner and the government may petition for discretionary review of the trial court's decision in the [court of appeals].

(7) The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the purposes of sentencing in § 1.02(2).

(8) The court may modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law.

(9) When a prisoner who suffers from a physical or mental infirmity is ordered released under this provision, the department of corrections as part of the prisoner's reentry plan shall identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

(10) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by courts when considering the modification of prison sentences under this provision.

Comment: [145]

a. Scope. This provision is new to the Code. Most state codes include sentence-modification provisions that permit the "compassionate release" or "medical parole" or "geriatric release" of aged or infirm prisoners, although the relevant terminology and eligibility criteria vary widely. A handful of jurisdictions have enacted provisions that include broader or open-ended standards. Current federal law on the subject states that "extraordinary and compelling reasons" may warrant the reduction of an incarceration term. These expressly include exigent family circumstances such as the death of a spouse who was the sole caretaker of the prisoner's minor children. Section 305.7 embraces and combines all of the above grounds for sentence modification into a single provision, to be administered by trial courts in light of the underlying purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007).

The sentence-modification authority under this Section may be exercised at any time during a term of imprisonment. The provision is intended to respond to circumstances that arise or are discovered after the time of sentencing, when those circumstances give compelling reason to reevaluate the original sentence.

[145] This Comment has not been revised since § 305.7's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

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b. Criteria for eligibility. Subsection (1) sets forth the grounds for eligibility for sentence modification, which include "circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence." Subsection (1) interlocks with subsection (7), which requires that such considerations "justify a modified sentence in light of the purposes of sentencing in § 1.02(2)." This standard is enforceable by an appellate court, via discretionary review under subsection (6)(e), and may be elucidated both by the accumulation of judicial precedent, and by sentencing guidelines promulgated by the sentencing commission under subsection (10).

The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner who reaches an advanced age while incarcerated, or a prisoner whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement. Subsection (1) makes separate provision for circumstances of age and infirmity. This is because advanced age may limit a person's capabilities, including the physical wherewithal to commit criminal acts, even in the absence of illness, injury, or special disability. Most states provide for the early release of aged and physically infirm inmates, or their removal to other institutions or programs. Some limit their provisions to cases of terminal illness or other very extreme conditions such as paralysis or a coma. The revised Code eschews such a narrow approach in favor of a standard that allows the courts to assess the full context of the situation, including the prisoner's condition and capabilities, and the presence or absence of reasons for continued confinement.

Only a minority of compassionate-release laws embrace serious mental infirmities, but the revised Code recommends that this should become the universal practice. While estimates vary, it is clear that a substantial percentage of inmates in the nation's prisons suffer from mental illnesses. Often, effective treatment is unavailable in prison, conditions of the institution may exacerbate the inmate's condition, and the inmate's impairment may make it impossible to navigate the daily life of the penitentiary.

No state code expressly authorizes prison sentence reductions on grounds of exigent family circumstances, but the principle is incorporated into the current federal code and sentencing guidelines. Given the powerful collateral effects of prison sentences on families, and the well-documented concern that incarceration of a parent is highly correlated with later offending by children, the sentencing system must be permitted in "exigent" circumstances to take account of third-party consequences of the penalties it imposes, and avoidable future harms that may be generated by the legal system itself. More broadly, the express reference to exigent family circumstances in subsection (1) signals that § 305.7 is not confined philosophically to events that occur within institutional walls. Cases arising under § 305.7 will usually focus on circumstances having to do with the prisoner, or the prisoner's behavior, but the provision is flexible enough to reach compelling changes of circumstances outside the institution. One primary goal of sentencing under the revised Code is the preservation of families, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), and the effectiveness of the sentencing system as a

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1 whole is measured in part by "the effects of criminal sanctions on families and communities,"
2 § 1.02(2)(b)(vii) (id.).

3 The open-ended "compelling reasons" standard in subsection (1) borrows from the most
4 flexible of existing provisions in American correctional codes. Current federal law on the subject
5 states that "extraordinary and compelling reasons" may warrant a reduction of a term. At least
6 one state code uses the catch-all standard of "good cause shown." Another looks to whether the
7 prisoner is "a suitable candidate for suspension of sentence," without elaboration of what counts
8 toward suitability. There are only a few compassionate-release laws of such scope nationwide. In
9 a related setting, however, it is relatively common to find prison-release provisions that respond
10 to "extraordinary" events of an unspecified nature. Many existing good-time provisions grant
11 sentence discounts for a prisoner's extraordinarily meritorious conduct, and are intended to
12 reward acts such as heroism during a prison riot, saving the life of a prison guard, or preventing
13 an escape. Perhaps in recognition that extraordinariness is not distillable into specific statutory
14 language, these laws are often expressed in terms of a general standard. The original Code, for
15 example, offered a sentence reduction of up to 20 percent for "especially meritorious behavior or
16 exceptional performance of his duties," see Model Penal Code, Complete Statutory Text § 305.1
17 (1985). The revised Code elects to remove such broad authority from the department of
18 corrections, see § 305.1 (this draft), and transfers decisional discretion to the courts.

19 Many compassionate-release statutes expressly require a finding that the prisoner does
20 not pose a threat to public safety before release from prison may be ordered by the court. The
21 revised Code contains no explicit command of this kind. Nevertheless, subsection (7) requires
22 that the court's sentence-modification power be exercised in light of the purposes of sentencing
23 in § 1.02(2) (Tentative Draft No. 1, 2007). These include the incapacitation of dangerous
24 offenders, see § 1.02(2)(a)(ii) (id.). A global statement in subsection (7), incorporating all of the
25 purposes in § 1.02(2), is superior to a requirement that only one among those purposes should be
26 reflected in the judge's decision.

27 *c. Identity of decisionmaker.* Section 305.7 places final decisional authority in the trial
28 courts, rather than a board of pardons, parole agency, or corrections department. This
29 recommendation follows the minority practice among American states. It reflects the Code's
30 policy preference for "front-end" decisionmakers over "back-end" agencies in the sentencing
31 chronology, and conforms to the Code's general philosophy that sentencing is primarily a
32 judicial function. See § 305.6 and Comment *d*.

33 In one important respect, § 305.7 departs sharply from current American laws of
34 compassionate release. The provision declines to interpose a gatekeeper in the sentence-
35 modification process to screen applications and decide which ones are worthy of consideration
36 by the trial courts. In nearly all jurisdictions that have designated the courts as ultimate
37 decisionmakers, the department of corrections or another agency plays such a role; the courts

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enjoy no sentence-modification power in the absence of a motion or recommendation from the gatekeeper.

There was much debate within the Institute concerning the advantages and dangers of a gatekeeping mechanism of this kind. On the one hand, a system that routes all applications directly to the courts may result in an undifferentiated flood of petitions, requiring the expenditure of scarce judicial resources to separate wheat from chaff. Further, the absence of a gatekeeper might actually reduce the number of worthy petitions. A system of third-party screening might promote meritorious cases if, for example, a department of corrections is alert to inmates' potential eligibility, and encourages applications that would not otherwise be made. On the other side of the balance, however, is the substantial worry that a gatekeeper would exercise its authority on too few occasions, thus choking off potentially worthy applications. While there is little research or data on how state departments of corrections have wielded their gatekeeping discretion in the compassionate-release setting, the Federal Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal compassionate-release provision a virtual nullity. Unless a state legislature is confident that its corrections officials—or alternative gatekeepers that may be identified—will discharge screening authority under § 305.7 in a way that comports with the statute's intentions, the revised Code recommends that the screening process be performed within the court system; see subsection (3).

d. Assistance provided by department of corrections. Many eligible prisoners will be unaware of their rights under § 305.7, or will lack the skills or competence to assert those rights. There is little benefit to the prisoner, the corrections system, or the public at large when a strong case goes unasserted. Paragraph (2) provides that the department of corrections must provide appropriate notice whenever it learns of reasonable grounds for a prisoner's eligibility. The department must ensure that correctional staff, and health providers, understand this responsibility. In addition, the department must make adequate assistance available to prisoners for the preparation of applications. The assistance may be provided by nonlawyers, such as knowledgeable staff members or volunteers, or qualified prisoners.

e. Assignment and screening of applications. Subsection (3) requires that the courts create a method of timely assignment of applications to individual trial courts. Because the provision lacks a third-party gatekeeper, see Comment *c* above, subsection (3) authorizes the courts to create a screening process of their own, both to manage the workload of many applications, and to preserve judicial resources for those colorable applications that deserve close attention. A centralized screening approach, prior to assignment to individual judges, would be consistent with this provision.

Additional provisions of § 305.7 allow for the sorting of applications into levels of higher and lower priority. Paragraph (4) makes clear that the trial courts have discretion to rule on applications with or without a hearing, and paragraph (5) gives the court discretion to appoint counsel in selected cases. Sentencing guidelines promulgated under subsection (10) may also

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speak to the question of what types of applications should receive a full hearing, and which may be disposed through more summary process.

f. Appointment of counsel. Paragraph (5) recommends that the legislature grant the courts discretion to appoint legal counsel to represent indigent prisoners. Normally appointment will be appropriate only after the court has determined that a hearing is warranted. In some instances, however, the court may conclude that counsel is necessary to assist a prisoner in the preparation of an amended application.

g. Minimum hearing procedures. Section 305.7 delegates much rulemaking authority to the court system itself, but subsection (6) speaks to selected procedural issues of importance for cases that reach the stage of a hearing. Given that sentence modification under this provision may occur at any stage during a prison term, and may represent a radical change in penalty, the prosecuting authority must be allowed to represent the government's interests. Likewise, crime victims should be notified when a hearing has been set, if they are available and can be located through reasonable efforts. The revised Code will speak generally to victims' rights of participation in sentencing proceedings, at various stages of the process, in a separate provision slated for future drafting.

Subsections (6)(d) and (e) are especially important within the Code's scheme. Because § 305.7 creates a broad sentence-modification power, that will in some cases be exercised under an open-ended standard, and must in all cases include careful analysis of the basic sentencing purposes of § 1.02(2) (Tentative Draft No. 1, 2007), it is essential that the courts' reasoning process be visible and open to review. Accordingly, subsections (6)(d) and (e) require that trial courts give reasons for their decisions on the record, and that the appellate courts have discretion to accept appeals from adverse rulings. These basic protections will promote the legitimacy and accountability of the process, aid in reasoned decisionmaking, add to the effectiveness of the applicable sentencing guidelines, and encourage the development of a common law of sentence modification.

h. Substantive standard for sentence modification. Section 305.7 is designed to respond to circumstances that arise or are discovered after the time of sentencing, including cases in which the full effects of known conditions, such as a prisoner's physical or mental illness, are not appreciated until a later date. Such circumstances must provide compelling reason to reevaluate the original sentence, and to replace it with a modified penalty, when measured against the underlying purposes of § 1.02(2) (Tentative Draft No. 1, 2007).

i. What modifications are permitted. Paragraph (8) states that the court may "modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence." Subject to the ceiling on prospective severity, this is intended to give the courts broad authority to impose a modified sentence, which may take the form of a shortened prison term, but may also include new or altered sanctions of other kinds, such as new requirements of postrelease supervision and treatment.

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Paragraph (8) also states that the sentence-modification power "is not limited by any mandatory-minimum term of imprisonment under state law." A number of compassionate-release provisions in current American codes likewise grant authority to override mandatory-minimum sentences, although some states make narrow exceptions to the general rule that mandatory penalties do not limit the modification power, e.g., for capital cases or sentences of life without parole. Paragraph (8) is consistent with the revised Code's general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute's longstanding disapproval of such laws; see § 6.06(8) and Comment *m*.

j. Transition to outside medical and mental-health care. Whenever a prisoner suffering from a physical or mental infirmity is released, there should a plan for adequate treatment of the prisoner outside of prison. It would be perverse for § 305.7 to encourage the "dumping" of ex-prisoners into the community without adequate provision for the continuing care that they need. To avoid this possibility, subsection (9) provides that the department of corrections, as part of the prisoner's reentry plan, must identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

k. Sentencing guidelines. Paragraph (10) requires the sentencing commission, on an ongoing basis, to produce and amend sentencing guidelines addressed to the courts for sentence-modification decisions under this provision. These guidelines may be addressed to the screening decisions courts must make in separating potentially meritorious applications from the frivolous, the determination of which applicants should be given the benefits of a full hearing, and final dispositions. Given the scope of the sentence-modification power under § 305.7, principled grounds for decision can best be evolved within an institutional framework that allows inputs from the trial courts, the appellate courts under paragraph (6)(e), and the sentencing commission through guidelines.

It should be noted that Article 6B governs the sentence-modification guidelines promulgated under this provision. Most importantly, the guidelines may carry no more than presumptive force, see § 6B.04 (Tentative Draft No. 1, 2007), so that ultimate decisionmaking authority remains with the trial courts, subject to the possibility of appellate review.

REPORTERS' NOTE [146]

b. Criteria for eligibility

(1) Advanced age. Inmates aged 50 and older have been the fastest-growing age group in the nation's prisons, and the costs of their confinement, largely driven by medical expenses, are three times greater than for younger prisoners. See Carrie Abner, Council of State Governments, Graying Prisons: States Face Challenges of an Aging Inmate Population (2006), at 9 ("Some estimates suggest that the elder prisoner population has grown by as much as 750 percent in the last two decades"); Mike Mitka, Aging Prisoners Stressing Health Care System, JAMA

[146] This Reporters' Note has not been revised since § 305.7's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

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292:4, 423 (2004) (noting that "A 50-year-old inmate may have a physiological age that is 10 to 15 years older . . . due to such factors as abuse of illicit drugs and alcohol and limited lifetime access to preventive care and health services.").

For existing laws on the subject of geriatric release, see Conn. Gen. Stat. § 54-131k(a) ("so physically or mentally debilitated, incapacitated or infirm as a result of advanced age . . . as to be physically incapable of presenting a danger to society"); D.C. Code § 24-468(a)(2) ("The inmate is 65 years or older and has a chronic infirmity, illness, or disease related to aging"); Ga. Code § 42-9-42(c) ("notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons"); Mo. Stat. § 217.250 ("advanced in age to the extent that the offender is in need of long-term nursing home care"); N.J. Rules of Court, R. 3:21-10(B)(2) ("infirmity"); N.M. Stat. § 31-21-25.1(F) (geriatric parole available when inmate is "sixty-five years of age or older [and] suffers from a chronic infirmity, illness or disease related to aging"); N.C. Gen. Stat. § 15A-1369 (release available for geriatric inmate "who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk"); Or. Rev. Stat. § 144.122(1)(c) (inmate "[i]s elderly and is permanently incapacitated in such a manner that the prisoner is unable to move from place to place without the assistance of another person"); Va. Code § 53.1-40.01 ("Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence"); 18 U.S.C. § 3582(c)(1)(A)(ii) ("the defendant is at least 70 years of age, has served at least 30 years in prison"); Wyo. Stat. § 7-13-424(a)(ii) ("The inmate is incapacitated by age to the extent that deteriorating physical or mental health substantially diminishes the ability of the inmate to provide self-care within the environment of a correctional facility").

(2) Physical infirmity. See Alaska Stat. § 33.16.085(a)(1),(5) ("the prisoner is severely medically or cognitively disabled" and "the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner"); Ark. Code § 12-29-404(a) ("an inmate has an incurable illness which, on the average, will result in death within twelve (12) months, or when an inmate is permanently physically or mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction"); Cal. Penal Code § 1170(e)(2)(A),(C) (effective January 1, 2009) (prisoner is terminally ill or "permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function"); Conn. Gen. Stat. § 54-131k(a) ("so physically or mentally debilitated, incapacitated or infirm as a result of advanced age or as a result of a condition, disease or syndrome that is not terminal as to be physically incapable of presenting a danger to society"); 11 Del. Code § 4346(e) ("Whenever the physical or mental condition of any person confined in any institution demands treatment which the Department cannot furnish"); D.C. Code § 24-468(a)(1) ("permanently incapacitated or terminally ill"); Fla. Stat. § 947.149(1)(a),(b) (inmate is terminally ill or suffers from "a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the inmate permanently and irreversibly physically incapacitated to the extent that the

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inmate does not constitute a danger to herself or himself or others"); Ga. Code § 42-9-42(c) ("notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons"); Idaho Code § 20-223(f) (prisoner is terminally ill or, "by reason of an existing physical condition which is not terminal, is permanently and irreversibly physically incapacitated"); La. Rev. Stat. § 15:574.20(B)(1),(2) (inmate is terminally ill or, "by reason of an existing physical or medical condition, is so permanently and irreversibly physically incapacitated that he does not constitute a danger to himself or to society"); Mich. Comp. Laws § 791.235(10) ("The parole board may grant a medical parole for a prisoner determined to be physically or mentally incapacitated"); Minn. Stat. § 244.05, subd. 8 ("the offender suffers from a grave illness or medical condition and the release poses no threat to the public"); Mo. Stat. § 217.250 ("a disease which is terminal . . . or when confinement will necessarily greatly endanger or shorten the offender's life"); Mont. Code § 46-23-210(1)(c)(i) ("a medical condition requiring extensive medical attention" or "a medical condition that will likely cause death within 6 months or less"); Neb. Rev. Stat. § 83-1,110.02(1) ("terminally ill or permanently incapacitated"); N.H. Rev. Stat. § 651-A:10-a(I)(a) ("terminal, debilitating, incapacitating, or incurable medical condition or syndrome"); N.J. Rules of Court, R. 3:21-10(B)(2) ("illness or infirmity"); N.M. Stat. § 31-21-25.1(A)(6) ("permanently incapacitated and terminally ill" inmates are eligible for medical parole); McKinney's Cons. Law of N.Y. § 259-r(1)(a) (eff. Sept. 1, 2009) (inmate suffers from "a terminal condition, disease or syndrome and [is] so debilitated or incapacitated as to create a reasonable probability that he or she is physically incapable of presenting any danger to society"); N.C. Gen. Stat. § 15A-1369 ("permanently and totally disabled" or "terminally ill"); Ohio Rev. Code § 2967.05 ("imminent danger of death"); 57 Okl. Stat. § 332.18(B) ("an inmate who is dying or is near death . . . or whose medical condition has rendered the inmate no longer a threat to public safety"); Or. Rev. Stat. § 144.122(1)(b) ("severe medical condition including terminal illness"); R.I. Stat. § 13-8.1-3 (terminally ill or "suffering from a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, permanently and irreversibly physically incapacitates the individual to the extent that no significant physical activity is possible, and the individual is confined to bed or a wheelchair"); S.C. Code of Laws § 24-21-970 ("Consideration [for pardon] shall be given to any inmate afflicted with a terminal illness where life expectancy is one year or less"); Tenn. Code § 41-21-227(i)(2)(A)(i),(ii) ("[i]nmates who, due to their medical condition, are in imminent peril of death [and] [i]nmates who can no longer take care of themselves in a prison environment due to severe physical . . . deterioration"); Tex. Admin. Code, tit. 37, § 143.34(a) ("terminal illness, total disability, or for needed medical care which cannot be provided by the medical facilities of the Texas Department of Corrections."); 28 Vt. Stat. § 502a(d) ("a terminal or debilitating condition so as to render the inmate unlikely to be physically capable of presenting a danger to society"); Wyo. Stat. § 7-13-424(a)(i),(iii),(iv) ("The inmate has a serious incapacitating medical need which requires treatment that cannot reasonably be provided while confined in a state correctional facility" or "[t]he inmate is permanently physically incapacitated as the result of an irreversible injury, disease or illness which makes significant physical activity impossible, renders the inmate dependent on permanent medical intervention for survival or confines the inmate to a bed, wheelchair or other assistive device where his mobility is significantly limited" or "[t]he inmate suffers from a terminal illness caused by injury or disease which is predicted to result in death within twelve (12) months").

(3) Mental infirmity. See Alaska Stat. § 33.16.085(a)(1),(5) ("the prisoner is severely . . . cognitively disabled" and "the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner"); Ark. Code § 12-29-404(a) ("inmate is permanently . . . mentally incapacitated to the

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1 degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting
2 providing a level of care not available in the Department of Correction or the Department of Community
3 Correction"); Conn. Gen. Stat. § 54-131k(a) ("so . . . mentally debilitated . . . as to be physically incapable of
4 presenting a danger to society"); 11 Del. Code § 4346(e) ("Whenever the . . . mental condition of any person
5 confined in any institution demands treatment which the Department cannot furnish"); Mich. Comp. Laws
6 § 791.235(10) ("The parole board may grant a medical parole for a prisoner determined to be . . . mentally
7 incapacitated"); N.J. Rules of Court, R. 3:21-10(B)(2) ("illness or infirmity"); Tenn. Code § 41-21-227(i)(2)(A)(ii)
8 ("Inmates who can no longer take care of themselves in a prison environment due to severe physical or
9 psychological deterioration").

10 *(4) Exigent family circumstances.* 18 U.S.C. § 3582(c)(1)(A)(i), allows judicial modification of a term of
11 imprisonment (albeit only upon motion of the Director of the Bureau of Prisons), if the court finds that
12 "extraordinary and compelling reasons warrant such a reduction," in light of the general purposes of sentencing in
13 18 U.S.C. § 3553(a). The U.S. Sentencing Commission, granted statutory power to issue policy statements for the
14 implementation of this provision, has determined that one example of "extraordinary and compelling reasons" is
15 "The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor
16 child or minor children." U.S. Sentencing Guidelines, §1B1.13. Reduction in Term of Imprisonment as a Result of
17 Motion by Director of Bureau of Prisons (Policy Statement), Commentary, § I(A)(iii). Until 1994, Bureau of Prisons
18 regulations governing sentence-reduction motions, under§ 3582(c)(1)(A)(i) and 18 U.S.C. § 4205(g), explicitly
19 contemplated invoking the judicial sentence-modification authority "if there is an extraordinary change in an
20 inmate's personal or family situation." 28 C.F.R. § 572.40 (1993).

21 *(5) Open-ended criteria.* Most state codes do not authorize sentence modification on open-ended grounds,
22 but at least three American jurisdictions have done so. See N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend
23 prison sentence exists at any time if "the commissioner of the department of corrections has found that the prisoner
24 is a suitable candidate for suspension of sentence"); N.J. Rules of Court, R. 3:21-10(b)(3) (sentence may be reduced
25 or changed "for good cause shown," but only upon joint motion of the prisoner and the prosecuting authority); 18
26 U.S.C. § 3582(c)(1)(A)(i) (if, following motion from Federal Bureau of Prisons, court finds "extraordinary and
27 compelling reasons warrant such a reduction").

28 *(6) Requirement that public safety not be jeopardized.* Such a condition is ubiquitous in laws authorizing
29 compassionate release. See, e.g., Alaska Stat. § 33.16.085(a)(2)(B) (requirement that "the prisoner will not pose a
30 threat of harm to the public"); Cal. Penal Code § 1170(e)(2)(B) (effective January 1, 2009) ("The conditions under
31 which the prisoner would be released or receive treatment do not pose a threat to public safety"); D.C. Code § 24-
32 468(a)(1),(2) ("release of the inmate under supervision is not incompatible with public safety"); Fla. Stat.
33 § 947.149(1)(a) (requirement that "the inmate does not constitute a danger to herself or himself or others"); La. Rev.
34 Stat. § 15:574.20(B)(1) (requirement that inmate "does not constitute a danger to himself or to society"); Minn. Stat.
35 § 244.05, subd. 8 (medical release available only if "the release poses no threat to the public"); N.H. Rev. Stat.
36 § 651-A:10-a(I)(c) (requirement that "[t]he parole board has determined that the inmate will not be a danger to the
37 public, and that there is a reasonable probability that the inmate will not violate the law while on medical parole and
38 will conduct himself or herself as a good citizen"); N.M. Stat. § 31-21-25.1(F) (requirement that inmate "does not
39 constitute a danger to himself or to society"); McKinney's Cons. Law of N.Y. § 259-r(1)(b) (eff. Sept. 1, 2009)

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("release shall be granted only after the board considers whether, in light of the inmate's medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law"); N.C. Gen. Stat. § 15A-1369.2(a)(2) (inmate must be "incapacitated to the extent that the inmate does not pose a public safety risk"); R.I. Stat. § 13-8.1-4(f) (board must consider whether "there is a reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the release is compatible with the welfare of society and will not so depreciate the seriousness of the crime as to undermine respect for the law"); Tenn. Code § 41-21-227(i)(2)(B) (release available to "those inmates who can be released into the community without substantial risk that they will commit a crime while on furlough").

c. Identity of decisionmaker. Like § 305.7, a number of existing statutory provisions repose ultimate sentence-modification authority in the trial courts. Nearly all of these first require that a motion or recommendation be made by the department of corrections or other gatekeeping authority. See 18 U.S.C. § 3582(c) (motion by Federal Bureau of Prisons required); Cal. Penal Code § 1170(d) & (e) (if more than 120 days from initial sentencing, a recommendation to recall sentence is required from either the Department of Corrections and Rehabilitation or the Board of Parole Hearings); D.C. Code § 24-468 (motion by Federal Bureau of Prisons required); Mont. Code § 46-23-210(2) (only for cases in which offender was declared parole ineligible at original sentencing); N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend prison sentence exists at any time if "the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence"); N.J. Rules of Court, R. 3:21-10(b)(2) (allowing motion at any time to amend "a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant"). The New Jersey law imposes no gatekeeper for applications based on illness or infirmity, but requires consent of the prosecutor before a more general sentence-modification power may be invoked "for good cause shown," see N.J. Rules of Court, R. 3:21-10(b)(3). New Jersey has a separate mechanism for "medical parole," limited to terminally ill inmates, which is administered by its parole board, see N.J. Stat. § 30:4-123.51c.

A majority of state laws analogous to § 305.7 designate a nonjudicial official or agency as decisionmaker. Most of these, however, assume the existence of a parole-release agency—an institutional arrangement not recommended by the revised Code, see § 6.06(3),(4) and Appendix B, Reporter's Study, The Question of Parole-Release Authority (this draft). See Alaska Stat. § 33.16.085 (board of parole); Ark. Code § 12-29-404 (post prison transfer board); Conn. Gen. Stat. § 54-131k (board of pardons and paroles); 11 Del. Code § 4346(e) (board of parole); Fla. Stat. § 947.149 (parole commission); Ga. Code § 42-9-42(c) (board of pardons and paroles); La. Rev. Stat. § 15:574.20 (board of parole); Mich. Comp. Laws § 791.235(10) (parole board); Minn. Stat. § 244.05, subd. 8 (commissioner of corrections); Mo. Stat. § 217.250 (board of probation and parole or governor); Mont. Code § 46-23-210 (board of pardons and parole for most cases); Neb. Rev. Stat. § 83-1,110.02(1) (board of parole); N.H. Rev. Stat. § 651-A:10-a (parole board); N.M. Stat. § 31-21-25.1 (parole board); McKinney's Cons. Law of N.Y. § 259-r (board of parole); N.C. Gen. Stat. §§ 15A-1369 through 15A-1369.5 (postrelease supervision and parole commission); Ohio Rev. Code § 2967.05 (governor upon recommendation of director of rehabilitation and correction); 57 Okl. Stat. § 332.18(B) (pardon and parole board); S.C. Code of Laws § 24-21-970 (governor following recommendation of probation, parole, and pardon-services board); Tenn. Code § 41-21-227(i)(3) (commissioner of department of corrections given authority to grant furlough of indeterminate duration); Tex.

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1 Admin. Code, tit. 37, § 143.31 (governor upon recommendation of board of pardons and paroles); Va. Code § 53.1-
2 40.01 (parole board).

3 After much debate, the Institute decided not to endorse a third-party gatekeeping mechanism in § 305.7,
4 and instead located the responsibility to screen petitions in the trial courts themselves. This judgment was based on
5 experience under the federal compassionate-release provision, which requires a motion from the Director of the
6 Bureau of Prisons before the matter may be heard by the courts. This arrangement has resulted in only a trickle of
7 recommendations each year. See Stephen R. Sady and Lynn Deffebach, Second Look Resentencing under 18 U.S.C.
8 § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration, 21 Fed. Sent. Rptr. (2009))
9 ("with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between
10 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the
11 motion was ruled on"); Mary Price, A Case for Compassion, 21 Fed. Sent. Rptr. 170 (2009) (recommending that,
12 "[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for
13 Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of
14 controlling compassion."). In light of this experience, the American Bar Association Commission on Effective
15 Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in both §§ 305.6 and 305.7
16 of the revised Code. See ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a
17 Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter),
18 at 28.

19 If a state decides that there must be an outside gatekeeper for compassionate-release petitions, the ABA
20 Commission encouraged creative thought in designating a gatekeeper other than the Department of Corrections. One
21 suggestion was that an expert clemency commission might play this role. See Rachel E. Barkow, The Politics of
22 Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent. Rptr. 153 (2009); Report of the Second Look Roundtable,
23 at 15 ("The clemency commission could be enlisted to double duty as gatekeeper for the judicial sentence reduction
24 authority in 18 U.S.C. § 3582(c)(1)(A)(i)").

25 *i. What modifications are permitted.* Many state provisions authorize, at least in some instance, a sentence
26 modification that departs from the terms of a mandatory-minimum sentence. See Alaska Stat. § 33.16.085(a)
27 ("Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner may be serving or
28 any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon
29 application by the prisoner or the commissioner, be released by the board on special medical parole [if statutory
30 criteria satisfied]"); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) ("This subdivision does not apply to a
31 prisoner sentenced to death or a term of life without the possibility of parole."); Conn. Gen. Stat. § 54-131k ("The
32 Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any sentence of
33 imprisonment, except an inmate convicted of a capital felony"); Fla. Stat. § 947.149 (parole commission's power to
34 grant medical release exists "[n]otwithstanding any provision to the contrary" except for inmates under sentence of
35 death); Idaho Code § 20-223(f) ("Subject to the limitations of this subsection and notwithstanding any fixed term of
36 confinement or minimum period of confinement . . . the commission may parole an inmate for medical reasons.");
37 La. Rev. Stat. § 15:574.20(A)(1) ("Notwithstanding the provisions of this Part or any other law to the contrary, any
38 person sentenced to the custody of the Department of Public Safety and Corrections may, upon referral by the
39 department, be considered for medical parole by the Board of Parole. Medical parole consideration shall be in

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addition to any other parole for which an inmate may be eligible, but shall not be available to any inmate who is awaiting execution or who has a contagious disease.”); N.H. Rev. Stat. § 651-A:10-a(VI) (“An inmate who has been sentenced to life in prison without parole or sentenced to death shall not be eligible for medical parole under this section”); N.M. Stat. § 31-21-25.1(B) (“Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible.”); N.C. Gen. Stat. § 15A-1369.2(b) (“Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article”); Or. Rev. Stat. § 144.122(4) (“The provisions of this section do not apply to prisoners sentenced to life imprisonment without the possibility of release or parole”); R.I. Stat. § 13-8.1-1 (“Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except those serving life without parole shall at any time after they begin serving their sentences be eligible for medical parole consideration, regardless of the crime committed or the sentence imposed.”); 28 Vt. Stat. § 502a(d) (“Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is serving a sentence, including an inmate who has not yet served the minimum term of the sentence” may be eligible for medical parole); Wyo. Stat. § 7-13-424(a) (“Notwithstanding any other provision of law restricting the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may grant a medical parole to any inmate meeting the conditions specified in this section.”).

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§ 305.8. Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in an Appendix containing Principles of Legislation. See page 587.

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APPENDIX A

PRINCIPLES FOR LEGISLATION

PART I. GENERAL PROVISIONS

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

1 **§ 6.14. Victim-Offender Conferencing; Principles for Legislation.**[147]

2 *The language below sets out principles that should be advanced by laws that authorize*
3 *courts to experiment with the use of victim-offender conferencing in criminal cases.*

4 **1. When consistent with the safeguards set forth in this provision, trial courts should**
5 **be permitted to authorize victim-offender conferencing in appropriate criminal cases,**
6 **either as an alternative to traditional adjudication or as a supplement to the adjudicative**
7 **process.**

8 **2. As used in this provision, victim-offender conferencing is any formalized**
9 **opportunity for guided exchange between one or more defendants and crime victims.**

10 **3. The primary purpose of victim-offender conferencing should be to repair harm to**
11 **crime victims, families, and communities; to facilitate the rehabilitation and reintegration**
12 **of offenders into the law-abiding community; and to increase a sense among victims and**
13 **offenders that their views have been heard and that a fair process has been employed for**
14 **the resolution of harm caused by acts of crime.**

15 **4. Victim-offender conferencing should be used only when all participating victims**
16 **and defendants have given informed consent to participation. Additional eligibility**
17 **requirements, such as the accused's willingness to accept responsibility for the offense, may**
18 **also be imposed by the court.**

19 **5. When the participating victim(s) and defendant(s) have given informed consent,**
20 **and the prosecutor and court have given their approval, victim-offender conferencing may**
21 **be used to devise a final disposition at sentencing, as part of a deferred-prosecution**
22 **agreement under § 6.02A, or as part of a deferred-adjudication program under § 6.02B if**
23 **any agreed-upon disposition reached by the participants is first presented to the court for**
24 **approval.**

25 **a. Before approving a recommended disposition, the court should find that:**

26 **i. The participants have freely consented to the recommendation; and**

27 **ii. The recommended disposition is not disproportionate to the crime.**

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[147] This Section has been approved by the Council and is presented to the membership for a vote for the first time in this draft.

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b. If the court approves the recommended disposition, the disposition should be allowed to supplant any or all other authorized disposition, and should be permitted to supersede any mandatory-minimum term of imprisonment under state law.

c. If a victim-offender conference does not yield agreement on an appropriate disposition, or if the court refuses to approve a recommended disposition, then all other originally authorized sentencing dispositions should be available.

d. When a victim-offender conference does not yield an agreement on an appropriate disposition, no admission made by the defendant as part of that process should be admissible in any proceeding against the defendant.

6. Notwithstanding paragraph (5), when requested by a victim or defendant, and with the consent of the participating victim(s) and defendant(s), the court should be permitted to may make victim-offender conferencing available for purposes other than fashioning a disposition.

7. In deciding how to respond to a request made pursuant to either paragraph (5) or (6), the court should be authorized to seek the advice of a trained facilitator or mediator on the case's appropriateness for victim-offender conferencing. In making such a determination, the facilitator should consider factors such as the relationship between the parties, the nature and severity of the offense, and any imbalances of power between the defendant(s) and victim(s).

8. Victim-offender conferences should be designed to help participating victims and defendants reach mutual agreement about issues that concern them both including—when appropriate—what the disposition of the case should be. Any victim-offender conference utilized under this Section should allow participants adequate opportunity to express their views about the crime, the harm it caused, and what reparation is needed. The practice should be led by a neutral, trained facilitator with responsibility for ensuring that all participants have the opportunity to be heard. The judge assigned to the case may not serve as a victim-offender conference facilitator for that case.

9. With the consent of the participating victim(s) and defendant(s), a victim-offender conference may include additional participants, such as friends and family members of victims and offenders and representatives of the community in which the offense occurred, and may require that some or all additional participants join in any agreement on a recommended disposition.

10. A participating defendant or victim should be permitted to withdraw at any time from participation in a victim-offender conference with no prejudice to the continuation of the case in a traditional adjudicative forum.

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11. The [sentencing commission] should ensure that victim-offender conferences used under this Section are appropriately monitored and evaluated to ensure that they are not being used in ways inconsistent with the principles set forth in § 1.02.

Comment:

a. Scope. Restorative justice is a response to crime that seeks to redress the harm caused by crime by providing both defendants and victims with the opportunity to contextual crime and to allow defendants the opportunity to make reparations. In the United States, the term "restorative justice" has been used to cover a host of criminal justice interventions and programs, including community service programs, victim education panels, peer courts for youth, and—perhaps most commonly—victim-offender conferencing. This provision sets forth principles of legislation for the use of victim-offender conferencing by sentencing courts. As used in this provision, victim-offender conferencing is a formalized opportunity for guided dialogue between one or more defendants and crime victims. This Section recognizes the use of victim-offender conferencing in criminal cases, both as a potential alternative to traditional sentencing, and as an opportunity for dialogue that augments, rather than replaces, traditional sentences. The principles set forth here are designed to guide the development of legislation on the subject, ensuring that experimentation with victim-offender conferencing is done in a way that safeguards the rights of defendants and victims, and advances the purposes of sentencing set forth throughout the Code. This provision recognizes that there are some cases in which the purposes of sentencing and the goal of victim and community restoration may be best met through a more inclusive, nonadversarial sanctioning process, and other cases in which an inclusive process that includes victim-offender dialogue may advance these goals even when the sentence is imposed in a more traditional manner. Paragraph (1) indicates that courts should be authorized, but not required, to use victim-offender conferencing as specified throughout the provision. Paragraph (2) defines victim-offender conferencing victim-offender conferencing for purposes of this provision as a formalized opportunity for guided exchange between one or more defendants and victims. This definition focuses the provision on mediated dialogue between the direct victim and offender, and does not address other forms of restorative justice such as court-ordered community service or efforts by victim proxies to educate defendants about the effects of crime on the community or on similarly situated victims. Paragraph (3) sets forth the purposes of victim-offender conferencing. These purposes include repairing harm to crime victims and communities; facilitating offender rehabilitation and reintegration; and increasing victim and offender satisfaction with the fairness of proceedings. Paragraph (4) emphasizes that any court-authorized victim-offender conference should require informed consent from all participating victims and defendants, and should permit the court to impose additional eligibility requirements, including the acceptance of responsibility by the defendant. Paragraph (5) indicates that courts should be permitted to allow victim-offender conferences to generate dispositions in some cases, but only when the participating victim(s) and defendant(s) have given informed consent, and the prosecutor and court approve of any nontraditional disposition generated by the conference. This

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paragraph applies not only to cases handled through traditional adjudicative processes, but also to deferred prosecution under § 6.02A and deferred adjudication under § 6.02B. The paragraph specifies that any resolution reached through a victim-offender conference must be presented the court for approval before taking effect. In deciding whether to approve a recommended disposition, the court must be satisfied that the participants have freely agreed to it, and that the disposition would not impose sanctions disproportionate to the underlying crime. When a victim-offender conference under paragraph (5) fails to yield agreement on the proper disposition of the case, or when the court rejects the disposition reached by the participants in any victim-offender conference, this paragraph states that the case should return to the court for normal adjudicative proceedings. Any admissions made by a defendant during the conference should not be admissible in any legal proceeding against the defendant. Paragraph (6) provides that when a victim or the defendant requests it and the other(s) agree to participate, with court approval, victim-offender conferencing can be authorized even in cases where a traditional sentence will be imposed. In such cases, victim-offender dialogue may assist in promoting the purposes set forth in paragraph (3) without supplanting formal punishment through the traditional adjudicative process. Paragraph (7) indicates that the court should be authorized to seek expert advice from a trained facilitator to determine whether it is appropriate to make victim-offender conferencing available under either paragraph (5) or (6). The paragraph specifies that the facilitator should make his or her recommendation based on a variety of factors, including the relationship between the parties, the nature and severity of the offense, and any imbalances of power between the defendant and victim(s) that might give rise to concerns about coercion or injustice. Paragraph (8) speaks generally to the content of victim-offender conferences, which should allow all participants to express their views about the crime, the harm it caused, and the proper reparation, including in cases proceeding under paragraph (5), what the proper disposition should be. It specifies that any victim-offender conference should be convened by a neutral, trained facilitator who should not be the judge in the case in order to preserve judicial impartiality. Paragraph (9) permits victim-offender conferences to include additional participants, such as extended family and community members, when appropriate. Paragraph (10) specifies that defendants and victims who have agreed to participate in a victim-offender conference may withdraw at any time, and that doing should not affect the outcome of traditional adjudicative proceedings. Paragraph (11) suggests that the use of victim-offender conferencing be monitored and evaluated by the sentencing commission (or another designated entity) to ensure they are being used in ways that do not undermine the principles of sentencing set forth in § 1.02.

b. Purposes of victim-offender conferencing. The goals of victim-offender conferencing are a subset of the general goals of sentencing set forth in § 1.02(2)(a)(ii): primarily, restoration of crime victims and communities, and rehabilitation of offenders. In a restorative justice model, this restoration occurs in part by providing victims and offenders with the opportunity to be heard and, in appropriate cases, to fashion a disposition that is satisfactory to both, subject to the court's approval. To further these goals, this Section suggests that courts should be authorized to

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refer appropriate cases for victim-offender conferencing, which is defined broadly here as a formalized opportunity for guided exchange between participating defendants and victims. Paragraph (8) states that any practice should be guided by a neutral, trained facilitator tasked with ensuring that all participants are given the opportunity to be heard.

c. Need for informed consent. Paragraph (4) requires that all participants give informed consent to engage in victim-offender conferencing. Consent can be obtained by the court or by a trained facilitator, but should ensure that all participants understand the legal consequences of participating in any process. Participants should be made aware of the purposes and procedures of the conference, along with their right to terminate involvement at any time. Participants should be informed about the goals of the practice and understand what will happen in cases where the parties fail to reach agreement about the appropriate case disposition, when such a disposition is sought. The court also should ensure that victims understand how the procedures may affect the court's treatment of the defendant(s) and that defendants understand how their participation may affect the court's pending decisions in the case.

All parties, including the court, should respect victims' and defendants' choices about whether and how to engage in a victim-offender conference. Once the decision has been made to initiate a conference, the process itself should be victim-centered and defendant-sensitive. Victims, as the individuals who have suffered harm most directly, should define the goals of the process. There should be no obligation on a victim or defendant to continue to take part in a victim-offender conference once it has begun—participation should remain at all times voluntary, see § 6.14(10), and any participant should be permitted to withdraw at any time and return to traditional adjudicative procedures.

d. Using victim-offender conferencing to select a disposition. One concern about the use of victim-offender conferencing to supplant traditional sentencing is that the informality of the conference may fail to protect both the due process interests of defendants and the legitimate justice of the ultimate sentence. Paragraph (5) attempts to address these concerns by requiring the court to review any disposition developed by the participants through a victim-offender conference. It suggests that the court should only approve such dispositions when it is satisfied that the participating defendant(s) and victim(s) have freely consented to the recommended disposition and that it is not disproportionate to the crime. One of the court's duties in this regard should be to ensure that the agreed-upon sanction does not conflict with the statutory purposes of sentencing laid out in Tentative Draft No. 1, § 1.02(2). Thus, for example, the court should have authority to reject an agreement that would result in a disproportionately lenient or severe sentence; see § 1.02(2)(a)(ii).

In addition to protecting victims against undue pressure, paragraph (5) also offers some protection for defendants from potential abuses of victim-offender conferencing. Not only should the defendant, like the victim, give informed consent to participating in any victim-offender conference, but if the participants cannot reach agreement on a disposition, the defendant should be sentenced in traditional proceedings without penalty. See § 6.14(10). No admissions made

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during the victim-offender conference, or in preparation for it, should be used against the defendant in criminal proceedings.

e. Guarding against abuses of victim-offender conferencing. Critics of victim-offender conferencing are often concerned that deviating from traditional adjudicative and sentencing procedures risks coercion of either the victim or defendant, and has the potential to minimize the seriousness of harms caused to victims and to the larger community by the defendant's crime. These risks are particularly high in certain types of cases, including those involving intimate partner violence, and those in which there is a significant power differential between the defendant and the victim. The principles set forth in this provision attempt to address these concerns in several ways. First, paragraph (7) says that judges should be authorized to seek the advice of a neutral, trained facilitator before approving a case for participation in any victim-offender conference. In making such a recommendation, facilitators should consider factors suggestive of potential coercion, such as the prior relationship between the parties and the nature of the crime itself. Second, paragraph (8) provides that victim-offender conferences should be convened by a neutral, trained facilitator, ensuring the moderating influence of a third party in all interactions between participating victims and defendants. In cases where victim-offender conferencing is being used to craft a disposition for the case, paragraph (3) recommends strong judicial review and approval of all dispositions reached through conferencing, ensuring that the sentence is not disproportionate to the crime committed, and that the participating victim(s) and defendant(s) agree with the resolution of the case. Finally, paragraph (11) suggests that the court or sentencing commission be charged with regularly monitoring and evaluating the use of victim-offender conferencing to ensure it is not used in ways inconsistent with the purposes of sentencing and corrections, as set forth in § 1.02.

f. Using victim-offender conferencing for purposes other than sentencing. Paragraph (6) recognizes that in some cases, victim-offender conferencing will not be an appropriate way to reach a disposition in a case. Even when a traditional sentence is warranted, the defendant and victim may nonetheless benefit from the opportunity to engage in a dialogue with the aid of a trained facilitator. When either a defendant or a victim initiates such a request, the court may choose to make such a process available. Paragraph (6) states that the court should be permitted to consult with a trained facilitator when deciding whether a case is appropriate for victim-offender conferencing.

g. Facilitating victim-offender communication. When the trial court refers a case for victim-offender conferencing under either paragraph (5) or (6), paragraph (8) provides that the selected process should provide participants an opportunity to express their thoughts about the crime, the harm it has caused, and what reparation is needed. A trained facilitator should assist the participants in voicing their concerns and working toward consensus about the proper response. In some cases, participants will include not only the victim and offender, but also third parties connected to the victim and defendant, along with members of the community. This Section does not prescribe any particular process for victim-offender conferences in all cases. Preparatory

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meetings with a facilitator may be required in some cases. Depending on the nature of the crime and the relationship between the parties, a face-to-face meeting may not be necessary, or even desirable, in some cases. Communication between victims and offenders, when warranted, may be facilitated by letter, video, or through one or more in-person conferences.

h. Qualifications of facilitators. Paragraph (8) indicates that facilitators should be trained in victim-offender conferencing. In several countries, restorative justice facilitators are accredited by the government. In others, such as the United Kingdom, private organizations offer accreditation to practitioners with sufficient training and experience. In the United States, there is currently no standardized accreditation process, though training in restorative justice principles and practices, such as victim-offender conferences, are offered by many nonprofit organizations and universities. Section 6.14 does not specify the standards that should be used for the selection of facilitators, but does suggest that such individuals be trained to facilitate restorative dialogue between victims and offenders, and be neutral with respect to their involvement in the criminal case. See § 6.14(8). Trial courts may wish to impose minimum training standards for all victim-offender conference facilitators.

REPORTERS' NOTE

a. Scope. Victim-offender conferencing is one of the most common examples of the use of restorative justice in criminal cases. Restorative justice is term that has many meanings. In the international peacekeeping context, it has been used to refer to practices designed to ease tensions among neighbors following ethnic cleansing. See Lars Waldorf, Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice, 79 Temp. L. Rev. 1 (2006). It has been used to describe indigenous tribal practices in New Zealand and the United States that have been used for centuries to redress wrongs committed by and against tribal members. See Colin Miller, Banishment from Within and Without: Analyzing Indigenous Sentencing Under International Human Rights Standards, 80 N.D. L. Rev. 253 (2004). In more recent decades, it has been applied to efforts to further understanding, reconciliation, and healing between crime victims and offenders, as well as opportunities for criminal offenders to engage in community service and learn more about the harms caused by crime.

Restorative justice has been used in the United States for centuries in tribal courts, where restoration is often a stated goal of sentencing. See, e.g., Haungooah v. Greyeyes, 11 Am. Tribal Law 171 (Navajo Nation Sup. Ct. 2013) ("*Diné bi beenahaz'áanii* imposes a duty on our government to provide avenues for restoration. *Diné* justice "throws no one away."). Within the state criminal justice systems, formal efforts to promote restorative justice began in the 1970s, with the introduction of victim-offender conferencing, a form of the one-on-one dialogue that arose out of the Mennonite tradition. Joanne Katz and Gene Bonham, Jr., *Restorative Justice in Canada and the United States: A Comparative Analysis*, 2006 J. of the Inst. of Just. & Int'l Studies 187, 187-88. In the United States, victim-offender conferences have been primarily limited to minor criminal crimes, though conferencing has also been used in cases involving serious interpersonal violence, where the harms caused by crime are arguably in greater need of healing. See Mark Umbreit et al., The Impact of Victim-Offender Mediation: Two Decades of Research, 65-DEC Fed. Probation 29 (2001); Ilyssa Wellikoff, Note, Victim-Offender Mediation and Violent Crimes: On the Way to Justice, 5 Cardozo Online J. Conflict Resol. 2

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(2004). Although no U.S. jurisdiction offers a comprehensive statutory structure for restorative justice initiatives, more than half of all states do have legislation that encourages or facilitates victim-offender conferencing in some cases. Mark S. Umbreit et al., Legislative Statutes on Victim Offender Mediation: A National Review, 15 VOMA Connections 5 (2003), http://www.voma.org/docs/connect15.pdf; see, e.g., Colo. Rev. Stat. § 17-28-103 (2011); Minn. Stat. § 611A.775 (1998); Tex. Gov't Code Ann. § 508.324 (West 1999); Vt. Stat. Ann. tit. 28, § 2a (2012).

Advocates of restorative justice emphasize that both victims and offenders who participate in restorative justice programs are more satisfied with the handling of their cases than are those whose cases are adjudicated through traditional criminal justice practices. See Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 Prison J. 127 (2005); John Braithwaite, Restorative Justice and Responsive Regulation (2002). Critics warn, however, that many restorative justice practices, such as victim-offender conferencing, can be easily abused. Victims, particularly of intrafamilial crimes, can feel pressured to resolve cases informally when a more formal sanction is warranted. See Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. Rev. 1, 85 (1999). Defendants can be subjected to overly harsh punishment in processes that do not follow a due process model, and in which notions of the community to which restoration is due can become unfairly broad. Robert Weisberg, *Restorative Justice and the Danger of "Community*,*"* 2003 Utah L. Rev. 343.

This proposed provision focuses on principles for victim-offender conferencing, a mechanism by which victims and defendants are brought together in a formal way for guided exchange in an attempt to repair harm, facilitate the rehabilitation and reintegration of the offender, and increase a sense among victims and offenders that their views have been heard through a fair process. The principles of legislation set forth in this provision are intended to guide jurisdictions experimenting with victim-offender conferencing in developing legislation that safeguards the rights of both offenders and victims. The provision suggests ways in which courts might integrate the use of victim-offender conferencing into criminal cases, while retaining appropriate judicial oversight of both the process and the case.

Recognizing the potential value of restorative justice in cases where the victim and offender freely consent to communicate about the crime and the harm it caused, the provision proposes that courts make victim-offender conferencing available to victims and defendants who seek it out, and even—in limited and closely supervised circumstances—permit practices that allow participants to fashion a recommended sentencing disposition. At the same time, the provision emphasizes that such conferences should guard against the potential for abuse of both victims and defendants by providing for court review of the decision to refer the case initially, requiring the use of trained facilitators, requiring the court to review of any recommended disposition, and requiring regular assessment of any restorative justice practice by the sentencing commission or other designated entity.

b. Purposes of victim-offender conferencing. Like all types of restorative justice, victim-offender conferencing is "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible." Howard Zehr, The Little Book of Restorative Justice 36 (2002); see also Erik Luna, Punishment Theory, Holism, and the

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Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 228 (offering additional definitions). Restorative justice aims to make victims whole, repair damage to the community caused by crime, and to give voice to the experiences of both victims and offenders. When done well, it can have the effect of significantly improving the way those who participate in restorative justice processes view the criminal justice system. Barton Poulson, A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice, 2003 Utah L. Rev. 167 (examining data from seven evaluative studies and finding that "restorative justice outperformed court procedures on almost every variable for victims and offenders"); see also Lawrence W. Sherman and Heather Strang, Restorative Justice as Evidence-Based Sentencing, in The Oxford Handbook of Sentencing and Corrections 222-23 (Joan Petersilia and Kevin R. Reitz eds., 2012) (discussing how restorative justice conferencing has been better studied than almost any other criminal-justice intervention). When done poorly, however, it can have quite the opposite effect. Harry Mika et al., Listening to Victims: A Critique of Restorative Justice Policy and Practice in the United States, 68-JUN Fed. Probation 32 (2004) (discussing victim experiences of restorative justice programs).

The principles set forth in this provision focus on a particular subset of restorative justice: those practices that are designed to bring together victim and offenders to heal the harm caused by crime, by facilitating mutual dialogue, by crafting a sentencing disposition specific to the needs of the victim and offender, or both.

e. Guarding against abuses of victim-offender conferencing. Although restorative justice has many proponents, it also has its share of skeptics. For defendants, participation in victim-offender conferencing has sometimes occasioned the loss of important procedural safeguards afforded by the adversarial criminal process. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 Stan. L. Rev. 751, 706, 763 (2000). For victims, restorative justice has the potential to magnify existing power inequities and pressure crime victims into minimizing the seriousness of the harms caused to them, particularly in cases involving domestic violence and in close-knit communities where there may be inordinate pressure to sanction a disproportionately lenient sentence. Id. at 762; see also Julie Stubbs, *Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice* 42 (John Braithwaite and Heather Strang eds., 2002). Supporters of victim-offender conferencing have argued, however, that dialogue between offenders and victims can be a helpful mechanism for resolving even many of these challenging cases. See, e.g., Clare McGlynn, Nicole Westmarland, and Nikki Godden, *"I Just Wanted Him to Hear Me:" Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & Soc'y 213 (2012); Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Question*s, 8 Va. J. Soc. Pol'y & L. 263, 267-268 (2000). The dangers of potential coercion and abuse justify a requirement by the legislature that the court screen cases and approve the use of victim-offender conferencing only appropriate. These same dangers also justify a requirement that such conferences be facilitated by a neutral, well-trained third party.

h. Qualifications of facilitators. This provision contemplates that victim-offender conferences will be facilitated by trained individuals who will assist courts in their gatekeeping function, to ensure that only appropriate cases are referred for victim-offender conferencing and that such conferences are carried out in a manner that safeguards the interests of all involved. The training of restorative justice facilitators is a subject that has not received as much attention in the United States as it has elsewhere in the world. In New Zealand and Australia, while in Belgium and France, only trained mediators are allowed to facilitate restorative justice conferences, W. Reed Leverton, *The Case for Best Practice Standards in Restorative Justice Processes*, 31

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Am. J. Trial Advoc. 501, 524 (2008). While basic training in mediation and principles of restorative practice are plainly desirable, scholars have warned that it is also important to avoid "standards that are so prescriptive that they inhibit restorative justice innovation." John Braithwaite, *Setting Standards for Restorative Justice*, 42. The British J. of Criminology 563, 565 (2002). The principle set forth in paragraph (8) emphasizes the importance of utilizing well-trained facilitators, but leaves room for legislatures to develop local training standards for those wishing to facilitate victim-offender conferences.

ARTICLE 305. PRISON RELEASE; CORRECTIONAL POPULATIONS EXCEEDING CAPACITY

§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation.[148]

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language below sets out principles that a legislature should seek to effectuate through enactment of such a provision.

1. The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.

2. After first eligibility, a prisoner's right to apply for sentence modification shall recur at intervals not to exceed 10 years.

3. The department of corrections shall ensure that prisoners are notified of their rights under this provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers. The judicial panel or other judicial decisionmaker shall have discretion to appoint counsel to represent applicant prisoners who are indigent.

4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence. The judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under this standard.

[148] This Section was originally approved in 2011; see Tentative Draft No. 2. At the Reporters' recommendation, subpart 6 has been amended to reflect the Institute's general policies on victims' rights in the sentencing process; see Council Draft No. 6 (2016), Appendix A (Reporters' Memorandum: Victims' Roles in the Sentencing Process). The amendments have been approved by the Council and are presented to the membership for the first time in this draft.

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5. The judicial panel or other judicial decisionmaker shall be empowered to modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law.

6. Notice of sentence-modification proceedings should be given to victims, if they can be located with reasonable efforts, and to the relevant prosecuting authorities. Any victim's impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker. Victims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.

7. An adequate record of proceedings under this provision shall be maintained, and the judicial panel or other judicial decisionmaker shall be required to provide a statement of reasons for its decisions on the record.

8. There shall be a mechanism for review of decisions under this provision, which may be discretionary rather than mandatory.

9. The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by the judicial panel or other judicial decisionmaker when considering applications under this provision.

10. The legislature should instruct the sentencing commission to recommend procedures for the retroactive application of this provision to prisoners who were sentenced before its effective date, and should authorize retroactivity procedures in light of the commission's advice.

The Reporters' proposed changes in this provision, already approved by the Council, are indicated in redlining below:

§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language below sets out principles that a legislature should seek to effectuate through enactment of such a provision.

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6. Notice of ~~the~~ sentence-modification proceedings should be given to ~~the relevant prosecuting authorities and any~~ victims, if they can be located with reasonable efforts~~,~~ and to the relevant prosecuting authorities.~~ of the offenses for which the prisoner is incarcerated~~. Any victim's impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker. Victims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.

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The Reporters' proposed changes in this Comment, already approved by the Council, are indicated in redlining below:

Comment: [149]

a. Scope. This provision is new to the Code. It creates a "second-look" process for sentence modification available to prisoners who have served exceptionally long terms. After 15 years of continuous confinement, prisoners are given the right to apply to a judicial panel or other judicial decisionmaker for possible modification of their original sentences. The Section complements § 305.7 (this draft), which permits judicial modification of prison sentences under circumstances of advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons.

No provision closely similar to § 305.6 exists in any American jurisdiction. The Model Code has never limited itself to a restatement of existing law, however. While it is true that much of the Code's mission is to identify, incorporate, and build upon best practices that have proven themselves in operation, the Code has always had an additional, aspirational dimension. When a careful appraisal of existing law reveals problems that are both serious and neglected, the Code has offered ambitious recommendations. In the 1962 Code, for example, many provisions in Part I (the "General Part"), especially the *mens rea* analysis pioneered in § 2.02, represented major advances over contemporary state codes and common law. The revised Code has continued in this spirit and has tendered other recommendations in the absence of prior precedent. See, for example, § 6A.07(3) (Tentative Draft No. 1, 2007) (calling for the routine preparation of "demographic" impact projections, including racial and ethnic impacts, whenever laws and guidelines affecting sentencing are proposed); § 6.11A (Tentative Draft No. 2, 2011) (recommending a consolidated and specialized statutory approach for the sentencing in adult courts of offenders who were under age 18 when their offenses were committed).

This provision is stated in terms of "principles for legislation" rather than recommended black-letter statutory language. This is because the provision envisions new *institutional* arrangements for prison-release decisions that have not been tested in practice. In this respect, § 305.6 is more ambitious than an innovative substantive provision, or a new procedural recommendation that can be executed within existing institutional frameworks. For the cases it reaches, § 305.6 would effect a change in the allocation of sentencing authority analogous to the creation of a sentencing commission in a jurisdiction that has never had one, the introduction of meaningful appellate sentence review in a state with no such history, or the abolition of parole-release discretion in a formerly indeterminate system. All of these are fundamental structural changes—but are distinguishable from § 305.6 because they have long track records. It is

[149] The bulk of this Comment has not been revised since § 305.6's approval in 2011. New material to accompany the black-letter amendments offered in this draft is indicated by redlining in the text of the Comments. All Comments will be updated for the Code's hardbound volumes.

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possible for a model code to supply recommended statutory language and fine-grained implementation advice when the subject is sentencing reforms dating back more than 30 years. In the case of § 305.6, there is no equivalent fund of experience upon which to draw.

The Institute calls for a new approach to prison release in cases of extraordinarily long sentences for two reasons: First, American criminal-justice systems make heavy use of lengthy prison terms—dramatically more so than other Western democracies—and the nation's reliance on these severe penalties has greatly increased in the last 40 years. The impact on the nation's aggregate incarceration policy has been enormous. At the time of the revised Code's preparation, the per capita incarceration rate in the United States was the highest in the world. As a proportion of its population, the United States in 2009 confined 5 times more people than the United Kingdom (which has Western Europe's highest incarceration rate), 6.5 times more than Canada, 9 times more than Germany, 10 times more than Norway and Sweden, and 12 times more than Japan, Denmark, and Finland. The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation's exceptional use of long confinement terms that make no allowance for changes in the crime policy environment.

Second, § 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.

The policy imperatives of § 305.6 coexist with the revised Code's general preference for a "determinate" sentencing system. See § 6.06(4) and (5) (this draft); Appendix B, Reporter's Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). Section 305.6 is crafted to be a narrow incursion upon the Code's general preference for determinate sentences, and to avoid the shortcomings of the parole-release framework. It offers a wholly new institutional model, targeted to a small group of cases, that substitutes a judicial decisionmaker for the administrative parole board. It also represents a fundamental departure from the underlying theory of parole release, which supposed that most prisoners could be rehabilitated and that the parole board could discern when rehabilitation had been achieved in individual cases. Prisoner rehabilitation remains an eligible concern in appropriate cases under paragraph (4) (see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007)), but it is far from the only admissible consideration, or the basic underpinning, of the sentence-modification power.

While § 305.6 is innovative and ambitious, it will impact only a small share of all prison sentences. Given the Code's good-time allowances, which are expected to be granted to the great majority of inmates, see § 305.1 (Tentative Draft No. 2, 2011), only those serving pronounced terms of more than 20 years are likely to be affected by the second-look process. In most existing American criminal-justice systems, offenders with such sentences make up a tiny fraction of all

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1 prison admissions—probably on the order of two or three percent in most states. Their numbers
2 are larger in standing populations, because offenders with shorter sentences move through the
3 corrections system far more quickly. But it is the rate of admissions that will determine the case
4 flow of eligible applicants under § 305.6, beginning 15 years post-admission for each cohort of
5 long-term prisoners.

6 Despite the relatively small absolute numbers of eligible prisoners at any given time,
7 implementation of a second-look process will carry substantial costs. If a state legislature selects
8 existing trial courts as the decisionmaking authority, for example, staffing and workload
9 adjustments will probably be necessary. Likewise, if a wholly new judicial tribunal is chartered,
10 the legislature must allocate start-up and operational funding. No matter where the modification
11 power is reposed, state expenditures for prosecutors' offices and appointed defense counsel can
12 be expected to increase; see paragraphs (3) and (6). Finally, the burdens of the first years of the
13 new process will be greater than in later years, partly because the experimental phase of any
14 undertaking carries efficiency costs, but also because each jurisdiction will have to address
15 retroactivity issues for prisoners who have already served 15 years or more of prison time under
16 prior law, see paragraph (10).

17 Apart from monetary costs, predictable political risks will be visited upon any judicial
18 authority vested with sentence-modification powers. Decisions to release prisoners short of their
19 maximum available confinement terms are often unpopular, and even one instance of serious
20 reoffending by a releasee can focus overwhelming negative attention upon the releasing
21 authority. This is true of any back-end system for the adjustment of prison stays, but the case mix
22 under § 305.6 will be unique, with a heavy tilt toward the most serious offenses and
23 victimizations. Care must be taken in the design of the sentence-modification scheme that
24 decisions are seen to be made according to transparent and defensible criteria, and that the
25 authorized decisionmakers are afforded institutional supports that will ensure the independence
26 needed for the exercise of reasoned judgment.

27 *b. A "second look" at long-term sentences.* No determinate sentencing system can be
28 absolute, and no purely determinate system has ever existed in American law. All jurisdictions
29 that have abrogated the releasing authority of a parole agency have retained mechanisms such as
30 good-time and earned-time credits, compassionate-release provisions, ad hoc emergency
31 contingencies for prison overcrowding, and the clemency power of the executive. The question is
32 not *whether* original judicial sentences should ever be subject to change in a determinate
33 structure, but what exceptions should be grafted onto the generally determinate scheme. The
34 second-look authority is one such special case, especially in a nation that makes frequent use of
35 exceptionally severe prison sentences. Whenever a legal system imposes the heaviest of
36 incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities
37 for the correction of errors and injustices. On this principle, determinate prison sentences are
38 least justifiable as they extend in length from months and years to decades. Both moral and

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consequentialist judgments become suspect when their effects are projected so far forward into a distant future.

The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue.

On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived. An optimist would expect this to be so. For example, research into risk-assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change. Proven and credible rehabilitative programming may become a pillar of deincarceration policy in the United States, as some contemporary advocates of “evidence-based sentencing” now expound. Twenty years or more in the future, with sturdier empirical foundations, the perceived collapse of rehabilitation theory could be substantially reversed.

The illustrations above could be multiplied many times over. On every conceivable utilitarian premise, it is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past.

c. Time periods. Paragraph (1) sets the timing of first eligibility for possible sentence modification under this Section, and paragraph (2) advises the legislature to provide for recurring eligibility at intervals no longer than 10 years. There was near consensus within the Institute that 15 years was the proper time period for engagement of the second-look authority—at least until experimentation and actual experience under § 305.6 suggests a different arrangement. Where there was disagreement over the 15-year provision, it came from proponents of significantly shorter periods, such as 10 or even 5 years.

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1 While § 305.6 contemplates much room for experimentation by state legislatures, the
2 Institute would not endorse a period longer than 15 years. Nor should a substantially abridged
3 eligibility period be codified without deliberation. If much shorter time lines are employed, there
4 is a danger that the second-look authority will skew the system as a whole toward an
5 indeterminate framework. Because shorter sentences occur in much larger numbers than very
6 long sentences, a trimming of the eligibility period would geometrically expand caseloads under
7 § 305.6, as if moving down from the apex toward the base of a pyramid. The financial costs of
8 the second-look mechanism, and the practical burdens placed on the judicial decisionmaker,
9 could be greatly magnified. More importantly, the policy foundations of the sentencing system
10 would be eroded. An eligibility timeline substantially shorter than 15 years could upset the
11 balance of institutional powers that has proven successful in a number of states—and is the
12 template for the Code's sentencing structure.

13 A 15-year eligibility formula is also driven by the underlying theory of § 305.6. The very
14 justification for a second-look exception within a determinate framework is that sentences of
15 extraordinary length present compelling ethical and utilitarian uncertainties—directly as a
16 consequence of the amount of time they span.

17 Calculations of when the 15-year period has elapsed should be made with the benefit of any
18 doubt going to the prisoner-applicant. Section 305.6 is intended to reach prisoners serving an
19 aggregate period of incarceration no matter how that period has been legally composed.
20 Paragraph (1) expressly extends to "prisoners who have served 15 years of *any sentence of*
21 *imprisonment*." This language should be read literally and broadly. For example, a prisoner
22 serving a single 30-year sentence based on one count of conviction should become eligible for
23 sentence modification at the same time as a prisoner serving two consecutive 15-year sentences
24 or a prisoner serving two concurrent 30-year terms. The configuration of the original sentence
25 will of course be one important consideration for the judicial decisionmaker to weigh when
26 discharging its sentence-modification responsibilities, and any sentencing guidelines produced
27 under paragraph (9) might incorporate this concern, as well. But the makeup of the original
28 sentence is not relevant to the timing of first eligibility. The trigger for the second-look authority
29 is the passage of enough time that the premises underlying the original sentence should be
30 revisited, and any significant changes in circumstances assessed.

31 Paragraph (1)'s reference to "any sentence of imprisonment" may benefit from clarification
32 through statutory definition. The following language is one possible formulation:

33 **"Sentence of imprisonment" shall include a single sentence or multiple**
34 **sentences resulting in an aggregate period of confinement, whether imposed**
35 **concurrently or consecutively, in a single proceeding or multiple proceedings.**

36 Paragraph (2) states that a prisoner's eligibility to apply for sentence modification must
37 recur at least every 10 years after denial of an initial application. The 10-year period is meant as
38 an outer limit on the time period for successive applications. So long as the date of first

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eligibility is set at 15 years or a similar period, the procedures for recurring applications can do little to undermine the general determinacy of the sentencing system unless they are heedlessly generous. While the numbers of prisoners who reach the 15-year mark of confinement terms is small, the numbers dwindle further after 20 or 25 years. States are free to provide for fixed eligibility intervals shorter than 10 years consistent with § 305.6, or to make other arrangements such as allowing the judicial decisionmaker to set dates of next eligibility within a 10-year ceiling.

d. Identity of the official decisionmaker. Although § 305.6 calls for considerable experimentation by the states in its implementation, the Code firmly recommends that the sentence-modification authority should be viewed as a *judicial* function. The root conception of § 305.6 is that, while many applications will be screened out at an early stage, something akin to a resentencing will occur in cases that proceed the full length of the process, see paragraph (4) and Comment *f*. Accordingly, judges should be empowered as the responsible decisionmakers. The judicial model for sentence modification is also consistent with the institutional philosophy of the Code, carried through the sentencing system as a whole, that judges should be the central authorities in the system, with a greater share of sentencing discretion than other official actors. See § 1.02(2)(b)(i) and Comment *h* (Tentative Draft No. 1, 2007).

There is also a persuasive *negative* case in support of a judicial decisionmaker. In large part, the project of creating a second-look provision grew out of disillusionment with traditional arrangements of back-end discretion over the lengths of prison terms, which place large reservoirs of power in parole agencies and corrections officials. These policy judgments are echoed throughout the revised Code. The Code's determinate framework removes the prison-release authority of parole boards; see § 6.06(4) and (5) (this draft); Appendix B, Reporter's Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). While corrections departments continue to exercise power over good-time allowances, the revised Code seeks to circumscribe and regularize the process; see § 305.1 and Comment *a* (Tentative Draft No. 2, 2011).

Paragraph (1) states that the modification power should be exercised by "a judicial panel or other judicial decisionmaker." Given the experimental nature of the provision as a whole, the identity of the judicial authority is left open-ended. Each jurisdiction that adopts the provision must design an institutional architecture that will best suit its local needs and circumstances. This could entail the creation of a new court or other judicial authority, or reliance on the existing court system. In early drafts of the second-look provision, the sentence-modification power was to be reposed in "a trial court of the jurisdiction in which the prisoner was sentenced." See § 305.6(2) (Preliminary Draft No. 6, April 11, 2008). In some states, this may prove to be the simplest arrangement, and it enjoys a natural "fit" with the concept of § 305.6 as calling for a new sentencing decision in selected cases. The "back to court" proposal met with strong opposition, however, if it were the Code's sole black-letter recommendation to be addressed indiscriminately to all jurisdictions. Doubts were expressed that the trial courts in many or most

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states were well positioned to discharge the second-look responsibility. Each legislature must weight these concerns when crafting the institutional machinery that will work best in its state.

The doubts were several, but do not apply equally to all state judicial systems. First, § 305.6 would add to the workload of already overburdened trial courts. Problems of docket overload exist nationwide, but in some places are more acute than in others. There is a danger that trial judges in some jurisdictions would treat sentence-modification applications as nuisances, of far lower priority than their pending cases, and would feel pressure to dispose of the bulk of cases on the papers alone, without a hearing or counsel.

There is a related danger that different trial courts would attach varying degrees of importance to sentence-modification applications, and that disparity in outcomes under § 305.6 would result from the idiosyncrasies of individual judges. Some might make frequent use of the modification authority while others would rarely or never do so. Sentencing guidelines and an appellate review process could perhaps iron out some of these disparities, but individual trial judges would still possess the greatest share of second-look discretion.

Finally, judges in some jurisdictions are more politically vulnerable than in others—and there is every reason to anticipate that many second-look decisions will be politically charged. The cases that come forward will by definition include the most serious offenses and the most blameworthy offenders. Many will involve great harms suffered by victims, their families, and communities. A decision to amend an original sentence might trigger a public and media backlash. Because methods for the appointment, retention, or election of trial judges vary a great deal across the states, it may be unrealistic, unfair, or counterproductive to place the entire weight of second-look decisionmaking onto single judges. One risk is that timorous judges would fail to act on meritorious applications; another is that courageous judges would be voted out of office.

The alternative to the "back to court" approach is for the legislature to create a wholly new judicial decisionmaker for the sentence-modification process, preferably a "panel" of several judges or retired judges. If such a new authority is created for the sole purpose of ruling upon § 305.6 applications, and is separately funded, sentence-modification applications will not be in danger of being pushed to a back shelf in favor of other matters. Also, judicial panels or other decisionmakers who regularly discharge the sentence-modification function can be expected to develop specialized expertise, and a uniformity of approach, greater than if § 305.6 were administered by individual trial judges. A panel would carry the further advantage of distributing responsibility and accountability over more than one individual, thus muting the political costs attached to unpopular decisions. If the panel were composed of former judges, who need not stand for retention or election, the risks would be further reduced. There is much room for innovation in dealing with questions of competency, expertise, and independence. Some legislatures might find it desirable to charter sentence-modification panels that retain a judicial character, but include former prosecutors and defense lawyers, or other criminal-justice professionals, as well as sitting or former judges. In the spirit of § 305.6, majority representation

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by judges would remain an essential ingredient, so the panel would retain its judicial character, but the heightened difficulty of second-look cases may call for broader representation.

A further advantage of the creation of an independent judicial authority for second-look decisions might be that the original trial judge, even if still on the bench, would not be asked to reevaluate his or her own sentence. Different views on this question are easily imaginable. Some may think it an optimum arrangement to return the case to the original sentencer—although the time periods involved in § 305.6 will often make this infeasible. At best, this preference would be spottily met. Alternatively, some may fear that the original sentencer, when still available, would bring a psychological investment in the original sentence that would affect the modification proceedings. Fresh, objective analysis would be difficult no matter how carefully the law declared that the purpose of § 305.6 is not to review the correctness of the original sentence. Moreover, if this worry is justified, the impediment would exist only for a few applicants, on the happenstance of when the original sentencing took place in a judge's career. Indeed, on this reasoning—even in a system that designates trial courts as the relevant authority under § 305.6—a legislature might choose to prohibit the original judge from hearing a sentence-modification application, in favor of another trial court. All of this falls within the realm of state-by-state experimentation envisioned by this section.

No matter what the legislature's choice of judicial decisionmaker, states that adopt the recommendations of § 305.6 will be exploring new ground. A minority of states recognize no judicial authority whatsoever to modify a prison sentence once its execution has begun. Most states grant trial courts a sentence-reconsideration power that expires a mere several months after the original sentencing. Section 305.6 has little similarity with these provisions. It creates a sentence-modification power that activates many years after the original sentencing, at the back end of the sentence chronology rather than the front end. Only a handful of states have adopted a judicial sentence-modification mechanism that extends years into the execution of a prison term—and only two impose periods of delay before the court's authority comes into being, with eligibility periods generally much shorter than the 15 years recommended in the revised Code. There is only limited precedent for the notion that judicial sentencing discretion, selectively exercised, may play an important role deep into the execution of a long prison term.

The Institute weighed and rejected a split decisionmaking model for this section. Long consideration was given to the possible inclusion of a "gatekeeper" to ensure that only colorable applications are presented to the judicial decisionmaker for consideration. Instead, the provision envisions that the judicial authority itself will create appropriate processes of its own to review and screen out applications that are unmeritorious on their face. Paragraph (4) explicitly authorizes such a process, both to manage the workload of applications in general, and preserve resources for those applications that deserve closest attention. A centralized sorting approach would be consistent with this section, or the use of an outside agency to offer nonbinding recommendations. For example, a probation department might be enlisted to give preliminary input, perhaps as part of a larger responsibility to prepare presentence reports in designated

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cases. The main concern is that there be no external gatekeeper with the power to select or veto cases. It is difficult to imagine an existing agency that could safely be entrusted with so much power. In the related context of compassionate release, gatekeepers such as the department of corrections have been seen to unduly choke off the flow of meritorious petitions. See § 305.7 and Comment *c* (Tentative Draft No. 2, 2011).

Paragraphs (6) through (8) of this Section are not intended to apply to applications summarily dismissed as unmeritorious under paragraph (4).

e. Assistance to eligible prisoners. Paragraph (3) provides that the department of corrections in each jurisdiction must establish procedures to notify eligible prisoners of their rights under § 305.6, and must give prisoners adequate assistance for the preparation of applications. The assistance may be provided by nonlawyers, such as knowledgeable staff members or volunteers, or qualified prisoners. Without basic support of this kind, the sentence-modification process would prove empty for many long-term prisoners. Some would be unaware of their rights, or unable to calculate accurately their first eligibility date. Others would be unable to make informed strategic choices, such as the decision of when to file an application, or would lack the skills to formulate an application that fairly captures the arguments in their favor.

Paragraph (3) further states that the judicial panel or decisionmaker must be given the discretion to appoint legal counsel to indigent prisoners. Implicit in this provision is that the legislature must authorize funding for such representation. Normally an appointment of counsel would not be made unless the judicial authority has reviewed a prisoner's application and determined that a hearing is warranted. In some instances, however, it may be necessary to appoint counsel to assist a prisoner in the preparation of an amended application.

f. Model of decisionmaking; substantive standard. The theoretical model of § 305.6, for colorable applications that survive the screening stage, is that the judicial decisionmaker should engage in a thought process that resembles a de novo sentencing decision. Paragraph (4) describes the final modification decision as "analogous to a resentencing." The decisionmaker should not be expected to reconstruct the reasoning behind the original sentence, or critique the decision of the sentencing judge many years before. It must be emphasized that the purpose of § 305.6 is not to review the correctness of the original sentence. Such a task would be pointless and perhaps impossible, given the passage of time. Any notion of review might also raise a barrier to sentence modifications if they are perceived as a disparagement of the sentencing judge. After a period of 15 years, § 305.6 presumes that much new information about the prisoner will have accumulated, new criminological knowledge may exist about offender rehabilitation and other relevant utilitarian objectives and, in some cases, broader societal values relevant to punishment decisions may have shifted, see Comment *b*. The ultimate inquiry is whether, in light of current information, the purposes of sentencing in Tentative Draft No. 1 (2007), § 1.02(2), would best be served by completion of the original sentence or a modified sentence.

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Thus, for example, the unserved balance of an applicant's prison sentence might be justified on the reasonable belief that the offender presents a continuing danger to the community, see id. § 1.02(2)(a)(ii), and so the judicial decisionmaker could rule under paragraph (4) that the original sentence should remain undisturbed on incapacitation grounds. On the other hand, there may be cases in which there are no reasonable grounds to believe the prisoner presents a danger to public safety. For example, a prisoner's progress in correctional treatment programs and behavior while institutionalized may now support a low assessment of recidivism risk. Or, over a period of 15 years or more, prediction technology may have improved so that an offender previously placed in a "high risk" category may be differently classified using contemporary tools. See § 6B.09 (Tentative Draft No. 2, 2011). Depending on what other considerations exist in the case, the judicial decisionmaker may well decide that there is no sound rationale for the applicant's continued incarceration.

Sentence modifications on proportionality grounds may be warranted if the opprobrium attached to certain criminalized conduct has diminished over a long period of time. Even for offenses as grave as homicide, societal values sometimes shift in unforeseeable ways, as may be occurring across recent decades in connection with killings of battering spouses by their victims or instances of euthanasia and assisted suicide. That these subjects are hotly controversial, and the public's attitudes in flux, suggests at least the possibility that a new consensus as to offense gravity and proportionate penalties may emerge over the coming generation. The level of societal condemnation attached to drug usage has also proven highly mutable over the past century, with large swings in the criminal law's approaches to mind-altering substances such as alcohol, marijuana, and crack versus powder cocaine. For the vast majority of criminal offenses, the revised Code does not anticipate fundamental shifts in the community's judgments of proportionate penalties in a time span of 15 years. In the unusual instances when this does occur, however, the sentencing system should be empowered to respond. Under paragraph (4), the judicial decisionmaker would be permitted to evaluate the proportionality of the punishment already experienced by offenders in light of present-day values, together with the remainder of the original sentence still to be served.

Section 305.6 rejects a number of alternative models that might be posited for a sentence-modification provision, which are different or more limited than the resentencing model. Many of these are already effected in other parts of the Code. The second-look provision is not meant to displace rules concerning sentence reconsideration authorized during the early stages of a prison sentence. The sentencing judge's front-end reconsideration powers should perhaps be expanded beyond existing rules, but this is a separate subject to be taken up in an as-yet-undrafted provision of the revised Code. Section 305.6 is not intended as a new form of appellate review or other reappraisal of the correctness of the original sentence (appellate sentence review will also be addressed elsewhere. See § 7.ZZ (Tentative Draft No. 1, 2007) (draft provision submitted for informational purposes only). Nor is § 305.6 meant to be a reinstitution of the traditional parole inquiry focused primarily on the timing of offender rehabilitation, a reward or

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incentive for good behavior while incarcerated (addressed in § 305.1, Tentative Draft No. 2, 2011), a new form of judicial clemency or mercy (the clemency power has never been a part of the Model Code), or a vehicle that responds only to demonstrably "new" circumstances that have arisen since the original sentencing. (See § 305.7, Tentative Draft No, 2, 2011.)

It bears emphasis that § 305.6 has been designed largely out of deep dissatisfaction with the discretionary-release framework of indeterminate sentencing systems in the United States, and it would subvert the policies of the provision to locate the second-look authority in a parole board. The clarity of this recommendation as to institutional design should not, however, be read to suggest that, as a matter of substantive sentencing policy, inquiries into prisoner rehabilitation should not be allowed—or should be subjected to some form of heightened skepticism. Under § 305.6, rehabilitation remains an eligible concern on an equal footing with other utilitarian objectives, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), all of which are admissible when found to be "reasonably feasible." It is therefore incorporated expressly into § 305.6(4)'s criteria. But it is not the only admissible consideration, far less the general underpinning, of the sentence-modification power. Rehabilitation may justify a modification of penalty, for example, when the judicial decisionmaker finds reasonable grounds for belief that an applicant-prisoner has in fact been reformed, and that this consideration supports a modification of sentence in light of all other relevant circumstances. It may also support a change in penalty if the judicial decisionmaker finds that the prisoner's rehabilitation is a reasonably feasible goal for the future, but that an altered sentence is needed to facilitate the process.

g. What modifications are permitted. Paragraph (5) states that the judicial decisionmaker must be given the power to "modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence." Subject to the ceiling on prospective severity, this is intended to be as broad an authority as possible to craft a modified sentence. An amended sentence could take the form of a shortened prison term, but might also include new or altered sanctions such as a longer or shorter term of postrelease supervision than originally imposed, a term of intermittent confinement (as in a halfway house or day-reporting center), and newly imposed economic sanctions including fines, forfeitures, and victim restitution. Any lawful sanction or combination of sanctions that would have been available to the original sentencing judge should be among the options permissible at sentence modification.

The primary limitation placed on the judicial decisionmaker's authority is the Section's prohibition of increases in severity of punishment. Paragraph (5) makes clear that § 305.6 is designed to operate only in the direction of lenity. This bias is almost certainly required by constitutional law, particularly if § 305.6 were applied to prisoners whose crimes predated its enactment, but is fundamental to the Institute's conception of the provision even in the absence of constitutional command. The second-look mechanism is meant to work as a check on the state's power to impose punishments of extraordinary severity, not an enhancement of that power.

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Paragraph (5) further clarifies that the sentence-modification authority "shall not be limited by any mandatory-minimum term of imprisonment under state law." A similar exemption from the force of mandatory penalties exists under the compassionate-release provisions of some states, see § 305.7(8) and Comment *i* (Tentative Draft No. 2, 2011). Paragraph (5) is also consistent with the revised Code's general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute's longstanding disapproval of such laws; see § 6.06, Comment *d* (this draft) ("The revised Code continues the 'firm position of the Institute that legislatively mandated minimum sentences are unsound.'"). For a discussion of other provisions in the revised Code that seek to mute the effects of mandatory penalties, see § 6.06, Comment *d*.

h. Minimum procedural requirements; role of victims. Section 305.6 does not give detailed guidance on the subject of required procedures. Many important subjects go unaddressed. For instance, hearings will no doubt be required in many second-look cases that reach the stage of full consideration, but § 305.6 lays down no standard for when hearings should be convened, or what level of formality is appropriate. The provision's modesty on this subject stems from the fact that the sentence-modification process envisioned by the Code is untried. There is no body of experience to inform fine-grained questions of implementation. Especially at this level, the provision encourages experimentation, and acknowledges the need for flexibility in approach across jurisdictions.

The Section does, however, lay down several core principles of fair process that should be effectuated by each legislature in one way or another. Basic to fair process are paragraph (7)'s injunctions that adequate records of proceedings must be maintained, and that the judicial decisionmaker must be required to provide a statement of reasons for its decisions on the record. Sound recordings of hearings, if any, should be maintained, and any dossier or other information considered by the judicial decisionmaker should be preserved. While there is no requirement that the decisionmaker's statement of reasons be in writing, it must be sufficient to explain why the standard for decision in Paragraph (4) was met or unmet in a given case. Boilerplate explanations, too often a feature of parole-release systems, should be viewed as unsatisfactory.

~~Paragraph (6) states that notice of sentence-modification proceedings should be given to the relevant prosecuting authorities, and also to crime victims when they are still living and can be contacted with reasonable efforts. Given the long time periods to eligibility under § 305.6, victims will sometimes be unavailable. And, of course, some crimes that are currently paired with extremely long sentences, such as drug offenses in some jurisdictions, have no identifiable victim. Where prosecutors and victims are notified, and wish to participate, paragraph (6) supposes that they should be allowed to have input into the sentence-modification proceedings, but does not seek to define the nature of that input. One possible model is the original sentencing hearing, suggested by the fact that the substantive mission of the second-look provision resembles that of a de novo sentencing. The revised Code will speak to victims' rights of participation in sentencing proceedings in a separate provision slated for future drafting.~~

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Paragraph (6) speaks to victims' rights in the sentence modification process under § 305.6. Earlier in this draft, § 7.07C gives close attention to the role of victims in original sentencing proceedings and, in general, limits victims' rights of participation to those that will advance the general purposes of the sentencing system. See also Appendix B, Reporters' Memorandum, Victims' Roles in the Sentencing Process (this draft). Under that analysis, victims have important information to provide to the sentencing authority and, in some cases, may directly participate in the delivery and effectiveness of criminal sanctions.

Consistent with the spirit of § 7.07C, § 305.6(6) counsels state legislators to afford certain procedural rights to crime victims during sentence-modification proceedings. These are not coterminous with victims' rights at an original sentencing, nor do offenders enjoy comparable rights in both settings.[150]

Paragraph (6) requires that reasonable efforts must be taken to notify victims of sentence-modification proceedings in their cases. It also requires that any victim impact statement offered at the original sentencing be made part of the record, and must be considered by the § 305.6 decisionmaking authority. Difficult questions arise as to whether input by crime victims should be permitted in addition to their earlier impact statements. One might argue that the severity of the offense was legally determined at the time of first sentencing, and should not be relitigated in the § 305.6 context. In the normal course of criminal law, offenders' sentences do not vary over time depending on the experiences and preferences of victims. Given the innovation of a de novo resentencing that § 305.6 sets up, however, 15 years after the original sentencing hearing, it would be extraordinary to ban the victim from submitting information about changed circumstances in the intervening years. As explained in Tentative Draft No. 2 (2011), § 305.6, Comment *f*, "The ultimate inquiry is whether, in light of current information, the purposes of sentencing in . . . § 1.02(2), would best be served by completion of the original sentence or a modified sentence." Paragraph (6) therefore recommends that victims "be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing."

The Code does not speak to how the supplemental impact statement is to be transmitted to the judicial decisionmaker. This is in accord with the general spirit of § 305.6, that each jurisdiction should be allowed latitude to develop its own processes. It would be consistent with

[150] In important ways, a sentence-modification proceeding under § 305.6 is not identical to an original sentencing. For example, § 305.6(4) contemplates that "[t]he judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face . . . ." No such screening process exists at a first sentence; every offender is entitled to a judicial hearing. Even if a hearing is ordered under § 305.6, the Code's scheme does not mandate that it follow the same procedural rules as first sentencings; the provision is intended to be flexible and allow room for experimentation across the states. Also in contrast with an original sentencing, offenders have no absolute right to be represented by counsel; instead, under § 305.6(3), provision of appointed counsel to indigent prisoners is a matter within the court's discretion.

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1 Paragraph (6) for a state legislature to provide that supplemental victim impact statements must
2 be submitted in writing.

3 *i. Appeals.* The revised Code disapproves of the existence of great powers of sentencing
4 discretion without the check of appellate review. At the same time, it is the Code's policy that
5 the "intensity" of review should not be constructed in such a way that judicial discretion to
6 individualize penalties is unduly restricted. See § 7.ZZ (Tentative Draft No. 1, 2007). The
7 intensity of an appellate process increases with the likelihood that any given decision will be
8 reviewed, nondeferential legal standards of review, and high reversal rates. Paragraph (8) does
9 not attempt to strike an exact balance between intensity of review and the scope of discretion
10 ceded to the sentence-modification authority. It insists merely that an effective review
11 mechanism of some kind must be in place. No appeal as of right need be created under paragraph
12 (8), but each state must give an appellate tribunal discretion to hear prisoners' appeals from
13 adverse rulings. Without at least this much potential for review, any guidelines or other
14 substantive decision criteria developed under paragraphs (4) and (9) would be demoted to
15 advisory status. Indeed, a central criticism of the traditional parole-release process is that the
16 parole board's discretion is not subject to enforceable regulations or meaningful substantive
17 review. The probability of reversal need not be great under § 305.6(8) in order for a competent
18 appellate body to reinforce the legal status of decision rules. In addition, a growing body of
19 appellate precedent, from selected cases that present important issues, can promote principled
20 analysis through the development of a common law of sentence modification.

21 *j. Sentencing guidelines.* Because the theoretical model for § 305.6 most closely resembles
22 the resentencing of long-term prisoners, it follows that the sentencing commission should have
23 responsibility to promulgate guidelines for the process. Sentence-modification guidelines, and
24 their amendments over time, would be informed by the judgment of the diverse membership of
25 the commission, the commission's investigations into the views of stakeholders throughout the
26 justice system, and its ongoing monitoring of sentence-modification decisions once the second-
27 look process has begun to operate. Sentence-modification guidelines could aid the judicial
28 decisionmaker in the difficult tasks of selecting cases under paragraph (4) to be brought forward
29 for full consideration, and in reaching ultimate dispositions in those cases. A guidelines
30 framework would also help distribute the political costs of sentence modification so that they do
31 not fall entirely upon the judicial decisionmaker, but are shared by a broadly representative and
32 bipartisan commission. The danger of popular backlash might be diffused, for example, when a
33 controversial modification ruling is seen to be consistent with the guidelines' presumptions or
34 recommendations.

35 Paragraph (9) provides that sentence-modification guidelines are subject to all the strictures
36 of Article 6B. Most importantly, this means that the guidelines may carry no more than
37 presumptive force, see § 6B.04 (Tentative Draft No. 1, 2007), so that ultimate sentencing
38 authority remains with the judiciary. In the normal course, the judicial decisionmaker will have
39 the final word under § 305.6, although the mechanism for appeals will in some cases include the

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input of an appellate tribunal. Given the innovative nature of the long-term sentence-modification power, the development of principled grounds of decision—a common law of sentence modification, as it were—can best be promoted through a three-way conversation that includes the judicial decisionmaker, the reviewing courts, and the sentencing commission.

Sentencing guidelines can address thorny substantive questions that are not appropriate for resolution in the Code itself. For example, there may be some categories of cases for which the guidelines state a presumption in favor of release at first eligibility. In other instances, the guidelines might provide that the judicial decisionmaker look with increasing sympathy upon prisoner applications in the second or third rounds of recurring eligibility under paragraph (2).

k. Retroactivity. Over the long run, caseloads under § 305.6 will be determined by the numbers of prisoners 15 years in the past who were sentenced to sufficiently long terms that they are still incarcerated. During the initial period, however, there will be a backlog of prisoners who were sentenced under prior law, who have already been incarcerated for 15 years or more, but who have not had access to the newly instituted sentence-modification procedure. Although the numbers of such inmates should not be overwhelming, they will be present in greater numbers during the initial phase of § 305.6's administration than in later years. Important questions of retroactivity thus arise, and must be considered from viewpoints of policy and pragmatic realities.

From a policy perspective, there is no doubt that a new second-look process should be given retroactive force in some form. The considerations that support enactment of § 305.6 apply just as forcefully to long prison terms imposed in the past as to those not yet imposed. Indeed, because many jurisdictions have been operating without the constraints of proportionality, utilitarian purposes, and correctional resource management that are fundamental to the revised Code, extremely long sentences handed down under prior law might especially be in need of reconsideration. Simply put, given the scale of incarceration in the United States, unprecedented historically or in any other nation, and the prison overcrowding crisis in many jurisdictions, delayed implementation of § 305.6 would ignore the systemic imperatives that impelled its creation.

Even so, the question of retroactivity presents genuine practical difficulties with which each jurisdiction must contend. The number of prisoners eligible for retroactive consideration will vary substantially from state to state, as will the resources allocated to the new sentence-modification authority. States that choose to implement § 305.6 in a way that provides many procedural protections to applicants, and encourages maximum deliberation by the decisionmaker, will process cases more slowly than states that take a less formal approach. At least in some systems, it is unlikely that the judicial decisionmaker will be physically capable of clearing the backlog of cases in short order. Principles of selectivity, prioritization, and the queuing of applications are likely to be needed.

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Paragraph (10) states that the legislature, after receipt of the recommendations of the sentencing commission, should provide for the retroactive application of the second-look provision, but paragraph (10) is not unduly restrictive about how this should be done. The optimum approach for each state should be fashioned in light of correctional and case-processing data that the sentencing commission is best positioned to assemble and analyze. Paragraph (10) adopts a retroactivity strategy similar to that taken to the retroactive application of new sentencing guidelines that decrease punishment severity over prior law. See § 6B.11(3) and Alternative § 6B.11(3) (Tentative Draft No. 1, 2007).

REPORTERS' NOTE [151]

a. Scope. For a careful argument in favor of a second-look provision of the kind recommended in § 305.6, see Richard S. Frase, Second Look Provisions in the Proposed Model Penal Code Revisions, 21 Fed. Sent. Rptr. 194 (2009) (Professor Frase argued persuasively that there should be recurring eligibility under paragraph (1), which was not a feature of the original draft of § 305.6).

On the dwindling activities of pardoning and clemency authorities in recent decades, see Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent. Rptr. 153 (2009).

For worldwide incarceration rates, see Roy Walmsley, World Prison Population List, 8th ed. (International Centre for Prison Studies, 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8 (last visited Mar. 9, 2011). For further analysis of historically high U.S. incarceration rates, see The Pew Center on the States, One in 31: The Long Reach of American Corrections (2009), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=49398 (last visited Mar. 9, 2011); David Garland ed., Mass Imprisonment: Social Causes and Consequences (2001).

In order to weigh the burden § 305.6 will impose on the criminal-justice system, it is helpful to estimate the percentage of prison-bound offenders who receive sentences that will result in time served of greater than 15 years. No comprehensive national data on this question are available. However, the U.S. Dept. of Justice reports on felony sentences in the nation's 75 largest counties on a periodic basis. The most recent report, from 2004, collects statistics on 57,497 defendants charged with felonies, 10,156 of whom were convicted and sentenced to prison. See U.S. Dept. of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2004 (2008), at 1; Felony Defendants in Large Urban Counties, 2004—Statistical Tables (2008), table 26. Among the group sentenced to prison, 7 percent received *maximum* prison terms of 10 years or more, including 1 percent of the prison-bound group who received life sentences. There is no separate reporting of sentences in excess of 15 years—or any other term of years greater than 10. We can estimate, however, that the percentage of newly sentenced prisoners who might someday file petitions under § 305.6 is substantially less than the seven percent of the total who receive sentences of 10 years or more. First, among any cohort of sentenced offenders, the more serious punishments are outnumbered by the less serious, so this seven percent almost certainly includes far more 10-year terms than 20- or 30-year terms. It

[151] The bulk of this Reporters' Note has not been revised since § 305.6's approval in 2011. The Note has been revised only to reflect the amendments to the provision contained in this draft. All Reporters' Notes will be updated for the Code's hardbound volumes.

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is unlikely that more than two to three percent of all prison-bound defendants receive imposed maximum terms in excess of 15 years. It should also be noted that these data go only to maximum sentences as pronounced by the sentencing court rather than the actual term served by inmates—and we know that few prisoners remain confined for the full maximum period. Nationally, the Justice Department estimates that offenders serve, on average, 55 percent of their pronounced prison sentences. See U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004—Statistical Tables (2008), table 1.5. Thus, based on these aggregated statistics from large urban counties, the percentage of prison admittees who will actually serve terms of 15 years or more is in the low single digits.

The numbers and percentages of extremely long prison sentences can be expected to vary substantially from state-to-state, however. See generally Franklin E. Zimring and Gordon Hawkins, The Scale of Imprisonment (University of Chicago Press, 1991), at 137-155 (arguing that states are so different in their use of prison sentences that they should be seen as "fifty-one different countries"). While we lack comparative data on state prison sentences longer than 15 years, we know that individual states make dramatically different use of life prison terms and sentences of life without possibility of release (usually called "life without parole" or "LWOP"). See Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 6 ("In 16 states, at least 10% of people in prison are serving a life sentence. In Alabama, California, Massachusetts, Nevada and New York, at least 1 in 6 people in prison are serving a life sentence. On the other end of the spectrum, there are 10 states in which 5% or fewer of those in prison are serving a life sentence, including less than 1% in Indiana."); id. at 9 ("Nationally, there are nine states in which more than 5% of persons in prison are serving an LWOP sentence. On the other end of the spectrum, 15 states incarcerate less than 1% of persons in prison for LWOP."). The diversity of policy and practice concerning life sentences suggests that similarly large state-by-state variations would be found in the use of other extremely long prison sentences.

b. A "second look" at long-term sentences. A limited second-look mechanism within a determinate sentencing framework, reserved for very serious crimes, was discussed in Andrew von Hirsch and Kathleen J. Hanrahan, The Question of Parole (1979), at 108 ("Such a procedure might have the advantage of allowing the case to be considered in a calmer atmosphere, when it has lost some of its notoriety and a more detached assessment of the crime can be made."). These authors expressed reservations, however, about reproducing the problems of an indeterminate sentencing system. See id. ("If the initial time-fix is subject to later alteration, the time-fixer may be tempted, in his first decision, to resolve all doubts in favor of lengthier terms since he or she knows that 'mistakes' can be corrected later.")

On the shifting norms and priorities of criminal law, see Lawrence M. Friedman, Crime and Punishment in American History (1993); Samuel Walker, Popular Justice: A History of American Criminal Justice (2d ed. 1997); David F. Musto, The American Disease: Origins of Narcotic Control (1999); Michael Tonry, Crime and Public Policy, in Tonry ed., The Oxford Handbook of Public Policy (2009). For human accounts of the effects of long-term imprisonment, and changes in inmates over long periods of time, see Ron Wikberg, The Long-Termers, in Wilbert Rideau and Ron Wikberg, Life Sentences: Rage and Survival Behind Bars (1992). For a more academic discussion, see Robert Johnson, Hard Time: Understanding and Reforming the Prison (2d ed. 1996), ch. 4. On the change in criminal propensity over the life course, see Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology 327 (2009). On the reemergence of rehabilitative

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theory under an evidence-based model, and the prospects for deincarceration that would follow, see Lawrence W. Sherman, Reducing Incarceration Rates: The Promise of Experimental Criminology, 46 Crime & Delinq. 299 (2000).

c. Time periods. There are very few provisions that specify a minimum period of confinement that must elapse before a sentencing-modification power comes into being. The mechanism of delayed eligibility is not wholly unknown, however. See 11 Del. Code § 4217(f) ("the Court may order that said offender shall be ineligible for sentence modification pursuant to this section until a specified portion of said Level V sentence has been served, except that no offender who is serving a sentence of incarceration at Level V imposed pursuant to a conviction for a violent felony in Title 11 shall be eligible for sentence modification pursuant to this section until the offender has served at least one-half of the originally imposed Level V sentence"); N.H. Rev. Stat. § 651:20(a) ("Any person sentenced to state prison for a minimum term of 6 years or more shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence, whichever is greater, and not more frequently than every 3 years thereafter. Any person sentenced to state prison for a minimum term of less than 6 years shall not bring a petition to suspend sentence until such person has served at least 2/3 of the minimum sentence, or the petition has been authorized by the sentencing court.").

On the definition of "sentence of imprisonment," see 18 U.S.C. § 3584(c) ("Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment"); Me. R. Crim. P. 35(d) ("A sentence is the entire order of disposition, including conditions of probation, suspension of sentence, and whether it is to be served concurrently with, or consecutively to, another sentence"); N.H. Rev. Stat. § 651:20(a)(1),(2) ("For concurrent terms of imprisonment, the minimum term shall be satisfied by serving the longest minimum term imposed, and the maximum term shall be satisfied by serving the longest maximum term. . . . For consecutive terms of imprisonment, the minimum terms of each sentence shall be added to arrive at an aggregate minimum term, and the maximum terms of each sentence shall be added to arrive at an aggregate maximum term.").

d. Identity of the official decisionmaker. While no close precedent exists for a judicial "second look" procedure, a few states currently provide for the judicial modification or reduction of some prison sentences long after they were originally imposed. The closest analogues are 11 Del. Code § 4217 (judicial sentence-modification discretion exists upon recommendation of Department of Corrections and Board of Parole); Ind. Code § 35-38-1-17(b) (after passage of one year, court may resentence any prisoner to a community punishment if this had been an option at the original sentencing; otherwise resentencing of prisoner requires approval of prosecutor); N.H. Rev. Stat. § 651:20 (prisoners may petition court to suspend their sentences after serving a specified portion of their terms; earlier petitions require the recommendation of the department of corrections); and N.J. Rules of Court, R. 3:21-10(b) (court may entertain motion at any time to modify a custodial sentence in order to place offender into a substance-abuse treatment program; transfer of prisoner to intensive supervision program also authorized upon review of a three-judge panel). A judicial release provision exists in Ohio, but it does not apply to sentences longer than 10 years. See Ohio Rev. Code § 2929.20(3). In at least one state, judges until recently had power to modify prison sentences after many years—a practice sometimes called "bench parole," but this authority existed from the date of original sentencing. See Cecilia Klingele, Changing the Sentence Without Hiding the Truth: Sentence Modification as a Promising Method of Early Release, 52 Wm. & Mary L. Rev. 465, 503-506 (2010) (discussing

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Maryland Rule of Court 4-345, which was amended in 2005 to put a five-year limit on the sentencing court's "revisory power").

Effective in 2010, the New Jersey legislature created a new procedure for the potential release of long-term prisoners who are otherwise parole-ineligible, but who have served a period of 20 years. The new law bears some resemblance to early drafts of § 305.6. Within New Jersey's State Parole Board, there is now a "Blue Ribbon Panel for Review of Long-Term Prisoners' Parole Eligibility" made up of former judges, former prosecutors, and former public defenders. The panel has discretion whether to review individual cases after the 20-year mark. For the cases it selects, the panel's main power is to declare prisoners parole eligible who otherwise would not be. In one sense, this is a muscular provision. There is no statutory limitation on the panel's ability to confer parole eligibility. The statute, for example, would appear to reach prisoners who are serving sentences of life without parole or mandatory periods of incarceration of more than 20 years. Beyond this, however, the panel's role is merely advisory. Once parole eligibility is in place, the State Parole Board assumes jurisdiction; at this stage, the panel may do no more than make a "recommendation regarding the case." See N.J. Stat. § 30:4-123.96.

Some jurisdictions in roughly similar contexts have used the Department of Corrections as a gatekeeper for prisoner petitions. Under the federal compassionate-release provision, for example, the Director of the Bureau of Prisons must make a recommendation in favor of sentence modification before the matter may be heard by the courts. This arrangement has resulted in only a small trickle of recommendations each year. See Stephen R. Sady and Lynn Deffebach, Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration, 21 Fed. Sent. Rptr. 167 (2009) ("with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on"); Mary Price, A Case for Compassion, 21 Fed. Sent. Rptr. 170 (2009) (recommending that, "[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion."). In light of this experience, the American Bar Association Commission on Effective Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in § 305.6, and encouraged the consideration of gatekeeping entities other than Departments of Correction. See ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28.

f. Model of decisionmaking; substantive standard. Most sentence-modification provisions do not articulate a theoretical model or substantive criteria for granting a sentence reduction. There are a few exceptions. See 11 Del. Code § 4217(c) ("Good cause under this section shall include, but not be limited to, exceptional rehabilitation of the offender, serious medical illness or infirmity of the offender and prison overcrowding."); id. § 4217(d)(3) (Board of Parole, which screens applications for sentence modification before they are submitted to the courts, "may reject an application for modification if it determines that the defendant constitutes a substantial risk to the community"); Me. R. Crim. P. 35(c)(2) ("The ground of the motion shall be that the original sentence was influenced by a mistake of fact which existed at the time of sentencing"); Mass. R. Crim. P. 29(a) (sentencing court may "revise or revoke such [original] sentence if it appears that justice may not have been done"); N.D. R. Crim. P. 35(b), Explanatory Note ("A motion under the rule is essentially a plea for leniency"); Tenn. R. Crim. P. 35, Advisory Commission Comment

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1 ("The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be
2 proper in the interests of justice."). The Notes of the Advisory Committee on Rules to former Fed. R. Crim. P. 35(b)
3 (discussing the 1983 amendment) stated that "the underlying objective of rule 35 . . . is to 'give every convicted
4 defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the
5 sentence in the light of any further information about the defendant or the case which may have been presented to
6 him in the interim,'" quoting U.S. v. Ellenbogan, 390 F.2d 537, 543 (2d Cir. 1968).

7 *g. What modifications are permitted.* The authority granted to the judicial decisionmaker in paragraph (5) to
8 disregard the terms of a mandatory-penalty provision finds some precedent in the American law of sentence
9 modification, and is a relatively common feature of existing compassionate-release provisions. See Kan. Stat. § 21-
10 4603(e) (applicable to offenders sentenced prior to July 1, 1993) ("The court shall modify the sentence at any time
11 before the expiration thereof when such modification is recommended by the secretary of corrections unless the
12 court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be
13 jeopardized or that the welfare of the inmate will not be served by such modification. *The court shall have the power*
14 *to impose a less severe penalty upon the inmate, including the power to reduce the minimum below the statutory*
15 *limit on the minimum term prescribed for the crime of which the inmate has been convicted.*") (emphasis supplied).
16 This sentence-modification authority was not carried forward with enactment of the Kansas Sentencing Guidelines.
17 See also Md. Code Crim. P. § 8-107 (Under procedure where trial-court sentences are reviewable by a three-judge
18 review panel, "[a] review panel may not order a decrease in a mandatory minimum sentence unless the decision of
19 the review panel is unanimous").

20 In the setting of compassionate release for age or infirmity, American law generally makes prisoners eligible
21 for consideration even though they are otherwise subject to mandatory-minimum terms of incarceration, although
22 many states make narrow exceptions, e.g., for capital cases or sentences of life without parole. See Alaska Stat.
23 § 33.16.085(a) ("Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner
24 may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least
25 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical
26 parole [if statutory criteria satisfied]"); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) ("This subdivision
27 does not apply to a prisoner sentenced to death or a term of life without the possibility of parole."); Conn. Gen. Stat.
28 § 54-131k ("The Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any
29 sentence of imprisonment, except an inmate convicted of a capital felony"); Fla. Stat. § 947.149 (parole
30 commission's power to grant medical release exists "[n]otwithstanding any provision to the contrary" except for
31 inmates under sentence of death); Idaho Code § 20-223(f) ("Subject to the limitations of this subsection and
32 notwithstanding any fixed term of confinement or minimum period of confinement . . . the commission may parole
33 an inmate for medical reasons."); La. Rev. Stat. § 15:574.20(A)(1) ("Notwithstanding the provisions of this Part or
34 any other law to the contrary, any person sentenced to the custody of the Department of Public Safety and
35 Corrections may, upon referral by the department, be considered for medical parole by the Board of Parole. Medical
36 parole consideration shall be in addition to any other parole for which an inmate may be eligible, but shall not be
37 available to any inmate who is awaiting execution or who has a contagious disease."); N.H. Rev. Stat. § 651-A:10-
38 a(VI) ("An inmate who has been sentenced to life in prison without parole or sentenced to death shall not be eligible
39 for medical parole under this section"); N.M. Stat. § 31-21-25.1(B) ("Inmates who have not served their minimum

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sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible."); N.C. Gen. Stat. § 15A-1369.2(b) ("Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article"); Or. Rev. Stat. § 144.122(4) ("The provisions of this section do not apply to prisoners sentenced to life imprisonment without the possibility of release or parole"); R.I. Stat. § 13-8.1-1 ("Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except those serving life without parole shall at any time after they begin serving their sentences be eligible for medical parole consideration, regardless of the crime committed or the sentence imposed."); 28 Vt. Stat. § 502a(d) ("Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is serving a sentence, including an inmate who has not yet served the minimum term of the sentence" may be eligible for medical parole); Wyo. Stat. § 7-13-424(a) ("Notwithstanding any other provision of law restricting the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may grant a medical parole to any inmate meeting the conditions specified in this section."). In other states, the sentence-modification power cannot alter a mandatory-minimum prison term. See 11 Del. Code § 4217(f) ("no offender who is serving a statutory mandatory term of incarceration at Level V imposed pursuant to a conviction for any offense set forth in Title 11 shall be eligible for sentence modification pursuant to this section during the mandatory portion of said sentence"; although this preclusion does not apply in cases of "serious medical illness or infirmity"); State v. Peterson, 2007 WL 2609244 (N.J. Super. A.D. 2007) (holding Rule 3:21-10(b) does not permit court to reduce sentence below a statutory mandatory-minimum period of incarceration).

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§ 305.8. Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation.[152]

1.1. The legislature shall create a framework for "control release" from prison, jail, probation, and postrelease supervision when correctional populations exceed the operational capacities of relevant agencies and institutions.

1.2. The legislature should empower correctional agencies to establish and periodically revise standards of their operational capacities with respect to different correctional populations, subject to review by the courts, the sentencing commission, or other qualified body.

a. For incarcerated populations, operational capacity should reflect a threshold beyond which an institution cannot guarantee the safety and humane treatment of inmates, cannot reasonably respond to the risks and needs of individual inmates, or cannot provide reasonable health-care and mental-health-care services.

[152] This Section has been approved by the Council and is presented to the membership for the first time in this draft.

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b. For populations under community supervision, operational capacity should reflect a threshold beyond which [the supervising agency] cannot supervise the offenders under its charge in accordance with [professional standards] [standards promulgated by a statewide standards certification workgroup].

c. "Populations" under this provision include correctional subpopulations who require different facilities, levels of security, supervision, or services, such as male versus female inmates, or probation caseloads divided by risk, needs, or offense category.

d. Standards of operational capacity shall be made available to the public together with explanations of how the standards were derived.

1.3. The control-release authority under this provision shall not be limited by any mandatory-minimum term of incarceration or supervision under state law.

1.4. Once control release is granted from a term of incarceration or supervision under this Section, the balance of that term is permanently discharged. Control release from one sanction does not release the offender from any other sanctions remaining in their sentences.

1.5. The legislature may authorize or require the sentencing commission to promulgate guidelines to assist the relevant agencies in the control-release decisionmaking process.

1.6. The special powers created by this provision should remain in effect so long as the circumstances of overcrowding exist.

1.7. The legislature should provide that the control-release framework creates no enforceable right of action on the part of any prisoner, jail inmate, probationer, or individual on postrelease supervision.

1.8. Priorities for control-release eligibility shall be based on uniform criteria that are made publicly available.

1.9. All measures taken under this Section entail the lowest possible risk to public safety.

Prison Populations

2.1. When an inmate population exceeds the operational capacity of available prison resources for [30] consecutive days, the director of the department of corrections shall be authorized to declare an overcrowding state of emergency. Following such a declaration, the Department should be empowered to take the following actions for affected prisoners:

a. advance any prisoner's release date by as much as [90] days.

b. award good-time allowances to any prisoner of up to [double] the credits earned under § 305.1.

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2.2. If the above measures are not sufficient to resolve the state of emergency, the department of corrections may:

a. advance any prisoner's release date by up to one year in conformity with control-release guidelines promulgated by the sentencing commission; or

b. advance any prisoner's release date by any amount of time in conformity with reliable risk-assessment processes and procedures.

Jail Populations

3.1. When [the officer in charge of a city or county jail] determines that an inmate population has exceeded the jail's operational capacity for [30] consecutive days, or has exceeded [120 percent] of the jail's operational capacity for [8 days within a 30-day period], [the officer] should be authorized to petition [the chief judge of the judicial district] to declare an overcrowding state of emergency. The court should be required to issue the emergency declaration if it finds by a preponderance of the evidence that [the officer's] determination is correct. Following such a declaration, [the officer] should be empowered to take the following actions for affected inmates:

a. advance any inmate's release date by as much as [90] days.

b. release any inmate convicted solely of nonviolent offenses after completion of [one-half] of the inmate's sentence.

Probation Populations

4.1. When a [chief of probation] determines that a probation population has exceeded the probation department's operational capacity for [30] consecutive days, the [chief of probation] should be authorized to petition [the chief judge of the judicial district] to declare an overcrowding state of emergency. The court should be required to issue the emergency declaration if it finds by a preponderance of the evidence that [the chief of probation's] determination is correct. Following such a declaration, [the chief of probation] should be empowered to take the following actions for affected probationers:

a. advance the date of discharge from supervision for any probationer by as much as six months;

b. discharge any probationer who has been in substantial compliance with sentence conditions for a continuous period of one year or more.

Postrelease Supervision Populations

5.1 When the director of the department of corrections determines that the postrelease supervision population exceeds the operational capacity of the postrelease supervision system for [30] consecutive days, the director shall be authorized to declare an overcrowding state of emergency. Following such a declaration, the department should be

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empowered to take the following actions for affected individuals on postrelease supervision:

a. advance the date of discharge from supervision for any individual on postrelease supervision by as much as six months;

b. for those convicted solely of nonviolent offenses, discharge any individual on postrelease supervision who has been in substantial compliance with sentence conditions for a continuous period of one year or more.

Comment:

a. Scope. This Section is new to the Model Penal Code. It recommends that correctional agencies should be given limited powers to reduce their offender populations to meet conditions of overcrowding. The Section builds on existing statutory precedent in roughly a dozen states, borrowing concepts of "control release to address prison, jail, probation, and postrelease supervision populations that exceed the "operational capacities" of their responsible correctional agencies. The Code posits that permanent mechanisms should be in place to respond to overcrowding throughout the corrections system, rather than ad hoc—or judicially imposed—measures.

The provision articulates a series of "Principals for Legislation" and does not set out model statutory language. This format is used because much of § 305.8 goes beyond existing precedent in American law, particularly in its provisions for meeting overcrowding in the setting of community corrections. The Institute encourages states to experiment along the lines outlined in § 305.8. Perhaps most importantly, it directs state legislatures' attention to urgent problems of oversubscription of probation and postrelease supervision services across the nation. The phenomenon of overcrowding in prisons and jails has obscured these realities in recent decades, yet the successes and failures of community supervision are just as important to societal interests as the successes and failures of our institutions of incarceration. If anything, community corrections has greater potential to reduce future recidivism and crime rates, but this potential cannot be fully realized when probation and parole supervision agencies are over-flooded with clientele.

b. Background. American correctional populations, as a percentage of general population, are the largest in the world. In 2014, the U.S. incarceration was approximately seven times the average rate among Western European states. "American exceptionalism" in penal severity is not limited to prisons and jails, however. Research indicates that America is also an international outlier in its rates of probation and postrelease supervision. In 2011, for example, the nationwide probation rate for the United States was seven times the average rate among reporting European countries, four times the Canadian rate, five times that in England and Wales, and seven times that in Australia. No other country for which we have statistical data casts the net of social control through probation and parole as widely as the United States.

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Large sentenced populations place strain on governments' ability to effectuate the purposes of the criminal justice system. Especially in the domain of community corrections, the resources available for supervision and programming are inadequate in most U.S. jurisdictions. By and large, corrections institutions must accept and manage whatever clientele they receive from the courts, and have only weak or indirect powers to control the overall numbers under their charge. Too often, institutions struggle to meet the minimum requirements of jurisdiction and control over their populations, and cannot invest appropriately in crime-reductive measures. Overcrowding in corrections has both systemwide effects and public policy costs. From the courts' perspective, for example, judges lack "sentencing discretion" to achieve desirable outcomes when appropriate programming does not exist to meet the needs of defendants. Every year, many offenders are confined because the community programs they need are in short supply, and many prisoners are denied release because they are on the waiting list for required treatment or cannot earn good-time credits because of the paucity of in-prison programming. From the viewpoint of public protection, much is lost when corrections agencies sacrifice goals of offender rehabilitation and reintegration, and substitute practices of "warehousing" and pro forma supervision.

In a more perfect world, with "model" sentencing laws and institutions, circumstances of correctional overcrowding would not arise. Indeed, a primary goal of the revised Model Penal Code's sentencing system is to use tools such as sentencing guidelines and correctional-resource impact projections to reduce the likelihood that sentenced populations will overrun the facilities and resources available for the administration of their sentences. See §§ 1.02(2)(b)(v), 6A.07. While the experience of a number of states demonstrates that the goal of resource management is achievable for sustained periods, this Section recognizes that the majority of real-world criminal justice systems fail to operate as intended. Even in the best-designed structures, it is wise to create fail-safe controls to relieve overcrowding. Especially for those states that lack a well-fashioned system of presumptive sentencing guidelines—either because they have no guidelines or have only advisory guidelines—the mechanisms recommended in this provision are essential.

c. Purpose of the provision. The chief purpose of the control release framework is to promote public safety and the safety of corrections officers by ensuring that adequate resources are available to meet the risks and needs of offenders serving criminal sentences. This is impossible in systems that are chronically overtaxed. Likewise, norms of humane treatment and minimal health and safety standards cannot be maintained in overcrowded institutions. There is genuine concern that the nation's institutions of criminal punishment sometimes do more harm than good—for example, the frequent observation that prisons can be "schools of crime"—or that unartful probation practices hinder rather than promote reintegration. Criminal sanctions fail in the worst possible way when they act as criminogenic interventions.

Section 305.8 seeks to ensure the highest and most effective use of finite correctional resources by creating safety valves for circumstances of overcrowding throughout the corrections system. The provision gives correctional agencies tools to maintain sensible operational priorities

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during periods of excess demand, and focus their expenditures on those offender populations most in need of confinement, surveillance, treatment, and support. The Section reflects a core objective of the revised Code, that adequate resources be available for carrying out sentences imposed and rational priorities established for the use of those resources; see § 1.02(2)(b)(v).

d. Overcrowding in community supervision. A major innovation in § 305.8 is the creation of population-control mechanisms for community supervision populations that exceed reasonable operational capacity. Most overcrowding provisions in state codes address only prison crowding, and a minority extend to jails. None address community supervision.

e. Precedents in state law. At least 11 states currently have overcrowding emergency statutes that serve as inspirations for this provision. At one time, as many as 20 states had enacted such laws. Typically these statutes have addressed only prison crowding, although a few have extended to overcrowding in local jails. No former or existing provision embraces problems of over-subscription of probation or postrelease supervision services. One policy conclusion advocated by the revised Code is that resource shortfalls in community supervision—particularly in program availability for high-needs offenders—is as much a priority as shortages of bed spaces in the nation's total-confinement institutions.

About 10 states have enacted and repealed emergency-release laws, and a number of states with such laws have never made use of them. Nationwide they were employed most frequently in the 1980s, with a sharp decline in the 1990s. Even in their heyday, the emergency laws were never fully effective mechanisms for the control of prison overcrowding. According to evaluation research, they succeeded in slowing rather than halting the rate of prison expansion in individual states. Critics argued that the laws addressed the symptoms and not the causes of uncontrolled incarceration growth. Nonetheless, case studies indicated that the measurable public-safety costs of emergency-release provisions were not high. Recidivism rates among offenders released on an accelerated basis were no higher than those released under the normal course of state law.

One cause of the decline in use of emergency-release mechanisms was the perceived political cost of their invocation, especially in states that were called upon to use them time and time again. Nor were the statutes designed to be self-executing at an administrative level. Many overcrowding statutes have required affirmative action by the governor in order to trigger their operation. As high crime rates became an increasingly salient political issue in the late 1980s and early 1990s, few executives were willing to assume responsibility for the wholesale release of prisoners into the community. Much as parole-releasing agencies became increasingly risk-averse over the last several decades, decisionmakers with emergency-release authority were reluctant to exercise their statutory discretion.

The recommendations of the revised Code are designed to mute these difficulties. First and most importantly, a state that adopts the Code's sentencing structure, including a system of resource management through the use of presumptive sentencing guidelines, should not find

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itself in the straits of prison-crowding emergencies as frequently as many U.S. states in the 1980s, 1990s, and 2000s. If it is politically intolerable to make repeated use of emergency-release provisions over a short time span, the Code as a whole is designed to prevent that from happening. Indeed, the Code's "resource management" machinery extends beyond the prisons and jails to anticipate the demand for community corrections services. See § 6A.07(2) ("Projections under the [correctional-population forecasting] model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs."). The revised Code addresses the underlying causes of correctional overcrowding in comprehensive ways that most late-20th-century legislation did not. Section 305.8 is added to this structure as a desirable fail-safe, and its workability is enhanced by the fact that it will be called upon infrequently.

Second, the Code recommends that resource-control laws should be as self-executing as possible, at the administrative or local levels, without required action in the political branches. Under § 305.8, the Department of Corrections is empowered to take a great deal of ameliorative action based on its own determination that an emergency exists, and may take further action in collaboration with the sentencing commission. At the city and county levels, sheriffs (or other officials in charge of jails) and probation agencies are authorized to confront their own overcrowding problems with approval of the local courts.

f. Triggering criteria for incarcerated populations; measurements of operational capacity. Measurements of operational capacity of corrections institutions—or "rated capacity," or "design capacity"—are often slippery and subject to manipulation. When the triggering conditions are declared for use of controlled-release powers such as those in § 305.8, the declaration should represent a defensible judgment with a clear and transparent rationale for action.

g. Triggering criteria for community-supervision populations; measurements of operational capacity. Triggers for overcrowding in the domain of community supervision are similarly difficult to formulate. The problem is of sufficient importance, however, that legislatures and corrections agencies should be called upon to meet the conceptual challenge. Given the elasticity of concepts of operational capacity (and similar measures) in the world of incarcerated populations, the difficulty of measuring overcrowding in probation and parole should not be seen as different in kind.

For supervision populations, it may be useful for states to develop a "weighted caseload" standard. That is, instead of relying on a uniform caseload standard to measure how stressed an agency may be, separate maximum caseloads should be specified according to the classification of supervised offenders as high-risk, high-needs, low-risk, and so on.

h. Provisions for jail overcrowding. The measurement of jail overcrowding could present its own unique problems. Jail overcrowding is likely to be more episodic than it is for prisons. For

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example, many jails are chronically and seriously overcrowded on weekends or at other peak-load times, but rarely exceed capacity for a solid month or even a solid week. Serious overcrowding on weekends or for other short periods is still a major problem, especially in terms of security.

i. Publication of operational-capacity standards. The definition of "operational capacity" of correctional institutions is notoriously malleable. Model legislation cannot erase this problem. However, by requiring that capacity standards be public and open to inspection, and that any amendments to those standards also be available for public scrutiny, the Code introduces a political check on gross manipulation of capacity benchmarks.

REPORTERS' NOTE

b. Background. The literature on the use of "emergency release" provisions in American states is small and outdated. See Edward E. Rhine, Prison Overcrowding Emergency Powers Acts: A Policy Quandary For Corrections, Proceedings of the 116th Congress of Corrections, (American Correctional Association, 1986); James Austin, Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy, 32 Crime & Delinq. 404 (1986). As a consequence, much of the "research" base for § 305.8 has come from Reporters' interviews and correspondence with experts in the fields of institutional and community corrections.

d. Overcrowding in community supervision. A number of community corrections experts had input into the drafting of this Section. All were supportive of extending overcrowding controls to probation and postrelease supervision. One Adviser to the project wrote that, "I certainly believe that 'overcrowding' is as important a notion in community corrections as it is elsewhere, though it arises out of a concern for efficacy rather than a potential constitutional violation." Another Adviser wrote that:

> A strong argument can be made that crowding in supervision caseloads is as serious as, if not more serious than, prison and jail crowding. Probation and parole have for too long been regarded as an inelastic resource that remain largely unaffected by the growing numbers of offenders subject to supervision.

e. Precedents in state law. See Edward E. Rhine, Prison Overcrowding Emergency Powers Acts: A Policy Quandary For Corrections, Proceedings of the 116th Congress of Corrections, (American Correctional Association, 1986); James Austin, Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy, 32 Crime & Delinq. 404 (1986).

f. Triggering criteria for incarcerated populations; measurements of operational capacity. For a sample of existing state provisions, see Arkansas ("Whenever the population of the prison system exceeds ninety-eight percent (98%) of the rated capacity for thirty (30) consecutive days, or whenever the number of inmates on the county jail backlog exceeds five hundred (500) inmates, the Board of Corrections may declare a prison overcrowding state of emergency."); Nebraska ("The Governor may declare a correctional system overcrowding emergency whenever the director certifies that the population is over one hundred forty percent of design capacity."); New Mexico ("When the inmate population of female correctional facilities or male correctional facilities exceeds one hundred percent of rated capacity for a period of thirty consecutive days, the following measures shall be taken to reduce capacity: . .

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.”); Rhode Island (“Whenever the overall population of the adult correctional institutions exceeds ninety-five percent (95%) of the annual capacity set by the committee for thirty (30) consecutive days or whenever the prison inmate population of any secure facility within the adult correctional institutions exceeds one hundred percent (100%) of its capacity established by court order, consent decree or otherwise, for five (5) consecutive days,”); Wisconsin (“The prisoner population equals or exceeds the statewide prisoner population limit promulgated by rule under § 301.055 [stating that “The department shall promulgate rules providing limits on the number of prisoners at all state prisons . . . . The rules shall provide systemwide limits and limits for each state prison . . . .”]).

Some state codes specify how capacity limitations should be formulated, and by whom. See Arkansas (“Rated capacity” means the actual available bed space in the prison system as certified by the board, subject to applicable federal and state laws and the rules and regulations adopted pursuant to those laws.”); Mississippi (“Operating capacity” means the total number of state inmates which can be safely and reasonably housed in facilities operated by the Department of Corrections and in local or county jails or other facilities authorized to house state inmates as certified by the department, subject to applicable federal and state laws and rules and regulations.”) (“The Commissioner of Corrections shall within thirty (30) days after April 10, 1985, establish the operating capacities of the prison system, and shall at least quarterly certify existing operating capacities or establish changed or new operating capacities.”); Wisconsin (“The department shall promulgate rules providing limits on the number of prisoners at all state prisons . . . . The rules shall provide systemwide limits and limits for each state prison . . . .”).

g. Triggering criteria for community-supervision populations; measurements of operational capacity. Readers of an early draft of this Section recommended that a “weighted caseload” standard be employed for calculations of operational capacity in probation and parole. That is, instead of relying on one uniform caseload standard to measure how stressed an agency may be, separate maximum caseloads should be specified according to the classification of supervised offenders (as high-risk, high-needs, low-risk, and so on). One Adviser to the project wrote as follows:

> Caseload numbers are useless but workload numbers are very useful. If a proper assessment instrument is being used, each case will be slotted into a track that translates into amount of time staff need to spend on the case. These are weighted caseloads. . . . With workload numbers and offender performance records in hand, an algorithm could be developed that could cut back the workload into a manageable zone. This would involve early termination for “high performers” (treatment completers, compliers with other requirements, no new offenses, and moderate to low current risk levels) and declassification to a lower level of supervision, with related workload reduction, for cases that come closest to the line qualifying them for a lower level of supervision. These would be offenders not yet eligible for early termination. . . . More dramatic steps could be taken if these measures did not restore equilibrium between staffing levels and workload requirements. For example, high performers who hit the 50 percent point in their term of supervision could be eligible for early termination. . . . The group that would be ineligible for adjustments would be violent offenders with a high risk level.

Another Adviser offered the following suggestion:

> In determining an appropriate “operational capacity” over which an [Emergency Powers Act] may be triggered, field services agencies must adopt open and transparent professional standards for defining the upper limits of that capacity. The standards, in terms of their defensibility/credibility, might incorporate

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caseload ratios governed by classification systems that place offenders into appropriate levels of supervision based on a validated or reliable risk assessment tool (inclusive of tools that assess static and dynamic risks). . . . If a Chief Probation Officer, or Director of Parole Services were to recommend the activation of an Emergency Powers Act, he/she would be saying that the total number of cases supervised at the state or county level has exceeded 100 percent of the case staffing ratios that are necessary to adequately supervise offenders by their risk of reoffending (or risk level or classification status).

[T]he credibility of the weighted maximum caseload standards that are adopted is a necessary precondition for declaring an emergency. And credibility (it seems to me) turns on establishing a protocol for certification that includes representation from the probation/parole agencies themselves, but incorporates a wider mix of individuals to ensure an independent review and endorsement of the standards that are proposed or used to drive supervision.

Given the extent of variation across jurisdictions, especially probation, the MPC might consider a protocol that calls for the formation of an interagency (probation or parole) caseload standards certification workgroup. This group would consist of field agency executives, and members appointed by the director of the state's Sentencing Commission/Administrative Director of the Courts/Judge of the County (for probation), or the Director of Corrections/Executive Manager of Parole (if the agency is separate from DOC). The group need not exceed 3-5 members and would meet quarterly, as noted below. It would act as the body that certifies the caseloads standards that are adopted, and when necessary, modified over time. It would also be responsible for advising if the standards (case staffing ratios) are exceeded for 90 days.

i. Publication of operational-capacity standards. Subsection 1.2 incorporates the following suggestion from Professor Anthony Doob:

Operational capacity as you know is a slippery concept. Our penitentiary people have dealt with the problem of overcrowding by redefining capacity. They used to have a policy of no double bunking (except in short term emergency situations). Now they accept it as normal. There's no way to challenge that sort of thing, but if there were some way of making the design capacity a publicly available figure, one could at least ensure that if they fiddled with it so as to be "within capacity," it would be public. An easy way would be to require some kind of reporting of daily average capacity for each month along with "design capacity" for each institution. Again, changes in design capacity without additional construction could then be seen.

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Appendix B

Reporters' Memorandum

Victims' Roles in the Sentencing Process

1 From both policy and practitioner perspectives, the ascendancy of the crime victim was one
2 of the most important developments in American criminal justice in the late 20th century.
3 Starting in the 1970s, Congress and the legislatures of every state passed laws reflecting the
4 interests of crime victims in criminal-case processing, and two-thirds of the states ratified
5 constitutional amendments on the subject. A major Presidential Task Force on Victims of Crime
6 was launched in the early years of the Reagan Administration, and a new Office for Victims of
7 Crime was created in the U.S. Department of Justice in 1988. Numerous victims advocacy
8 groups grew to prominence and influence across the nation, there has been tremendous growth in
9 victims services in the courts and via other organizations, and it has become commonplace for
10 new criminal legislation to be named after individual crime victims.

11 These developments reflected deep political, professional, and cultural changes of
12 perspective about crime, responsibility, and punishment. In the 1960s, the focus of criminal law
13 reform, and the constitutional law of criminal procedure, was on the rights of defendants,
14 perceived racial inequities throughout the justice system, and conditions of poverty and
15 disadvantage that were believed to be leading causes of the nation's crime problem.[153] In the last
16 several decades, while advocacy in favor of defendants' interests has not disappeared,
17 counterbalancing attention to the moral claims of past and prospective crime victims has become
18 a prominent dimension of legal and policy debate.[154]

19 This Council Draft includes the Model Penal Code's first attempt to develop a
20 comprehensive approach to crime victims' roles at decision points throughout the sentencing

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[153] E.g., President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967), at 6 (stating that "warring on poverty is warring on crime.").

[154] See David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001), at 11-12 (discussing "the return of the victim"):

> Over the last three decades there has been a remarkable return of the victim to centre stage in criminal justice policy. In the penal-welfare framework [before the 1970s], individual victims featured hardly at all, other than as members of the public whose complaints triggered state action. Their interests were subsumed under the general public interest, and certainly not counter-posed to the interests of the offender. All of this has now changed. The interests and feelings of victims—actual victims, victims' families, potential victims, the projected figure of 'the victim'—are now routinely invoked . . . . In the USA politicians hold press conferences to announce mandatory sentencing laws and are accompanied at the podium by the family of crime victims. Laws are passed and named for victims: Megan's law, Jenna's law, the Brady bill.

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1 process. The most visible area of concern is judicial sentencing, but there are at least a dozen
2 other procedural contexts in which victims may be said to have participatory or other interests—
3 that is, junctures at which a role for victims is at least debatable. These include prosecutorial
4 charging, bargaining, and diversion decisions, deferred adjudications, appellate review of
5 sentences, trial-court modifications of sentences (of different kinds, including modifications of
6 prison terms, victim restitution orders, or conditions of community supervision), probation and
7 parole violations hearings, the several mechanisms for prison-release decisions contained in the
8 Code, and forums that offer offenders relief from collateral sanctions.[155]

9 For some of these decision points, sound policy analysis might suggest that victims have no
10 legitimate role to play. A general philosophy of victims' interests in the sentencing process—as
11 recommended in this Memorandum—can help answer that question. And where it is agreed that
12 victims have legitimate interests that should be accommodated in procedural rules, a coherent
13 theory will give guidance as to the proper contours of those accommodations

14 Because the Model Penal Code: Sentencing project covers only the Code's sentencing and
15 corrections articles, this Draft will not attempt to fashion an exhaustive "Model Crime Victims'
16 Act."[156] Instead, the Reporters have reviewed the extant constitutional and statutory provisions
17 and their related literatures with a focus on approaches to victims' issues in the domains of
18 sentencing and corrections.

19 In this subject area, the revised Code writes on a clean slate. When the original Code was
20 prepared in the 1950s and 1960s, the American "victims' rights" period had not yet dawned. In

[155] Some states extend victims' rights to notification or participation to numerous decision points in the process, see, e.g., Ky. Rev. Stat. § 421.500(5)(b) ("If victims so desire and if they provide the attorney for the Commonwealth with a current address and telephone number, they shall receive prompt notification, if possible, of judicial proceedings relating to their case, including, but not limited to, the defendant's release on bond and any special conditions of release; of the charges against the defendant, the defendant's pleading to the charges, and the date set for the trial; of notification of changes in the custody of the defendant and changes in trial dates; of the verdict, the victim's right to make an impact statement for consideration by the court at the time of sentencing of the defendant, the date of sentencing, the victim's right to receive notice of any parole board hearing held for the defendant, and that the office of Attorney General will notify the victim if an appeal of the conviction is pursued by the defendant; and of a scheduled hearing for shock probation or for bail pending appeal and any orders resulting from that hearing"); id. subsection (c) ("The victim [may] register to be notified when a person has been released from a prison, jail, a juvenile detention facility, or a psychiatric facility or forensic psychiatric facility"); id. subsection (e)(6) ("The victim shall be consulted by the attorney for the Commonwealth on the disposition of the case including dismissal, release of the defendant pending judicial proceedings, any conditions of release, a negotiated plea, and entry into a pretrial diversion program."); id. subsection (e)(10) ("If a defendant seeks appellate review of a conviction and the Commonwealth is represented by the Attorney General, the Attorney General shall make a reasonable effort to notify victims promptly of the appeal, the status of the case, and the decision of the appellate court."). For another extensive catalog of sentencing procedures that are points of attachment for victims' rights under state law, see Arizona's Crime Victims' Rights Acts, Ariz. Rev. Stat. § 13-4401 et seq.

[156] See 11A Uniform Laws Annotated, Uniform Victims of Crime Act (1995) (approved by the National Conference of Commissioners on Uniform State Laws in 1992).

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the spirit of the times, the Code's first edition made no provision for the participation of victims at sentencing or any other stage of the criminal-justice process.

This Memorandum is a statement of first principles that deserves careful consideration by the Institute. It also serves as a prospectus for new drafting that affects a wide range of provisions, from beginning to end of the MPCS, in which victims' interests are (or are arguably) implicated.

Roads Not Taken by the MPCS

Questions of which victim interests should be recognized in the sentencing process cannot be resolved by the invocation of slogans. One commonly heard dictum, usually offered to close down discussion, is that America has a "public" system of criminal justice and not a "private" one. This statement is a conclusion rather than an argument—and an ill-supported conclusion at that. The public-versus-private character of the criminal courts has shifted appreciably over time, and appears to be an issue that is resolved according to the tenor of the times. As a historical matter, private prosecutions brought directly by crime victims were the norm in this country through most of the 19th century.[157] It is true that, for much of the 20th century, with the advent of professional prosecutors, victims were moved out of the center stage of criminal litigation—but for the last 45 years the historical trend has inclined in the opposite direction. The public-versus-private character of the system is a matter of pendulum swings, not stone tablets.

Another shibboleth is that victims must be given "equal rights" to those of defendants. This is not a workable hallmark for system design. As Michael O'Hear has pointed out, victims and defendants have entirely distinct interests in the criminal-justice process, so a principle of equality cannot sensibly be applied.[158] There is no metaphorical "pie" of procedural rights that may be divided neatly in half.

First Principles

The "first principles" set out in this Memorandum fall under two subheadings of procedural theory. One family of theories posits that procedural rules exist to further the best or most accurate substantive results (for example, a defendant should have the right to cross-examine witnesses in order to test the truthfulness and accuracy of their testimony). An alternative type of theory asserts that procedural rights can have intrinsic value or reflect important values external to the adjudication, and argues that those rights should be recognized even if they do not

[157] See Abraham Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 1 (1982) ("this 'monopoly' of criminal prosecution by the district attorney is more the result of a misunderstanding of history than of explicit legislative direction."). For a detailed study of private prosecutions in the Philadelphia criminal courts, see Allen Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800-1888 (1989).

[158] For example, what would it mean to say that victims should have a right "equal" to the defendant's right to a jury trial? Also, defendants sometimes have a right that unconstitutionally obtained evidence cannot be used against them at trial. In either example, it makes no sense to attempt to invent a parallel procedural rule for the benefit of crime victims.

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maximize substantive results (for example, it has been said that a defendant's Fifth Amendment right to silence supports values of dignity, privacy, and the avoidance of cruelty, even though the right may be truth-defeating in individual cases).

The discussion below will begin with a focus on victims' roles in the sentencing and corrections process that can be said to further the larger purposes of the sentencing system (such as goals of proportionate punishment or rehabilitation of offenders). The Memorandum will then examine claims that victims may make on the sentencing process that supplement or conflict with the system's primary objectives.

The Sentencing System's Goals

Victims can contribute to the pursuit of sentencing-system goals in two ways. First, in most cases, victims possess information relevant to sentencing authorities' decisions about sanctions that will be best tailored to further retributive or utilitarian objectives. This might be called an "informational role." Because this is so often the case, a well-designed system should include processes for receiving and making use of relevant information that victims uniquely possess.

Second, in some settings, victims can serve as agents who help effect system goals. This might be called an "agency role." A well-ordered system should consider making use of victims in this way—although victims may have strong countervailing interests not to be put at risk, not to be forced to participate, not to be forced to confront offenders, etc. As a general rule, the consent of victims should be required before they are used as instruments for the furtherance of sentencing policies or the delivery of sanctions.

Victims who are so inclined have legitimate arguments that the system should make room for them to play informational and agency roles—and arguments of this kind spring from values that are already at work in the system, not claims or interests that are specific to victims. When based on this line of thinking, procedural accommodations of victims' informational and agency roles should be configured to best effectuate the system's goals, not the preferences of victims.[159]

The discussion below explores victims' informational and agency roles in relation to specific purposes of the sentencing system, starting with the deontological goal of proportionality in sentencing and moving to utilitarian purposes. It is not meant to be an exhaustive treatment of the subject. Rather, it gives several examples of convergences of societal and victims' interests.

Proportionality of Sentences

On the case-specific level, victims have important informational roles to play in determining penalties under the criteria in § 1.02(2)(a) (general purposes of the sentencing system in

[159] On this theory, therefore, in two otherwise comparable cases one victim's anger and the other victim's forgiveness should not count as "information" that must be received and considered by sentencing decisionmakers. Victims' preferences may be important on other grounds, as discussed later in this Memorandum, but not in service of their informational role.

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1 individual cases).[160] That Section establishes reference points against which the proportionality
2 of punishment may be measured in individual cases, as well as the utilitarian goals of criminal
3 sanctions. These will be considered in turn.

4 Section 1.02(2)(a)(i) states that the system should strive "to render sentences in all cases
5 within a range of severity proportionate to the gravity of offenses, the harms done to crime
6 victims, and the blameworthiness of offenders." Thus, proportionality in punishment is to be
7 evaluated against three considerations: offense gravity, victim injury, and offender
8 blameworthiness.

9 Crime victims have a great deal to contribute to legal assessments of all three dimensions of
10 proportionality. Victims can nearly always provide the fullest and most textured account of the
11 injuries they have suffered.[161] When no harm has been sustained, offense gravity may turn in
12 largest part on risk creation. For example, attempted murder when the gun jams is high in offense
13 gravity yet low in physical injury. Many victims will have information relative to the question of
14 risk creation beyond what was necessary to establish the elements of an offense for
15 conviction.[162] Third, victims may know a great deal about the offender's culpability when
16 committing the crime. The victim may be able to speak to a prior relationship with the offender
17 leading up to the crime, for example, or the offender's cruelty in commission of the crime.

18 Reasonable people may also believe that victims should be given the opportunity to play
19 agency roles with respect to the delivery of proportionate punishments. Communication of
20 victims' sentiments to offenders can have punitive impact. It can be exquisitely painful to hear
21 emotions of outrage, condemnation, and disappointment directed toward oneself. Victims'
22 actions may assist in "holding offenders to account" for their crimes in ways that are not
23 exclusively punitive, see R.A. Duff, Punishment, Communication, and Community (2003). For
24 example, a victims' impact statement might impress upon an offender the effects and gravity of
25 his or her conduct. Reportedly, interactions between victims and offenders at restorative-justice
26 proceedings sometimes achieve this result.

27 The Code's bases for proportionate penalties rule out certain possible victims' claims. For
28 example, there can be no victims' right to see that offenders are dealt with in the most punitive

[160] The considerations in text are distinct from those that support victims' roles at earlier stages, for example, when victims are critical fact witnesses to establish the legal guilt of the defendant. We are concerned here only with the sentencing process. The discussion above assumes that convictions have already been obtained and that victims have been permitted to contribute to that process in appropriate ways.

[161] See Michael M. O'Hear, Plea-Bargaining and Victims: from Consultation to Guidelines, 91 Marquette L. Rev. 323, 326-327, 329 (2007) ("Potentially useful information from victims may pertain both to the severity and to the type of sentence imposed. . . . At a deeper level, a basic concern for victims arguably animates the practice of retribution, which is unquestionably a core—perhaps *the* core—purpose of criminal punishment."); Jayne W. Barnard, Allocution for Victims of Economic Crimes, 77 Notre Dame L. Rev. 39 (2001) (arguing that victims of financial crimes can provide information about their losses and the sophistication of the defendant's scheme).

[162] In such cases, victims' informational role does not end with a finding of guilt.

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1 way possible. Such an "untethered" interest in punitiveness—that does not derive from harm,
2 offense gravity, or culpability—may be said to provide "satisfaction" or "empowerment" to
3 some victims, but is lawless and ungovernable. There cannot be an untethered victims' right to
4 name the severity of sentences simply because it is their preference.

5 *Utilitarian Goals*

6 Section 1.02(2)(a) also embraces a number of instrumental objectives: offender
7 rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution of crime
8 victims and communities,[163] and reintegration of offenders into the law-abiding community.
9 Depending on the case, crime victims' input could be important to the furtherance of most of
10 these utilitarian goals.

11 *Rehabilitation and Specific Deterrence*

12 With respect to rehabilitation and specific deterrence, victims can play agency roles, but
13 probably do not have useful information to provide.

14 There is a colorable theory that an offender's rehabilitation may be furthered when he is
15 required to hear a victim's impact statement. The statement may drive home to the offender the
16 gravity of what he has done, and may cause him to feel empathy for his victim and remorse for
17 his actions. This may be a significant step on the road to rehabilitation.[164] Similarly, forgiveness
18 or reconciliation may be important steps along the road to an offender's rehabilitation and
19 reintegration. If the sentencing system requires or allows offenders to make recompense to
20 victims, this may also be a step toward rehabilitation through the making of amends.

21 Rehabilitation and specific deterrence are closely related, if not the same thing. Victims'
22 participation in the sentencing and corrections process may be one important means of furthering
23 these blended goals. The painful experience of confronting their victims may help motivate some
24 offenders to avoid being on the receiving end of such emotions in the future. The underpinnings
25 of victims' anger toward offenders often includes an expressed desire to "teach them a lesson."

26 As with sentence proportionality, victims' input toward the goal of rehabilitation can only be
27 expected to go so far. The selection of rehabilitative sanctions depends largely on facts unknown
28 to victims. The information needed may include risk and needs assessments of offenders,
29 empirical evidence about the effectiveness of specific programs for discrete categories of
30 offenders, and resource constraints such as the need to save program slots for persons with the

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[163] Later in this Draft, the Reporters propose that some of the language referred to above should be changed before the Code reaches final approval. For now, the discussion is based on § 1.02(2) as approved in Tentative Draft No. 1 (2007).

[164] See Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Right (2002), at 338; Julian V. Roberts & Edna Erez, Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements, 10 Intl. Rev. of Victimology 223, 226 (2004).

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most acute needs. Lacking relevant information, victims should not be invited to speak to the selection of rehabilitative sanctions.

Incapacitation

Victims can often provide information concerning their own vulnerability to future injury at the hands of this offender and help determine incapacitative steps that might address this vulnerability. The terms of a no-contact order, for example, would be difficult to craft without hearing from the victim. When incapacitation policy focuses on the danger of revictimization, therefore, victims should be given an informational role.

For incapacitation analysis that focuses on prospective victims *in general*, the victim of the instant offense probably has less to say. It cannot be said that the informational role is always zero, however. Perhaps facts surrounding a current offense will suggest how the defendant might pose similar dangers to others in the future, which is information that might aid the sentencing court in choosing an appropriately disabling punishment.

As with other system goals, information provided by crime victims can only be one portion of the incapacitation calculus. Victims should not be heard on the ultimate question of what punishment is needed to address incapacitative concerns.

General Deterrence

Victims have no informational role here, and there is probably no agency role, either. The argument in favor would be as follows: When victims play an agency role in dispensing pain to offenders through their impact statements, this can be considered a part of overall sentence severity. Severity, in turn, may be a part of a policy to deter the general public. Prospective criminals (other than the offender) might be influenced by the threat that their victims would someday have power to cause them emotional pain—or, more exactly, this consideration might be one factor in their overall calculation of costs and benefits before deciding whether to commit an offense.

The Code requires that there must be at least a reasonable basis in fact for any attempt to realize utilitarian goals through criminal sentences, see Tentative Draft No. 1 (2007), § 1.02(2)(a)(ii). Research suggests that incremental increases in the severity of punishments do not bring about greater deterrent effects in the community at large.[165] On current knowledge, the marginal increase in severity associated with a victim impact statement cannot be expected to have a general deterrent effect.

[165] For a survey of the literature, spanning criminology to economics, see Cheryl Marie Webster and Anthony Doob, Searching for Sasquatch: Deterrence of Crime Through Sentence Severity, in Joan Petersilia and Kevin R. Reitz, The Oxford Handbook of Sentencing and Corrections (2012).

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Victim Restoration

Later in this draft, the Reporters recommend that the words "restoration of crime victims and communities" be removed from the Code's statement of the general purposes of sentencing, to be replaced with the goal of "restitution to crime victims," see § 1.02(2), Reporters' Proposed Revisions and Comment *a*. In the event the Reporters' recommendations are not accepted, then the "restoration" language in § 1.02(2) must be considered when weighing victims' roles in the sentencing process.

A policy of restoration certainly supports procedures for victim restitution for economic losses, which the Code addresses in a dedicated provision, see § 6.04A (this draft). It may also include a victim's right to be free from revictimization—or the fear of revictimization—at the offender's hands. Both are definable outcomes. Further than this, restoration's beginning and end points are not self-evident. In most cases, victims can never be restored to the position they were in before the crime was committed. The best reading of "victim restoration" in § 1.02(2) is probably that it makes allusion to the many freestanding interests that victims have expressed when making claims on the sentencing and corrections system. These are considered at length in the following section.

Victims' Freestanding Claims on the Sentencing System

Alongside substantive goals, American criminal-justice systems recognize a congeries of procedural values that may be claimed by persons who choose or are forced to participate in legal proceedings.[166] For defendants, many of these are rooted in the federal and state constitutions, such as the right to counsel and protections against self-incrimination and double jeopardy. Other procedural interests are afforded to defendants as a matter of subconstitutional law, such as the attorney–client privilege. At one time, many of defendants' procedural rights flew under the banner of "fundamental fairness"—and it has been suggested that considerations of "fairness" to crime victims place demands on the criminal-justice system, as well.[167]

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[166] See Robert G. Bone, Making Effective Rules: The Need for Procedure Theory, 61 Okla. L. Rev. 319, 329-330 (2009) ("I take it as given that whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law.").

[167] See President's Task Force on Victims of Crime, Final Report (1982), at 77 ("When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak."). Paul Cassell argues as follows:

> [T]he defendant is allowed to speak at sentencing because this opportunity is critical to the legitimacy of the proceeding. We allow defendants to speak at sentencing to "assure the appearance of justice and to provide a ceremonial ritual at which society pronounces its judgment." By the same token, allowing victims the same opportunity assures perceived fairness. In other words, victim impact evidence is appropriate not merely because defendants have this opportunity; rather, it is appropriate for the *same reason* as defendants get it.

6 Ohio State J. of Crim. L. at 625.

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1 As noted earlier, rules that respond to the procedural claims of victims will not necessarily
2 align with the criminal law's substantive purposes. That tension is a familiar feature of many of
3 defendants' procedural rights. For example, In re Winship's command that all elements of
4 offenses must be proven beyond a reasonable doubt can impede the retributive and utilitarian
5 purposes of the justice system when it results in a guilty offender going free (or, in Blackstone's
6 famous bromide, when 10 criminals go free).[168] Even so, few people challenge the wisdom or
7 correctness of *Winship*. Most agree that the case rests on compelling considerations of procedural
8 fairness and the need to preserve the legitimacy of the criminal- adjudication system as a
9 whole.[169]

10 What are the freestanding interests of crime victims that should be embraced when creating
11 the rules to be applied at sentencing proceedings? ("Freestanding" in the sense that they do not
12 derive from the traditional goals of criminal sentencing.) Looking to the national conversation of
13 victims' rights, as captured in government reports, scholarly writings, publications and websites
14 of victims' advocacy groups, and constitutional and statutory language, a number of claims are
15 articulated again and again.[170] It is argued that victims have entitlements to be treated with
16 respect and dignity, to be compensated for their losses, to be healed and restored, to be taken
17 seriously, to have themselves and their experiences recognized as important, to receive
18 recognition of their suffering, to be notified, to be present, to participate, and to be heard in
19 proceedings that affect them, and (alternatively) to elect not to participate in the process if that is
20 their choice. It is also said that victims have interests in privacy, confidentiality, satisfaction,
21 recovery, restoration, closure, reconciliation with the offender (when that is a victim's choice),
22 therapy, primacy, empowerment, equal rights with defendants, vindication, and expeditious
23 prosecution of their cases.[171]

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[168] 397 U.S. 358 (1970). See also William Blackstone, Commentaries, Book 4, Ch. 27 (1765-1769) ("all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."), http://www.lonang.com/exlibris/blackstone/bla-427.htm (last visited August 25, 2014).

[169] Procedural values that are extrinsic to the goals of a particular litigation are often justified on deontological grounds. Such arguments are persuasive, or not, depending on how many people find that they resonate with their own moral, ethical, or religious beliefs.

[170] It is notable that similar interests come up in very different contexts. For example, the right to present a victim impact statement at death-penalty proceedings is defended on some of the same grounds as those put forward to justify experiments in the direction of lenity, such as victim–offender mediation and restorative-justice conferences. Whatever theory of victims' interests the Code develops, it must operate with consistency in a number of settings.

[171] See, e.g., Peggy M. Tobolowski, Mario T. Gaboury, Arrick L. Jackson, and Ashley G. Blackburn, Crime Victim Rights and Remedies, Second Edition (2010), at 108; Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio State J. of Crim. L. 611, 622-623 (2009) ("The benefits that crime victims derive from delivering victim impact statements may be one facet of a larger movement: the "therapeutic jurisprudence" movement. … The goal is to consider ways in which legal processes might be made agents of therapeutic change. Giving crime victims the chance to deliver impact statements may well be a good example of such favorable benefits from the process itself.") (footnote omitted); Mary Margaret Giannini, Equal Rights for Equal Rites?: Victim Allocution, Defendant

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1 Many of these receive widespread approval as sympathetic and appropriate demands. On
2 grounds of fairness to victims, many believe the legal system should try to honor them, and that
3 it would be heartless or delegitimizing for the law to brush them aside entirely. Such broad
4 agreement conceals much uncertainty, however, at the level of application. We must analyze the
5 asserted interests individually to see where they reliably lead. Some of the above interests win
6 quick consensus, some provoke heated controversy—and there are some extrapolations of
7 victims' interests that strike nearly everyone as wrong-headed.[172]

Allocution, and the Crime Victims' Rights Act, 26 Yale L. & Pol'y Rev. 431, 452 (2008) ("By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocute signals both society's recognition of victims' suffering and their importance to the criminal process."); Marilyn Peterson Armour & Mark S. Umbreit, Exploring "Closure" and the Ultimate Penal Sanction for Survivors of Homicide Victims, 19 Fed. Sent. Rptr. 105 (2006); Erin Ann O'Hara, Victims and Prison Release: A Modest Proposal, 19 Fed. Sent. Rptr. 130 (2006) (arguing from, inter alia, interests of "victim control [of] at least a piece of the consequences of crime," victims' need to seek "revenge," restoration of victims' "moral stature in the community," victim re-empowerment, and victim healing); Edna Erez, Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings, 40 Crim. L. Bull. 483 (2004); Douglas Beloof, The Third Model of Criminal Process: The Victim Participation Model, 1999 Utah L. Rev. 289, 295-296 ("The primacy of the individual victim [reflected in values of fairness, dignity, and respect] is the value underlying the Victim Participation Model"); Edna Erez, Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice, 1999 Crim. L. Rev. 545, 550-551; Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1686 (1992) ("[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity."); President's Task Force on Victims of Crime, Final Report (1982), at 114 (proposing amendment to federal constitution providing that "the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."); Ohio Const., Art I, § 10a (granting crime victims in Ohio with constitutional rights to "be accorded fairness, dignity, and respect in the criminal justice process" and rights to "notice . . . protection and to a meaningful role in the criminal justice process."). From the procedural justice literature, Michael O'Hear argues that certain attributes of legal processes are associated with perceptions of fairness and legitimacy on the part of participants, and that these observations may be applied when framing victims' rights in the criminal process:

> Those attributes include (1) whether the people involved had an opportunity to tell their side of the story ("voice"); (2) whether the authorities were seen as unbiased, honest, and principled ("neutrality"); (3) "whether the authorities involved [were] seen as benevolent and caring" ("trustworthiness"); and (4) "whether the people involved [were] treated with dignity and respect."

Michael M. O'Hear, Plea-Bargaining and Victims: from Consultation to Guidelines, 91 Marquette L. Rev. 323, 326-327 (2007). For a general discussion of the theory of procedural justice, see Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, in Michael Tonry ed., 30 Crime & Justice 283 (2003).

[172] The discussion in this part of the Memorandum will often rely on such statements as "most people would agree that …" or "many believe that …" The Reporters consider this mode of analysis to be unavoidable. The freestanding interests catalogued above are all deontological, or mixed deontological-instrumental. That is, some claims are asserted simply because they are "the right thing to do" for crime victims, even though no further goal than doing "the right thing" is expected. Other types of claims aim toward future good effects, such as victim "healing" and "compensation." These are always paired with arguments that the pursuit of such ends on behalf of crime victims is morally "right" or even morally required. Thus, one profound difficulty in the debate of freestanding victims' claims

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1 *The Problem of Indeterminacy*

2 Among the victims' interests that resonate as legitimate with most people, there tends to be a
3 quality of subjectivity and even shapelessness. They have no beginnings or ends; no floors and
4 no ceilings. While there may be easy agreement that a particular interest exists and deserves
5 some degree of accommodation, there are no agreed-upon criteria to measure when a given
6 interest has been appropriately honored.

7 For example, "empowerment" of crime victims could be interpreted to mean that victims
8 have the right to play a substantive role in sentencing decisions, but their input should not be the
9 main driver of which penalties are chosen. Perhaps, under this interpretation, their right to
10 influence sentences should be confined to input that aligns with the sentencing system's goals.
11 This is one possible ballpark for an acknowledged interest in victims' empowerment.

12 On the other hand—the literal meaning of the word empowerment could be taken much
13 further, to mean that victims themselves should be the sentencing decisionmakers, or should
14 control some portion of the decision, or should have a veto over the judge's sentence. Victim
15 empowerment could even mean that the victim should be put in a position of exercising power
16 over the offender (the power to harm) that mirrors the offender's behavior in disempowering and
17 injuring the victim. Very few people would be willing to go this far—yet proposals going some
18 distance in this direction can be found in the current literature of victims' rights.[173]

19 Let us also consider victims' interest in being treated with dignity. No one is against that,
20 but how far does it go? The right to dignity does not appear to mean, for example, that everyone
21 in the courtroom must stand when the victim enters, even though we often believe such a
22 formality is appropriate to the dignity of judges. If a victim were to insist upon such a ritual for
23 her sense of dignity, most people would answer that she has every right to dignity, but her
24 demand goes too far. On the other hand, in most people's view, a right to dignity would certainly
25 include the right to be treated with politeness, and not brusquely or in a demeaning way, by
26 courtroom actors. Courtesies like a reserved seat in the courtroom for the sentencing hearing, or

is that they cannot be processed by human beings without each person falling back on their moral beliefs and intuitions. In a pluralistic society, this produces many different "right" answers. It also means that an honest disagreement can degenerate into moralistic condemnation of the person who disagrees with you. To move forward in the face of these difficulties, it is of course necessary to disallow moralistic name-calling, but also to ask what "most people" or "nearly everybody" would think as a starting point for further argument (for example, inquiring into why they would think that, and how a particular moral intuition lines up with others we feel great confidence in). Cf. Michael Moore, Moral Reality, 1982 Wis. L. Rev. 1061 (1982).

[173] See Erin Ann O'Hara, Victims and Prison Release: A Modest Proposal, 19 Fed. Sent. Rptr. 130 (2006) (arguing that "the State should set incarceration periods sufficiently high so that the community feels comfortable about the prospect that the victim might forgive a portion of that sentence. Then, the victim should be granted control over 10 percent of the convict's sentence. When the convict either (1) has 10 percent of his sentence remaining; or (2) has become eligible for parole, the victim should be given the option to either forgive or impose her 10 percent of the punishment."); George P. Fletcher, With Justice for Some: Victims' Rights in Criminal Trials 248 (1995) (suggesting that crime victims should be given the right to veto proposed plea agreements).

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1 scheduling the hearing to take the victim's calendar into account, are relatively easy to justify on
2 grounds of dignity. To some, a dignity interest also suggests that the rules of cross-examination
3 of victims should be construed as strictly as possible to prevent ad hominem attacks, or
4 attempted character assassination. Perhaps at a sentencing hearing, for example, the defendant's
5 cross could be limited to factual portions of the victim's impact statement. Respect for victims'
6 dignity in this context takes the form of a rule of construction, short of collision with the
7 Confrontation Clause. The test is whether the proposed procedural rule takes dignity "too far."

8 The indeterminacy problem recurs in debate of victims' rights "to be heard" or more
9 generally, "to participate." Nationally, there appears to be overwhelming support in favor of a
10 victim's right to make an in-court statement at a judicial sentencing hearing, or to provide a
11 written impact statement that will be seen by the judge, see § 7.07C (this draft). Every state now
12 provides some version of that right. Again, however, the right to be heard may be asserted more
13 forcefully than this by some victims, and system designers and officials must decide how to
14 answer those claims. What if a victim desires to make a three-hour statement at a sentencing
15 hearing, on the ground that only a small part of what he has to say will be "heard" if he is limited
16 to a shorter time? What if family members in a manslaughter case want to show an emotionally
17 charged video that celebrates the life of the deceased victim? As with dignity interests considered
18 above, it is necessary for someone to decide what should be allowed and what "goes too far."
19 One approach to questions at this level is to say that sentencing courts must simply exercise
20 discretion. Another approach, endorsed in § 7.07C(6) & (7) of the Code (this draft), is to set
21 down rules of relevance for what subject matters victim impact statements may address. Rules of
22 this kind at least provide grounding for the courts' discretionary judgment calls.

23 At a higher level of procedural design, it could be argued that victims' rights to be heard and
24 "to participate" require that victims be made full-fledged parties to criminal cases. "Respect" for
25 victims could be taken to mean that officials must solicit victims' views at every procedural
26 stage, listen to those views, take them into respectful account when making their official
27 decisions, and allow themselves to be swayed at least some of the time by the victims' opinions
28 that they are pledged to respect. Most people in our contemporary legal culture appear to agree
29 that this is inappropriate. No state law goes so far. However, victims *were* formal parties to
30 criminal cases in America a little over a century ago. Today, some U.S. jurisdictions allow
31 victims to take appeals from some decisions of criminal-court judges (usually decisions asserted
32 to have violated victims' constitutional or statutory rights). An Alaska statute goes farther and
33 authorizes victims to appeal the sentence itself—although the appellate courts in the state have so
34 far ruled that this cannot in fact happen.[174]

[174] See Alaska Stat. § 12.55.120(f) ("The victim of the crime for which a defendant has been convicted and sentenced may file a petition for review in an appellate court of a sentence that is below the sentencing range for the crime"); Cooper v. District Court, 133 P.3d 692 (Alaska App. 2006) (holding that victims should have no right to appeal judicial sentencing decisions).

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1 Without belaboring the argument, a similar problem recurs for many other commonly
2 asserted victims' interest or rights. Satisfaction, healing, closure, and vindication are not
3 meaningless terms, to be sure, but they describe relative states rather than identifiable goals, and
4 can be expected to mean widely different things to different victims. Even if we were to agree
5 that these were appropriate aspirations for the system—and, in the case of the interests
6 mentioned in this paragraph, it is doubtful such agreement could be had—translation into hard
7 rules and case-specific decisions would still be an uncertain process.

8 *Policy Analysis for Recognition and Tailoring of Victims' Rights in the*
9 *Sentencing and Corrections Process*

10 The fact that many victims' freestanding interests are characterized by subjectivity and
11 indeterminacy does not mean they are unimportant or should be relegated to the margin of policy
12 consideration. We do not dismiss other important values on these grounds. The fundamental goal
13 of proportionality in sentencing suffers from most of the indeterminacy objections that have been
14 mentioned above.[175] Claims of "due process" and "fundamental fairness" for criminal defendants
15 entail the same roster of defects.

16 What is needed is a multi-step analysis that may be used to resolve particularized claims that
17 an asserted victims' right should be recognized at a specific stage of the sentencing process, and
18 to decide how far the system should go in recognition of that interest. Such an analytic is
19 suggested below. It is not put forth as a constitutional "test." The setting for discussion is this:
20 Someone has come forward with an argument that victims possess one or more articulable
21 interests in the sentencing process, and has made a specific proposal about how those interests
22 should be reflected. Policymakers must respond.

23 *First Step: Interest Identification*

24 The first step is always to identify what victims' interests are asserted and evaluate their
25 legitimacy. For instance, lawmakers or rules-drafters in a particular state might come to up-front
26 agreement that claimed interests in "vengeance" or "seeing that the most severe punishment is
27 meted out at every stage" should not be given traction. This level of debate may be one of moral
28 acceptability, or may focus on the coherence or realizability of the claimed interest. For example,

[175] See Franklin E. Zimring and Gordon Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime (1995), ch. 4 (failing to find meaningful proportionality limitations on incapacitation policy); Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. Crim. L. & Criminology 1293 (2006) (arguing that "[D]esert has proven more illimitable than limiting. Conceptions of desert are . . . elastic: they easily stretch to accommodate and approve increasingly severe sentences"); Kevin R. Reitz, The Illusion of Proportionality: Desert and Repeat Offenders, in Julian V. Roberts and Andrew von Hirsch eds., Previous Convictions at Sentencing: Theoretical and Applied Perspectives (2010) (arguing that measures of proportionality in sentencing break down in the majority of all cases, when applied to repeat offenders and offenders with multiple convictions).

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1 although a staunch proponent of victims' rights in general, Professor Paul Cassell has argued that
2 an interest in "closure" for victims may be illusory.[176]

3 Most of the victims' interests that have been mentioned in this Memorandum would
4 probably survive such a preliminary evaluation for facial validity.

5 *Positive-Sum Cases*

6 The next step should be to ask whether the proposal is sustainable on grounds of the
7 sentencing system's core policies, such as the rendering of proportionate sentences, offender
8 rehabilitation, the incapacitation of dangerous offenders, and so on.

9 For example, the sponsors of restorative-justice conferences argue that such programs do a
10 better job (in some settings) of recidivism reduction than standard criminal-court dispositions.
11 Proponents have worked to amass an evidence-based brief to this effect.[177] They also suggest
12 that victims' interests in restitution, satisfaction with their treatment in the process, acceptance of
13 penalties imposed, and reduced fear of revictimization may also be advanced by well-structured
14 restorative-justice programs.[178] Finally, they contend that defendants' interests are not
15 compromised in restorative-justice proceedings, but are better served than in the traditional
16 criminal-sentencing process.[179]

17 Without launching a debate of these propositions (which the Reporters find reasonably well-
18 supported on current evidence), the main point for present purposes is that some advocates of
19 new sentencing procedures claim that the goals of the criminal-justice system and the interests of
20 defendants can be advanced side-by-side with the asserted interests of crime victims.[180] If

[176] Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio State J. of Crim. L. 611, 623 (2009) ("Occasionally the claim is made that victim impact statements will automatically bring 'closure' to victims from a crime. It is not clear that 'closure' ever really occurs after a violent crime—especially when extreme violence is at issue."); see also Michelle Goldberg, The "Closure" Myth, Salon, Jan. 21, 2003 ("No psychological study has ever concluded that the death penalty brings 'closure' to anyone except the person who dies . . . .").

[177] Lawrence W. Sherman and Heather Strang, Restorative Justice as Evidence-Based Sentencing, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (2012).

[178] See John Braithwaite, Restorative Justice and Responsive Regulation (2002) (collecting studies).

[179] A trickier situation is when the asserted right advances some of the goals of the sentencing system, but conflicts with others. For example, restorative-justice programs may improve the prospects of offender rehabilitation and increased understanding on the part of the offender of the harm he has caused, but may subtract from the uniformity and proportionality of sentences when compared one with another. The purposes of sentencing frequently come into conflict, even when victims' rights are not being considered in the equation. Thus, the question cannot be whether an asserted victims' right is supported by *all* substantive policies of criminal sentencing, but whether it is sufficiently supported by those policies that it would be justified in its own right without resort to an additional claimed interest on victims' part.

[180] See Michael M. O'Hear, Plea-Bargaining and Victims: from Consultation to Guidelines, 91 Marquette L. Rev. 323, 329 (2007) ("Procedural justice for victims can thus advance several well-recognized public ends of the criminal justice system, including effective crime control, accurate guilt determination, and proportionate

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policymakers find that a positive-sum case has been plausibly made, then the proposal should move ahead—subject to other potential objections such as financial cost and administrability.

For positive-sum cases, differences of opinion over "how far" a given victims' claim should be taken in statute or court rule must focus primarily on how the new rule can best be shaped to serve the substantive policies that support it. If the claimed procedural right exceeds those justifications, then it must be defended on other grounds.

Cases with No Policy Costs

Another group of relatively easy cases are those in which the asserted victims' right may be accommodated with no cost or benefit to the substantive policies of the sentencing system or procedural rights belonging to defendants or others. Now we are dealing with proposed rights that are based on assertions of freestanding victims' interests.

If policymakers are satisfied that no meaningful intrusions on other important policies will occur, then consideration of the claimed victims' interest should go forward.

The extent to which an interest of this type should be expressed in a procedural rule should reflect the perceived strength and merits of the freestanding interest supporting it, and outside constraints such as financial costs.

Zero-Sum Cases

The case in favor of an asserted victims' procedural right becomes considerably more difficult if the claim cannot be justified as consonant with system purposes and defendant's preexisting rights, or neutral, but affirmatively *conflicts* with one or more of those considerations. A sufficiently compelling claim on behalf of victims might justify such a trade-off.

For example, many U.S. jurisdictions place victims' rights to restitution above society's interest in the successful reintegration of offenders. In these jurisdictions, a victim restitution order is mandatory even if the obligation would interfere with an offender's ability to establish himself in the law-abiding community and economy. Victims have strong moral claims to restitution for their injuries, but society's interest in public safety militates in favor of helping offenders get back on their feet financially, at least to the point of reasonable subsistence for their own needs and those of their families.[181] Offenders who achieve this modest degree of

punishment."). For an example of a sustained positive-sum argument, see Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio State J. of Crim. L. 611 (2009).

[181] A similar collision of incommensurable interests occurs in the debate of risk assessment and selective incapacitation, when one is forced to weigh the moral claims of prospective victims (to be protected against foreseeable victimizations that society has the statistical knowledge to prevent) against the moral claims of convicted offenders (some of whom will suffer needlessly when the predictions as applied to them are wrong—the inevitable "false positive" problem). See § 6B.09 (Tentative Draft No. 2, 2011).

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success can be expected to reoffend less often than offenders who remain in a persistent state of "brokeness."[182]

This precise debate provoked considerable disagreement within the Institute, and was resolved in a close vote at the 2014 Annual Meeting, see § 6.04A and Reporters' Note to Comment *e* (this draft) (transcript of discussion at Annual Meeting).

In the Reporters' view, the bar should be placed high before substantial diminution of core criminal-justice goals or previously recognized rights of defendants should be countenanced. Ordinarily in this setting, accommodations to victims' interests should not be made. In the revised Code itself, see §§ 6.04A and 7.07C (this draft), zero-sum claims on behalf of victims have been given expression only when the prejudice to societal interests or defendants' rights is minimal, or can be mitigated through procedural safeguards.

****

The values analysis recommended in this Memorandum leaves much room for moral argumentation and reasonable disagreement. At the extremes, some claims will be easy to resolve, when they command quick consensus one way or the other. Unfortunately, there is a broad middle ground between claims of victims' rights that most people will agree upon as clearly justified, and those seen as clearly excessive.[183] Within this middle territory, debate must be had—and a process established for who gets the last word on the question. For some issues, identification of the ultimate decisionmaker will be as far as we can go. For example, many operational questions must be placed in the discretion of trial courts, subject to abuse-of-discretion review in the appellate courts.

The policy analytic recommended here must be undertaken separately in every context in which a claim on the system is asserted on behalf of crime victims.[184] Even the most undisputed of victim interests do not apply equally at all decision points throughout the sentencing and corrections chronology. For example, the right to present a victims' impact statement at judicial sentencing is now recognized in every state. In contrast, the right of victims to make statements at parole-release hearings is far from universal.[185]

[182] The term "brokeness" is used by Ronald P. Corbett, The Burdens of Leniency: Probation in the "Tough on Crime" Era, U. Minn. L. Rev. (forthcoming 2015).

[183] Cf. Alasdair MacIntyre, After Virtue: A Study in Moral Theory, Third Edition (2007); Richard A. Posner, The Problematics of Moral and Legal Theory (1999).

[184] We credit the work of Julian Roberts with impressing this principle most indelibly on our minds. See Julian V. Roberts, Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole, 38 Crime & Just. 347-412 (2009).

[185] In a later section, this Memorandum raises the question of what procedural rights, if any, victims should have in "second-look" prison-release decisions under § 305.6 (Tentative Draft No. 2, 2011), which is the Code's closest analogue to a parole-release determination.

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Even when focusing on a single decision point, victims' interests may vary case-by-case. When a judge considers early termination of probation supervision because of the probationer's good record of compliance with sentence conditions, most victims will not have relevant information or an obvious agency role.[186] On the other hand, if one condition of probation is a no-contact order, the victim may have more than one interest in the early termination decision—usually an interest in notification, and probably an interest in providing information to the court if there are factual grounds to believe that the offender may pose a continuing risk to the victim personally.

How the Analysis Is Used in This Draft

Council Draft No. 5 applies the analysis in this memorandum in new drafting for several provisions: victim restitution (§ 6.04A); victims' rights at judicial sentencing proceedings (§ 7.07C); sentence modification (§ 7.08); appellate review of sentences (§ 7.09); and modification of long-term prison sentences (§ 305.6).

Victim Restitution

In contrast with many other asserted victims' interests, an interest in restitution does not suffer from a high degree of indeterminacy. While the scope of losses that should be compensable in criminal proceedings may be debated, the outcome sought is not an abstraction. Partly for this reason, and partly due to broad consensus among American criminal-justice systems, the Reporters recommend in this draft that "victim restitution" be added to the general purposes of the sentencing system as expressed in § 1.02(2). In addition, cogent arguments exist that victim restitution orders can sometimes further other substantive goals of the system, such as offender rehabilitation and reintegration.

On the other hand, victim restitution, like all economic sanctions, can impair offenders' efforts to "get back on their feet" in the legitimate economy and law-abiding society. Victims' restitutionary interests may thus conflict with offender reintegration and public-safety goals. Section 6.04A must navigate this conflict. Following debate, and in accordance with the vote of the membership at the Institute's 2014 Annual Meeting, § 6.04A has been drafted to prohibit restitution awards when they would prevent offenders from being able to meet their own reasonable financial needs and those of their dependents. See § 6.04A(6). When core interests of public safety and recidivism reduction do not conflict with an award of victim restitution, the Code places priority on restitution over all other economic sanctions that a criminal court may impose, see Tentative Draft No. 3 (2014), § 6.04(10) ("If the court imposes multiple economic

[186] This is not to say that crime victims never have cognizable interests in procedures for early termination of community supervision. The important point is that the justifiable contours of victims' rights of participation must be separately evaluated at each stage of the sentencing process.

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sanctions including victim [restitution], the court shall order that payment of victim [restitution] take priority over the other economic sanctions").[187]

Sentencing Proceedings

The new Model Penal Code provision on victims' rights at sentencing proceedings, § 7.07C (this draft), reflects a policy conclusion that victims' roles should be limited to participation that furthers the purposes of sentencing in § 1.02(2). In this setting, granting victims an informational and agency role rooted in traditional purposes does "double duty," simultaneously advancing oft-asserted victims' interests in presence, participation, being treated with dignity and respect, and having their views heard. When a given right can be crafted so that system purposes and victims' freestanding interests overlap, the case for recognition of the right is especially strong.[188]

Out of respect for victims' dignity and right to choose not to participate, § 7.07C gives victims several options of how to present their statement, including the option to make no statement. Under § 7.07C, victims are not compelled to participate in the sentencing process even when the purposes of the system would be advanced by their participation.

Similarly, victims are given choices about their degree of participation, and their exposure to questioning. A victim who chooses not to offer sworn testimony cannot be cross-examined. An unsworn victim statement, however (sometimes called "victim allocution"), cannot serve as evidence in support of factual conclusions not already established on the record before the sentencing court. If a victim intends his or her statement to supply new and contested factual information that will become part of the judge's decision, then the victim must testify. Any other rule would work a serious derogation of defendants' rights to challenge factual testimony offered against them.

In implementation of § 7.07C, the Code envisions that reasonable latitude should be given to victims who stray from the strict relevancy requirements of what may be contained in their impact statements. In other words, courts need not police the relevancy requirements with great strictness. When an impact statement goes beyond permissible boundaries, the Code trusts sentencing judges to separate what is relevant from what is not. By not policing tightly at the sentencing hearing itself, the victim is spared the indignity of frequent objections and arguments over what may and may not be said. The precise amount of latitude that should be given for overbroad impact statements is a matter for the sentencing court's discretion.

[187] The language quoted in the parenthetical has been corrected to reflect the change in the Code's terminology, substituting the word "restitution" for "compensation." See § 6.04A and Comment *a* (this draft).

[188] See Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio State J. of Crim. L. 611 (2009) (arguing that victims' right to offer impact statement at sentencing serves both traditional sentencing goals and victims' independent interests).

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Sentence Modification

This draft's new provision for sentence modification, § 7.08, is intended to cover circumstances in which it is necessary "to correct an arithmetical, technical, or other clear error" in an original sentence, to take account of the defendant's "substantial assistance in investigating a crime or prosecuting another criminal case that was unknown to the court, or whose full value was not known, at the time of sentencing," and to allow for retroactive application of changes in sentencing laws or guidelines that lessen the severity of authorized sanctions imposed on offenders. Victims have no informational or agency roles to play in such decisions, assuming they have had opportunity to participate fully in the original sentencing process. Victims, however, are entitled to notice of the outcome of sentence modification proceedings whenever an original sentence is modified, see § 7.08(4).

Appellate Sentence Review

Similarly, the revised Code recognizes no substantive interest on the part of victims to participate in appeals from trial-court sentencing decisions. To the extent that victims have contributed to the judicial sentencing process, they have done so as fact witnesses or quasi-fact witnesses (if they have chosen to make unsworn statements). Review of the factual basis for a trial court's decision is almost always based on the record below, with no provision to expand that record by the taking of new testimony. As with trial judges' modification of their own sentencing decisions, however, victims should be notified when a sentence has been reversed, modified, or vacated on appeal. Section 7.09(9) (this draft) so provides.

Modification of Long-Term Prison Sentences

In light of the approach taken to questions of victims' roles in the sentencing process, as outlined in this draft, it is necessary to make one important procedural change to a provision that was approved in prior drafting. In Tentative Draft No. 2 (2011), § 305.6—the so-called "second-look" provision—the Code recommends that legislatures create a process for reconsideration of long-term prison sentences after the passage of 15 years (or less, with good-time credits) for adult offenders. The second-look mechanism engages after 10 years for offenders who were under the age of 18 at the time of their offenses, see Tentative Draft No. 2, § 6.11A(h). Once triggered, § 305.6(4) envisions a decisional process that closely resembles a de novo sentencing decision:

> **Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence.**

Given the theoretical framing of § 305.6, the Reporters now recommend that the original version of that Section be amended to provide as follows:

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Notice of sentence-modification proceedings should be given to victims, if they can be located with reasonable efforts, and to the relevant prosecuting authorities. Any victim's impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker. Victims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.

Minor Adjustments in Previously Approved Provisions

The Reporters have reviewed other provisions approved in the first three Tentative Drafts to determine how they may be affected by this draft's new approach to victims' rights in sentencing processes. In several instances, the Reporters recommend no changes, or cosmetic changes. These are as follows:

Minor changes are needed in §§ 6.02A and 6.02B dealing, respectively, with deferred prosecutions and deferred adjudications. As originally drafted, § 6.02A(4) provided that "the government shall make a good-faith effort to notify the victim of the conditions of the proposed deferred-prosecution agreement." Section 6.02B(4) stated that, "[b]efore deciding to grant deferred adjudication, the court shall direct the prosecution to make a good-faith effort to notify the victim, if any, of any judicial proceedings that may occur in connection with the motion, and provide an opportunity for comment." The Reporters now suggest that the language referring to "good-faith effort" to notify victims be changed to "reasonable efforts," to comport with more recent drafting, see, e.g., § 7.07C(2) (this draft) ("the prosecutor shall make reasonable efforts to notify the victim of his or her rights under this Section"). This formulation is also far more common in current legislation nationwide.

Earlier drafting did not require that one member of a state's sentencing commission be a crime victim. Alternative provisions, intended to be illustrative of the roster of commission members, included one version in which a membership slot would be designated for a crime victim, and another version with no such designation. See Tentative Draft No. 1 (2007), § 6A.02 and Alternative § 6A.02. Alternative § 6A.02(2)(h) suggested that a commission might include one public member who is "a victim of a crime defined as a felony, and one of whom shall be a rehabilitated ex-inmate of a prison in the state." Although the private perspectives of victims and ex-offenders are not essential to the functioning of a commission, they bring potentially useful information to the commission's deliberative process. One important aspect of Alternative § 6A.02(2)(h), however, is to require balance in representation of such interest groups: if a victim is a required member of a commission, so should an ex-offender be a required member. The Reporters do not recommend changes in this earlier drafting.

In light of the changes proposed in this draft to § 305.6 (see above), the Reporters considered whether parallel changes were needed in other Sections affecting dates of release from incarceration, including Tentative Draft No. 2 (2011), § 305.1 (Good-Time Reductions of Prison Terms) and id., § 305.7 ("Modification of Prison Sentences in Circumstances of

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Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons"). In both instances, based on the values analysis recommended in this Memorandum, crime victims have little or no interest in participating in the decisional process, but states should provide for notice to victims when the terms of the original sentence are subject to change. The Section as originally drafted and approved included such a provision, see Tentative Draft No. 2, § 305.7(6)(b), so the Reporters do not suggest a substantive change.

Conclusion: Victims' Interest in Rigorous Policy Analysis

Crime victims will benefit from a rigorous value analysis of their claims on criminal-justice processes. In the absence of a solid foundation, the roster of asserted rights tends to proliferate beyond the system's ability to accommodate them. This has already occurred in some American jurisdictions, and is the product of a predictable dynamic. In the political branches, elected lawmakers have little incentive to resist any suggestion to adopt or expand the corpus of victims' rights, by statute or constitutional amendment. On the other hand, the "courtroom workgroup" of judges, lawyers, and court personnel have powerful motivation to see that crime victims' interests are met with as little time, trouble, and disruption as possible. In many parts of the country, the energy and resources that can be devoted to any aspect of a criminal case are already in desperate undersupply, before victims' needs are added to the equation. In the context of victims' rights, the result can be thin efforts in public relations—enough to generate the appearance of solicitude toward victims—without any genuine follow-through.

A prudential theory of victims' rights must therefore prioritize. For a functioning law of victims' rights to be a reality, those rights should be concentrated on the most important of victims' concerns, and those with strongest justification for inclusion in the criminal-justice process.

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APPENDIX C

MODEL PENAL CODE: SENTENCING

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1 **[*Replaces Article I, § 1.02(2), Articles 6 and 7, and Parts III*
2 ***and IV of the Model Penal Code (1962)*]**

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1 **ARTICLE 11. PRISON RELEASE; CORRECTIONAL**
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26 **Principles for Legislation [§ 305.8 in earlier drafting]**

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28 **[*Replaces Article I, § 1.02(2), Articles 6 and 7, and Parts III***
29 ***and IV of the Model Penal Code (1962)*]**

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APPENDIX D

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<u>§ 1.02(2). Purposes of Sentencing and the Sentencing System.</u>

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

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

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

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

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

(iv) to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct.

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

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

(ii) to produce sentences that are uniform in their reasoned pursuit of the purposes in subsection (2)(a);

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

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

(v) to ensure that all criminal sanctions are administered in a humane fashion;

(vi) to promote research on sentencing policy and practices, including the effects of criminal sanctions on families and communities; and

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

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§ 6.01. Grading of Felonies and Misdemeanors.

(1) Felonies defined by this Code are classified, for the purpose of sentence, into [five] degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree;

(d) felonies of the fourth degree;

(e) felonies of the fifth degree.

[*Additional degrees of felony offenses, if created by the legislature*.]

(2) A crime declared to be a felony by this Code, without specification of degree, is of the [least serious] degree.

(3) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code, for the purpose of sentence, shall constitute a felony of the [least serious] degree.

(4) Misdemeanors defined by this Code are classified, for the purpose of sentence, into [two] grades, as follows:

(a) misdemeanors; and

(b) petty misdemeanors.

§ 6.02. Authorized Dispositions for Individuals.

(1) Following an individual's conviction of one or more offenses, the court may sentence the offender to one or more of the following sanctions:

(a) probation as authorized in § 6.03;

(b) economic sanctions as authorized in §§ 6.04 through 6.04D;

(c) imprisonment as authorized in § 6.06;

(d) postrelease supervision as authorized in § 6.09; and

(e) unconditional discharge, if a more severe sanction is not required to serve the purposes of sentencing in § 1.02(2)(a).

[(2) The court may suspend the execution of a sentence that includes a term of imprisonment and order that the defendant be placed on probation as authorized in § 6.03 and/or satisfy one or more economic sanctions as authorized in §§ 6.04 through 6.04D.]

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(3) When choosing the sanctions to be imposed in individual cases, the court shall apply any relevant sentencing guidelines.

(4) The court may not impose any combination of sanctions if their total severity would result in disproportionate punishment under § 1.02(2)(a)(i). In evaluating the total severity of punishment under this subsection, the court should consider the effects of collateral consequences likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.

(5) Authorized dispositions under this Article include deferred prosecutions as authorized in § 6.02A and deferred adjudications as authorized in § 6.02B.

<u>§ 6.02A. Deferred Prosecution.</u>

(1) For purposes of this provision, deferred prosecution refers to the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions, with the exception of an agreement to cooperate in the prosecution of any criminal case.

(2) The purpose of deferred prosecution is to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction.

(3) When a prosecutor has probable cause to believe that an individual has committed a crime and reasonably anticipates that sufficient admissible evidence can be developed to support conviction at trial, the prosecutor may decline to charge the individual or dismiss already-filed charges without prejudice, and forgo prosecution completely, contingent on the individual's willingness to comply with specified conditions.

(4) When the prosecution offers to defer prosecution in a case involving an identified victim, the government shall make a good-faith effort to notify the victim of the conditions of the proposed deferred-prosecution agreement.

(5) Before agreeing to the terms of a deferred-prosecution agreement, an individual shall have a right to counsel.

(6) Entry of a deferred-prosecution agreement does not relieve the prosecuting agency of any duty to disclose exculpatory evidence or bar the individual from seeking otherwise discoverable information about the alleged crime.

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[(7) A deferred-prosecution agreement may be conditioned on an individual's consent to a tolling of any applicable statutes of limitations during the period of a deferred-prosecution agreement.]

(8) A prosecutor's office may seek the cooperation of [correctional and court-services agencies] to provide services and supervision for the execution of deferred-prosecution agreements, or may contract with qualified service providers. No assessments of costs or fees may be collected from the individual subject to the deferred-prosecution agreement in excess of actual expenditures incurred by the prosecutor's office in the case.

(9) The deferred-prosecution agreement should extend for a specified duration that is reasonable in light of the stipulated condition(s) and the potential charge(s) available for prosecution.

(10) A deferred-prosecution agreement may be presented to the trial court for approval if needed to secure funding for or access to agreed-upon programs or services. If the court approves the agreement, it may order any conditions or services, consistent with the agreement, that might be ordered for a defendant for whom adjudication is deferred pursuant to § 6.02B.

(11) If the terms of the deferred-prosecution agreement are materially satisfied, no criminal charges shall be filed in connection with the conduct known to the prosecution that led to deferred prosecution. Completion of the terms of a deferred-prosecution agreement shall not be considered a conviction for any purpose.

(12) A deferred-prosecution agreement may be terminated only when the individual materially breaches the terms of the agreement. When such a breach occurs, sanctions short of termination should be used when reasonably feasible.

(13) If a deferred-prosecution agreement is terminated pursuant to subsection (12), the prosecutor may file against the accused any charge supported by fact and law. An individual's failure to comply with the agreement should not bear on the severity of the ultimate charge pursued or sentence imposed.

(14) Each prosecutor's office shall adopt and make publicly available written standards for its use of deferred-prosecution agreements. The standards should address:

(a) the criteria for selection of cases for the program;

(b) the content of agreements, including the number and kinds of conditions required for successful completion;

(c) the grounds and processes for responding to alleged breaches of agreements, and the possible consequences of noncompliance; and

(d) the benefits afforded upon successful completion of agreements.

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(15) Each prosecutor's office shall maintain records and data relating to its use of deferred prosecution in a manner that allows for monitoring and evaluation of the practice while protecting the confidentiality of participants. Demographic information shall be maintained, including the economic status, race, gender, ethnicity, and national origin of individuals who participated in the program, or were offered the option of participating, and shall be matched against demographic information concerning crime victims, if any, in each case.

§ 6.02B. Deferred Adjudication.

(1) For purposes of this provision, deferred adjudication refers to any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction. Courts are encouraged to defer adjudication in ways consistent with this provision.

(2) The purposes of deferred adjudication are to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.

(3) The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(4) The court may defer adjudication upon motion of either party, or on its own motion. Deferred adjudication shall not be permitted unless the court has given both parties an opportunity to be heard on the motion and has obtained the consent of the defendant. Before deciding to grant deferred adjudication, the court shall direct the prosecution to make a good-faith effort to notify the victim, if any, of any judicial proceedings that may occur in connection with the motion, and provide an opportunity for comment.

(5) Deferred adjudication shall not be conditioned on a guilty plea but may be conditioned on an admission of facts by the accused.

(6) Deferred prosecution may be conditioned on a waiver of the right to a speedy trial during the period in which the conditions of deferred adjudication are being satisfied.

(7) As a condition of deferred adjudication, the court may order, separately or in combination, any condition that would be authorized under § 6.03, along with victim restitution.

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(8) If the defendant materially satisfies the conditions for deferred adjudication, the court shall dismiss the underlying charges with prejudice. A disposition under this Section shall not be considered a conviction for any purpose.

(9) If there is probable cause to believe a defendant who has been offered deferred adjudication has materially breached one or more conditions of deferral, the court may require the defendant to appear for a hearing, at which the defendant is entitled to the assistance of counsel.

(a) If, after hearing the evidence, the court finds by a preponderance of the evidence that a material breach has occurred, it may take any of the following actions:

(i) modify the conditions of deferral in light of the violation to address the offender's identified risks and needs; or

(ii) revoke the opportunity for deferred adjudication, and resume the traditional adjudicative process.

(b) When sanctioning a violation, the court should impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, in light of the purpose for which the condition was originally imposed.

(10) The sentencing commission shall develop guidelines identifying the kinds of cases and offenders for which deferred adjudication is a recommended disposition.

§ 6.03. Probation.

(1) The court may impose probation for any felony or misdemeanor offense.

(2) The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses.

(3) The court shall not impose probation unless necessary to further one or more of the purposes in subsection (2).

(4) When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court should consult reliable risk- and needs-assessment instruments, when available, and shall apply any relevant sentencing guidelines.

(5) For a felony conviction, the term of probation shall not exceed three years. For a misdemeanor conviction, the term shall not exceed one year. Consecutive sentences of probation may not be imposed.

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(6) The court may discharge the defendant from probation at any time if it finds that the purposes of the sentence no longer justify continuation of the probation term.

(7) For felony offenders, probation sanctions should ordinarily provide for early discharge after successful completion of a minimum term of no more than 12 months.

(8) The court may impose conditions of probation when necessary to further the purposes in subsection (2). Permissible conditions include, but are not limited to:

(a) compliance with the criminal law;

(b) completion of a rehabilitative program that addresses the risks or needs presented by an individual offender;

(c) performance of community service;

(d) drug testing for a substance-abusing offender;

(e) technological monitoring of the offender's location, through global-positioning-satellite technology or other means, but only when justified as a means to reduce the risk that the probationer will reoffend;

(f) reasonable efforts to find and maintain employment, except it is not a permissible condition of probation that the offender must succeed in finding and maintaining employment;

(g) intermittent confinement in a residential treatment center or halfway house;

(h) service of a term of imprisonment not to exceed a total of [90 days];

(i) good-faith efforts to make payment of victim restitution under § 6.04A, but compliance with any other economic sanction shall not be a permissible condition of probation.

(9) No condition or set of conditions may be attached to a probation sanction that would place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community.

(10) The court may reduce the severity of probation conditions, or remove conditions previously imposed, at any time. The court shall modify or remove any condition found to be inconsistent with this Section.

(11) The court may increase the severity of probation conditions or add new conditions when there has been a material change of circumstances affecting the risk of criminal behavior by the offender or the offender's treatment needs, after a hearing that comports with the procedural requirements in § 6.15.

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(12) The court should consider the use of conditions that offer probationers incentives to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the probation term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

§ 6.04. Economic Sanctions; General Provisions.

(1) The court may impose a sentence that includes one or more economic sanctions under §§ 6.04A through 6.04D for any felony or misdemeanor.

(2) The court shall fix the total amount of all economic sanctions that may be imposed on an offender, and no agency or entity may assess or collect economic sanctions in excess of the amount approved by the court.

(3) The court may require immediate payment of an economic sanction when the offender has sufficient means to do so, or may order payment in installments.

(4) The time period for enforcement of an economic sanction [other than victim restitution] shall not exceed three years from the date sentence is imposed or the offender is released from incarceration, whichever is later. If an economic sanction has not been paid as required, it may be reduced to the form of a civil judgment.

(5) When imposing economic sanctions, the court shall apply any relevant sentencing guidelines.

(6) No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.

(7) If the court refrains from imposing an economic sanction because of the limitation in subsection (6), the court may not substitute incarceration for the unavailable economic sanction.

(8) The agencies or entities charged with collection of economic sanctions may not be the recipients of monies collected and may not impose fees on offenders for delinquent payments or services rendered.

(9) The courts are encouraged to offer incentives to offenders who meet identified goals toward satisfaction of economic sanctions, such as payment of installments within a designated time period. Incentives contemplated by this subsection include shortening of a probation or postrelease-supervision term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

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(10) If the court imposes multiple economic sanctions including victim restitution, the court shall order that payment of victim restitution take priority over the other economic sanctions.

(11) The court may modify or remove an economic sanction at any time. The court shall modify an economic sanction found to be inconsistent with this Section.

§ 6.04A. Victim Restitution.

(1) The sentencing court may order that the offender make restitution to the victim for economic losses suffered as a direct result of the offense of conviction, provided the amount of restitution can be calculated with reasonable accuracy.

(2) The purposes of victim restitution are to compensate victims for injuries suffered as a direct result of criminal conduct and promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims.

(3) For purposes of this Section, a "victim" is any person who has suffered physical, emotional, or financial harm as the direct result of the commission of a criminal offense. If dead, incapacitated, or a minor, the victim may be represented by the victim's estate, spouse, parent, legal guardian, sibling, grandparent, significant other, or other lawful representative, as determined by the court.

(4) "Economic losses" under this Section include the cost of replacing or repairing property, reasonable expenses related to medical care, mental-health care, and reasonable funeral expenses.

(5) "Economic losses" under this Section do not include general, exemplary, or punitive damages, losses that require estimation of consequential damages, such as pain and suffering or lost profits, or losses attributable to victims' failure to take reasonable steps to mitigate their losses.

(6) The sentencing court shall take the financial circumstances of the defendant into consideration when deciding whether to order victim restitution under this Section and the amount of the order; and, if necessary to comply with § 6.04(6), the sentencing court shall order partial restitution to the victim or shall refrain from awarding restitution.

(7) When more than one victim has suffered economic losses as a direct result of the offense of conviction, the court shall determine priority among the victims on the basis of the seriousness of the losses each victim has suffered, their economic circumstances, and other equitable considerations.

(8) When the criminal conduct of more than one person has caused a victim's economic losses under this Section, including persons not before the court, the court shall set the amount of restitution owed by an individual offender to reflect his or her relative role in

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the causal process that brought about the victim's losses. In exercising its discretion under this subsection, the sentencing court should consider the following factors:

(a) the number of persons believed to have contributed to the victim's total economic losses;

(b) the degree to which the offender played a direct or major role, relative to other persons, in bringing about the victim's total economic losses; and

(c) any other facts relevant to the defendant's relative causal role in bringing about the victim's economic losses.

Joint and several liability for payment of the full amount of restitution may be imposed on an offender in the court's discretion, when reasonable in light of the factors in subsection (8)(a) through (c).

(9) The sentencing court shall determine the amount of economic losses by a preponderance of the evidence.

(10) A restitution order under this Section shall not preclude the victim from proceeding in a civil action to recover damages from the offender. Any amount paid to a victim by an offender under this Section shall be set off against any amount later recovered as compensatory damages by the victim in a civil proceeding against that offender. If the victim has recovered economic losses from a defendant prior to sentencing, the court shall give credit for that recovery when calculating any amount of restitution to be ordered at sentencing against that defendant.

§ 6.04B. Fines.

(1) A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(a) [$200,000] in the case of a felony of the first degree;

(b) [$100,000] in the case of a felony of the second degree;

(c) [$50,000] in the case of a felony of the third degree;

(d) [$25,000] in the case of a felony of the fourth degree;

(e) [$10,000] in the case of a felony of the fifth degree;

[*The number and gradations of maximum authorized fine amounts will depend on the number of felony grades created in § 6.01.*]

(f) [$5000] in the case of a misdemeanor; and

(g) [$1000] in the case of a petty misdemeanor.

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(h) An amount up to [three times] the pecuniary gain derived from the offense by the offender or [three times] the loss or damage suffered by crime victims as a result of the offense of conviction.

(2) The purposes of fines are to exact proportionate punishments and further the goals of general deterrence and offender rehabilitation without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

(3) The [sentencing commission] [state supreme court] is authorized to promulgate a means-based fine plan. Means-based fines, for purposes of this Section, are fines that are adjusted in amount in relation to the wealth and/or income of defendants, so that the punitive force of financial penalties will be comparable for offenders of varying economic means. One example of a means-based fine contemplated in this Section is the "day fine," which assigns fine amounts with reference to units of an offender's daily net income.

(4) Means-based fine amounts shall be calculated with reference to:

(a) the purposes in subsection (2); and

(b) the net income of the defendant, adjusted for the number of dependents supported by the defendant, or other criteria reasonably calculated to measure the wealth, income, and family obligations of the defendant.

(5) Means-based fines under the plan may exceed the maximum fine amounts in subsection (1).

(6) The means-based fine plan must include procedures to provide the courts with reasonably accurate information about the defendant's financial circumstances as needed for the calculation of means-based fine amounts.

(7) A means-based fine shall function as a substitute for a fine that could otherwise have been imposed under subsection (1), and may not be imposed in addition to such a fine.

§ 6.04C. Asset Forfeitures.

(1) The sentencing court may order that assets be forfeited following an offender's conviction for a felony offense. [This Section sets out the exclusive process for asset forfeitures in the state and supersedes other provisions in state or local law, except that civil and administrative processes for the forfeiture of stolen property and contraband are not affected by this Section.]

(2) The purposes of asset forfeitures are to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies.

(3) Assets subject to forfeiture include:

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(a) proceeds and property derived from the commission of the offense;

(b) proceeds and property directly traceable to proceeds and property derived from the commission of the offense; and

(c) instrumentalities used by the defendant or the defendant's accomplices or co-conspirators in the commission of the offense.

(4) Assets subject to forfeiture under subsection (3)(c), in which third parties are partial or joint owners, may not be forfeited unless the third parties have been convicted of offenses for which forfeiture of the assets is an authorized sanction.

(5) Forfeited assets, and proceeds from those assets, shall be deposited into [the victims-compensation fund]. A state or local law-enforcement agency that has seized forfeitable assets may not retain the assets, or proceeds from the assets, for its own use. If a state or local law-enforcement agency receives forfeited assets, or proceeds from those assets, from any other governmental agency or department, including any federal agency or department, such assets or proceeds shall be deposited into [the victims-compensation fund] and may not be retained by the receiving state or local law-enforcement agency.

§ 6.04D. Costs, Fees, and Assessments.

(1) No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B, shall be held responsible for the payment of costs, fees, and assessments.

(2) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

Alternative § 6.04D. Costs, Fees, and Assessments.

(1) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

(2) The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correctional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

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(3) No costs, fees, or assessments may be imposed by any agency or entity in the absence of approval by the sentencing court.

(4) No costs, fees, or assessments may be imposed in excess of actual expenditures in the offender's case.

§ 6.06. Sentence of Incarceration.

(1) A person convicted of a crime may be sentenced to incarceration as authorized in this Section. "Incarceration" in this Code includes confinement in prison or jail.

(2) The court may impose incarceration:

(a) when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or

(b) when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. When appropriate, the court may consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims.

(3) The length of term of incarceration shall be no longer than needed to serve the purposes for which it is imposed.

(4) Incarcerated offenders shall be guaranteed personal safety and subsistence, and shall be provided reasonable medical care, mental-health care, and opportunities to rehabilitate themselves and prepare for reintegration into the law-abiding community following their release.

(5) When deciding whether to impose a sentence of incarceration and the length of term, the court shall apply any relevant sentencing guidelines.

(6) A person who has been convicted of a felony may be sentenced by the court, subject to Articles 6B and 7, to a term of incarceration within the following maximum terms:

(a) in the case of a felony of the first degree, the term shall not exceed life imprisonment;

(b) in the case of a felony of the second degree, the term shall not exceed [20] years;

(c) in the case of a felony of the third degree, the term shall not exceed [10] years;

(d) in the case of a felony of the fourth degree, the term shall not exceed [five] years;

(e) in the case of a felony of the fifth degree, the term shall not exceed [three] years.

[*The number and gradations of maximum authorized prison terms will depend on the number of felony grades created in § 6.01.*]

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(7) A person who has been convicted of a misdemeanor or petty misdemeanor may be sentenced by the court, subject to Articles 6B and 7, to a term of incarceration within the following maximum terms:

(a) in the case of misdemeanor, the term shall not exceed [one year];

(b) in the case of petty misdemeanor, the term shall not exceed [six months].

(8) The court is not required to impose a minimum term of incarceration for any offense under this Code. This provision supersedes any contrary provision in the Code.

(9) Offenders sentenced to a term of incarceration shall be released after serving the term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 6.07 and 305.1, unless sentence is modified under §§ 305.6 and 305.7.

[(10) For offenses committed after the effective date of this provision, the authority of the parole board to grant parole release to incarcerated offenders is abolished.]

<u>§ 6.07. Credit Against the Sentence for Time Spent in Custody.</u>

(1) A convicted person shall be given credit toward the service of his or her sentence for:

(a) days spent in custody in connection with the course of conduct for which sentence was imposed;

(b) days credited against sentences to be served concurrently pursuant to § 7.04; and

(c) days served on an earlier sentence for the same crime when the current sentence was imposed following proceedings in which the earlier sentence was vacated.

(2) As used in this subsection,

(a) a "day spent in custody" means any portion of a day spent in custody.

(b) "custody" includes detention in a holding cell, jail, prison, or locked therapeutic facility. When a person is subject to other forms of physical restraint, including home detention, the court shall award credit when the restrictions placed on a defendant are the functional equivalent of custody. Electronic monitoring alone does not entitle a defendant to an award of sentence credit.

(c) custody is connected to a course of conduct when it is related in whole or in part to one or more offenses for which the person is arrested or charged, or to any other sentence arising out of the same underlying conduct, either of which occurs while the person is awaiting or undergoing trial, awaiting sentence, or being

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investigated for or awaiting action as a result of an alleged violation of probation or postrelease supervision.

(3) At sentencing, counsel for the defendant shall provide to the court all necessary records related to the defendant's prior detention in any relevant facility. When in possession of information relating to time the defendant has spent in custody relevant to the offense, the prosecutor and probation office shall also furnish such information to the court. At the time of sentencing, the court shall enter a specific finding of the number of days for which sentence credit is due. In addition to credit awarded pursuant to subsection (1), credit shall be awarded against the sentence for all "good time" credit earned pursuant to § 305.1(1). A copy of the sentence credit record shall be given to the defendant.

(4) Upon a defendant's revocation from probation or postrelease supervision, the correctional agency to which the defendant is assigned shall gather all necessary records related to the defendant's prior detention in the case and submit them to the court, which shall enter a specific finding of the number of days for which sentence credit is due. In addition to credit awarded pursuant to subsection (1), credit shall be awarded against the sentence for all "good time" credit earned pursuant to § 305.1(1). A copy of the sentence credit record shall be given to the defendant.

(5) If any person who is in custody or on postrelease supervision believes he or she has not been properly credited for time served in custody, the person may petition the sentencing court to be given credit under this Section. Upon proper verification of the facts alleged in the petition, credit shall be applied retroactively, and the judgment amended accordingly.

§ 6.09. Postrelease Supervision.

(1) When the court sentences an offender to prison, the court may also impose a term of postrelease supervision.

(2) The purposes of postrelease supervision are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, and address their needs for housing, employment, family support, medical care, and mental-health care during their transition from prison to the community.

(3) The court shall not impose postrelease supervision unless necessary to further one or more of the purposes in subsection (2).

(4) When deciding whether to impose postrelease supervision, the length of a supervision term, and what conditions of supervision to impose, the court should consult reliable risk-and-needs-assessment instruments, when available, and shall apply any relevant sentencing guidelines.

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(5) The length of term of postrelease supervision shall be independent of the length of the prison term, served or unserved, and shall be determined by the court with reference to the purposes in subsection (2).

(6) For a felony conviction, the term of postrelease supervision shall not exceed five years. For a misdemeanor conviction, the term shall not exceed one year. Consecutive sentences of postrelease supervision may not be imposed.

(7) The court may discharge the defendant from postrelease supervision at any time if it finds that the purposes of the sentence no longer justify continuation of the supervision term.

(8) The court may impose conditions of postrelease supervision when necessary to further the purposes in subsection (2). Permissible conditions include, but are not limited to:

(a) Compliance with the criminal law.

(b) Completion of a rehabilitative program that addresses the risks or needs presented by individual offenders.

(c) Performance of community service.

(d) Drug testing for a substance-abusing offender.

(e) Technological monitoring of the offender's location, through global-positioning-satellite technology or other means, but only when justified as a means to reduce the risk that the probationer will reoffend.

(f) Reasonable efforts to find and maintain employment, except it is not a permissible condition of probation that the offender must succeed in finding and maintaining employment.

(g) Reasonable efforts to obtain housing, or else residence in a postrelease residential facility.

(h) Intermittent confinement in a residential treatment center or halfway house.

(i) Good-faith efforts to make payment of victim restitution under § 6.04A, but compliance with any other economic sanction shall not be a permissible condition of postrelease supervision.

(9) No condition or set of conditions may be attached to postrelease supervision that would place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community.

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(10) Prior to an offender's release from incarceration, [the postrelease-supervision agency] may apply to the court to modify the conditions of postrelease supervision imposed on an offender.

(11) The court may reduce the severity of postrelease-supervision conditions, or remove conditions previously imposed, at any time. The court shall modify or remove any condition found to be inconsistent with this Section.

(12) The court may increase the severity of postrelease-supervision conditions or add new conditions when there has been a material change of circumstances affecting the risk of criminal behavior by the offender or the offender's treatment needs, after a hearing that comports with the procedural requirements in § 6.15.

(13) The court should consider the use of conditions that offer incentives to offenders on postrelease supervision to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the supervision term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

<u>§ 6.11A. Sentencing of Offenders Under the Age of 18.</u>

The following provisions shall apply to the sentencing of offenders under the age of 18 at the time of commission of their offenses:

(a) When assessing an offender's blameworthiness under § 1.02(2)(a)(i), the offender's age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.

(b) Priority shall be given to the purposes of offender rehabilitation and reintegration into the law-abiding community among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii), except as provided in subsection (c).

(c) When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii).

(d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

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(e) The court shall impose a juvenile-court disposition in the following circumstances:

(i) The offender's conviction is for any offense other than [a felony of the first or second degree];

(ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction;

(iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or

(iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]

§ 6.14. Victim-Offender Conferencing; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the victim-offender conferencing permitted by this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in

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an Appendix containing Principles of Legislation at the end of the Code. See page 557.

§ 6.15. Violations of Probation or Postrelease Supervision.

(1) When there is probable cause to believe that an individual has violated a condition of probation or postrelease supervision, the supervising agent or agency shall promptly take one or more of the following steps:

(a) Counsel the individual or issue a verbal or written warning;

(b) Increase contacts with the individual under supervision to ensure compliance;

(c) Provide opportunity for voluntary participation in programs designed to reduce identified risks of criminal re-offense;

(d) Petition the court to remove or modify conditions that are no longer required for public safety, or with which the individual is reasonably unable to comply;

(e) Petition the court to impose additional conditions or make changes in existing conditions designed to decrease the individual's risk of criminal re-offense, including but not limited to inpatient treatment programs, electronic monitoring, and other noncustodial restrictions; or

(f) Petition the court for revocation of probation or postrelease supervision.

(g) If necessary to protect public safety, the agency may ask the court to issue a warrant for the arrest and detention of the individual pending a hearing pursuant to subsection (2). In exigent circumstances, the agency may arrest the individual without a warrant.

(2) When the supervising agent or agency petitions the court to modify conditions or revoke probation or postrelease supervision, the court shall provide written notice of the alleged violation to the individual under supervision, and shall schedule a timely hearing on the petition unless the individual waives the right to a hearing.

(a) At the hearing, the accused shall have the following rights:

(i) The right to counsel;

(ii) The right to be present and to make a statement to the court;

(iii) The right to testify or remain silent; and

(iv) The right to present evidence and call witnesses.

(b) The hearing must be recorded or transcribed.

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(3) If, after hearing the evidence, the court finds by a preponderance of the evidence that a violation has occurred, it may take any of the following actions:

(a) Release the individual with counseling or a formal reprimand;

(b) Modify the conditions of supervision in light of the violation to address the individual's identified risks and needs;

(c) Order the offender to serve a period of home confinement or submit to GPS monitoring;

(d) Order the offender detained for a continuous or intermittent period of time not to exceed [one week] in a local jail or detention facility; or

(e) Revoke probation or postrelease supervision and commit the offender to prison for a period of time not to exceed the full term of supervision, with credit for any time the individual has been detained awaiting revocation. [If an individual on probation has received a suspended sentence under § 6.02(2), the court may revoke supervision and impose the suspended sentence or any other sentence of lesser severity.]

(4) When sanctioning a violation of a condition of probation or postrelease supervision, the supervising agent or agency and the court shall impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, keeping in mind the purpose for which the sentence was originally imposed.

§ 6x.01. Definitions.

(1) For purposes of this Article, collateral consequences are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court.

(2) For purposes of this Article, a collateral consequence is mandatory if it applies automatically, with no determination of its applicability and appropriateness in individual cases.

(3) For purposes of this Article, a collateral consequence is discretionary if a civil court, or administrative agency or official, is authorized, but not required, to impose the consequence on grounds related to an individual's conviction.

§ 6x.02. Sentencing Guidelines and Collateral Consequences.

(1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.

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(a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law.

(b) The commission [or designated agency] shall ensure the compendium is kept current.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under §§ 6x.04 and 6x.05. The commission's guidance shall take into account the extent to which a mandatory consequence is substantially related to the elements and facts of an offense and likely to impose a substantial and unjustified burden on a defendant's reintegration.

§ 6x.03. Voting and Jury Service.

(1) No person convicted of a crime shall be disqualified on that basis from exercising the right to vote [, except that an individual serving a custodial sentence as a result of a felony conviction may be disqualified while incarcerated].

(2) A person convicted of a crime may be disqualified on that basis from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

§ 6x.04. Notification of Collateral Consequences; Order of Relief.

(1) At the time of sentencing, the court shall confirm on the record that the defendant has been provided with the following information in writing:

(a) a list of all collateral consequences that apply under state or federal law as a result of the current conviction;

(b) a warning that the collateral consequences applicable to the offender may change over time;

(c) a warning that jurisdictions to which the defendant may travel or relocate may impose additional collateral consequences; and

(d) notice of the defendant's right to petition for relief from mandatory collateral consequences pursuant to subsection (2) during the period of the sentence, and thereafter pursuant to §§ 6x.05 and 6x.06.

(2) At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.

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(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney.

(c) The court may grant relief from a mandatory collateral consequence if, after considering the guidance provided by the sentencing commission under § 6x.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence is not substantially related to the elements and facts of the offense and is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) An order of relief granted under this Section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity, such as an occupational or professional license. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be substantially related to the benefit or opportunity the individual seeks to obtain. If the decisionmaker determines that the benefit or opportunity should be denied based upon the conduct underlying the conviction, the decisionmaker shall explain the reasons for the denial in writing.

§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.

(1) Any individual who, by virtue of conviction in another jurisdiction, is subject or potentially subject in this jurisdiction to a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business, may petition the court for an order of relief if:

(a) The individual is not the subject of pending charges in any jurisdiction;

(b) The individual resides, is employed or seeking employment, or regularly conducts business in this jurisdiction; and

(c) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on the individual's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(2) An individual convicted in this jurisdiction whose sentence has been fully served may petition under this Section for relief from a mandatory collateral sanction if:

(a) No charges are pending against the individual in any jurisdiction; and

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(b) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on his or her ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(3) The court may grant relief if it finds that the petitioner has demonstrated by clear and convincing evidence a specific need for relief from one or more mandatory consequences, and that public-safety considerations do not require mandatory imposition of the consequence. In determining whether to grant relief, the court should give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.

(4) A petition filed under subsection (1) or (2) shall be decided in accordance with the procedures and standards set forth in § 6x.04(2), and an order of relief shall have the effect described in § 6x.04(3).

§ 6x.06. Certificate of Restoration of Rights.

(1) Any individual convicted of one or more misdemeanors or felonies may petition the [designated agency or court] in the [county] in which the individual resides for a certificate of restoration of rights, provided that:

(a) No criminal charges against the individual are pending; and

(b) [Four] or more years have passed since the completion of all the individual's past criminal sentences with no further convictions.

(2) When a petition is filed under subsection (1), notice of the petition and any scheduled hearings related to it shall be sent to the prosecuting attorney of the jurisdiction that handled the underlying criminal case.

(3) In ruling on a petition filed under subsection (1), the court shall determine the classification of the most serious offense for which the individual has been convicted.

(a) When the individual has been convicted of one or more [fourth or fifth] degree felonies or misdemeanors, the [court or designated agency] shall issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences.

(b) When the individual has been convicted of a [first, second, or third] degree felony, the [court or designated agency] may issue a certificate of restoration of rights if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community. In making this determination, the court may consider the amount of time that has passed since the individual's most recent conviction, any subsequent

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involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to any cultural, educational, or economic limitations affecting the petitioner.

(4) A certificate of restoration of rights removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this jurisdiction as a result of prior convictions, except as provided by Article 213. A court may deny a certificate or specify that a certificate should issue with exceptions when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences. A certificate does not entitle a recipient to any discretionary benefits or opportunities, though it may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.

(5) Information regarding the criminal history of an individual who has received a certificate of restoration of rights may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the individual.

§ 6A.01. Establishment and Purposes of Sentencing Commission.

(1) There is hereby established a permanent sentencing commission as an independent agency of state government.

(2) The sentencing commission shall:

(a) develop sentencing guidelines as provided in Article 6B;

(b) collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework;

(c) provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects;

(d) assemble and draw upon sources of knowledge, experience, and community values from all sectors of the criminal-justice system, from the public at large, and from other jurisdictions;

(e) perform its work and provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2); and

(f) ensure that all these efforts take place on a permanent and ongoing basis, with the expectation that the sentencing system must strive continually to evaluate itself, evolve, and improve.

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§ 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) [three] members from the state's judicial branch;

(b) [two] members from the state legislature;

(c) the director of correction;

(d) [one] prosecutor;

(e) [one] criminal defense attorney;

(f) [one] official responsible for the provision of probation or parole services;

(g) one academic with experience in criminal-justice research; and

(h) [one] member of the public.

(2) One of the [judicial] members of the commission shall serve as chair of the commission.

(3) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms.

Alternative § 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) the chief justice of the supreme court or another justice of the supreme court [designated by the chief justice];

[(b) one judge of the court of appeals appointed by the chief justice of the supreme court;]

(c) [three] trial-court judges [appointed by the chief justice of the supreme court];

(d) [four] members of the state legislature [, one of whom shall be appointed by the majority leader of the state senate, one of whom shall be appointed by the minority leader of the state senate, one of whom shall be appointed by the speaker of the house of representatives, and one of whom shall be appointed by the minority leader of the house of representatives];

(e) the director of correction or another representative of the department of correction [designated by the director];

(2) The sentencing commission shall also include the following members [, to be appointed by the governor]:

(a) [two] prosecutors;

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(b) [two] practicing members of the criminal defense bar [including at least one public defender];

(c) [one] official responsible for the provision of probation services;

(d) [one] official responsible for the provision of parole and prisoner reentry services;

(e) one chief of police;

(f) [one representative of local government];

(g) one academic with experience in criminal-justice research;

(h) [three] members of the public [, one of whom shall be a victim of a crime defined as a felony, and one of whom shall be a rehabilitated ex-inmate of a prison in the state].

(3) One of the [judicial] members of the commission shall [be designated by the governor to] serve as chair of the commission.

(4) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms. Members may serve successive terms without limitation.

(5) Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system.

(6) Commission members shall receive no salary for their service, but shall be reimbursed for expenses incurred in their work for the commission.

(7) Authorities empowered to make appointments to the commission should attend to the racial, ethnic, and gender diversity of the commission's membership, and should ensure representation on the commission from different geographic areas of the state.

(8) The commission shall have the power to form advisory committees, including persons who are not members of the commission, to assist the commission in its deliberations.

§ 6A.03. Staff of Sentencing Commission.

(1) The commission shall employ an executive director to serve at the pleasure of the commission. The executive director's responsibilities shall include:

(a) supervision of the activities of all persons employed by the commission;

(b) ultimate responsibility for the performance of all tasks assigned to the commission;

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(c) maintenance of contacts with other state agencies involved in sentencing and corrections processes and with sentencing commissions in other jurisdictions; and

(d) other duties as determined by the commission.

(2) The executive director shall select and hire a research director with research experience and expertise, together with a sufficient staff of qualified research associates.

(3) The executive director shall select and hire a director of education and training, together with a sufficient staff to perform necessary functions of education, training, and guideline implementation.

(4) The executive director shall select and hire such additional staff to be employed by the commission as are necessary to fulfill the responsibilities of the commission.

§ 6A.04. Initial Responsibilities of Sentencing Commission.

(1) In the first [two years] of its existence, the sentencing commission shall promulgate and present to the legislature one or more proposed sets of sentencing guidelines as provided in Article 6B, and shall develop a correctional-population forecasting model as provided in § 6A.07.

(2) In discharging its responsibilities under subsection (1), the commission shall:

(a) collect information on all correctional populations in the state;

(b) survey the correctional resources across state and local governments; and

(c) conduct research into crime rates, criminal cases entering the court system, sentences imposed and served for particular offenses, and sentencing patterns for the state as a whole and for geographic regions within the state.

(3) In discharging its responsibilities under subsection (1), the sentencing commission should:

(a) consult available research and data on the current effectiveness of sentences imposed and served in the jurisdiction as measured against the purposes in § 1.02(2); and

(b) study the experiences of other jurisdictions with sentencing commissions and guidelines.

(4) In conjunction with its activities under this Section, the sentencing commission may:

(a) advise the legislature of any needed reallocations or additions in correctional resources;

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(b) recommend to the legislature any changes needed in the criminal code, and recommend to [the rulemaking authority] any changes needed in the rules of criminal procedure, to best effectuate the sentencing guidelines promulgated by the commission; and

(c) identify and prioritize areas where necessary data and research are lacking concerning the operation of the sentencing system, and recommend to the legislature means by which the commission or other state agencies may be empowered to address such needs.

(5) The commission shall make and publish a final report to the legislature and the public on its activities as outlined in this Section.

§ 6A.05. Ongoing Responsibilities of Sentencing Commission.

(1) This Section sets forth the continuing responsibilities of the sentencing commission following completion of its initial responsibilities under § 6A.04.

(2) The commission shall:

(a) promulgate and periodically revise sentencing guidelines as needed, subject to the provisions of Article 6B;

(b) prepare correctional-population projections for the sentencing system at least once each year, and whenever new guidelines or laws affecting sentences are proposed, as described in § 6A.07;

(c) develop computerized information systems to track criminal cases entering the court system; the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served; sentencing patterns for the state as a whole and for geographic regions within the state; data on the incidence of and reasons for sentence revocations; and other matters found by the commission to have important bearing on the operation of the sentencing and corrections system;

(d) collect and, where necessary, conduct periodic surveys of the correctional populations and resources of the state;

(e) assemble information on the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

(f) investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities.

(3) The commission should:

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(a) make full use of available data and research generated by other state agencies, and cooperate with such agencies in the development of improved information systems;

(b) study the desirability of regulating through statute, guidelines, standards, or rules the charging discretion of prosecutors, the plea-bargaining discretion of the parties, the discretionary decisions of officials with authority to set prison-release dates, and the discretionary decisions of officials with authority to impose sanctions for the violation of sentence conditions; and

(c) remain informed of the experiences of sentencing commissions and guidelines in other jurisdictions, study innovations in other jurisdictions that have possible application in this state, and provide information and reasonable assistance to sentencing commissions in other jurisdictions.

(4) The commission may:

(a) offer recommendations to the legislature on changes in legislation, and recommendations to [the rulemaking authority] on changes in the rules of criminal procedure, needed to best effectuate the operation of the sentencing-guidelines system or of the commission;

(b) conduct or participate in original research to test the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

(c) collect and, where necessary, conduct research into the subsequent histories of offenders who have completed sentences of various types and the effects of sentences upon offenders, victims, and their families and communities.

(5) The commission shall monitor the operation of sentencing guidelines, relevant procedural rules, and other laws, rules, or discretionary processes affecting sentencing decisions. In performing this function, the commission shall:

(a) design forms for sentence reports to be completed by sentencing courts at the time of sentencing in every case;

(b) study the use of sentencing guidelines by the courts and other officials charged with their application;

(c) monitor the sentencing decisions of the appellate courts and the impact of sentence appeals on the workloads of the courts;

(d) study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law; and

(e) monitor compliance with procedural rules, particularly as applicable to administrative and correctional personnel engaged in the collection and verification of sentencing data.

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(6) The commission shall take steps to facilitate the implementation of sentencing guidelines by responsible actors throughout the sentencing system. In performing this function, the commission shall:

(a) develop manuals, forms, and other controls to attain greater consistency in the contents and preparation of presentence reports and sentence reports;

(b) provide training and assistance to judges, prosecutors, defense attorneys, probation officers, and other personnel;

(c) provide information to government officials, government agencies, the courts, the bar, and the public on sentencing guidelines, sentencing policies, and sentencing practices; and

(d) produce, as needed, manuals, users' guides, worksheets, software, summaries of case law, Internet resources, and other materials the commission deems useful to explain and ease the proper application of the guidelines.

(7) The commission shall make and publish annual reports to the legislature and the public on the commission's activities, including data collection and research, reports of any special research undertaken by the commission, and other reports as directed by the legislature.

(8) The commission shall perform such other functions as may be required by law or as may be necessary to carry out the provisions of this Article.

§ 6A.06. Community Corrections Strategy.

(1) The sentencing commission shall recommend a community corrections strategy for the state, including recommendations for legislation, sentencing guidelines, and legislative appropriations necessary to implement the strategy.

(2) The community corrections strategy shall be based on the following:

(a) a review of existing community corrections programs throughout the state, the numbers of offenders they can accommodate, the level of resources they receive from state and local governments, and the available evidence of their effectiveness and efficiency in serving the purposes in § 1.02(2);

(b) the identification of additional community corrections programs needed in the state, additional resources needed for existing programs, and other important deficits observed by the commission;

(c) the identification of categories of offenders who would be eligible for community corrections sanctions under a new statewide community corrections strategy;

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(d) projections of the impact that the implementation of a new community corrections strategy would be expected to have on sentencing practices and correctional resources throughout the state;

(e) a study of mechanisms of state oversight and coordination to ensure that community corrections programs at the state and local levels are coordinated;

(f) a study of mechanisms for the equitable distribution of state and local funding of community corrections programs; and

(g) a study of the experience of other jurisdictions that have adopted effective innovations in community corrections.

(3) The development and periodic revision of a community corrections strategy shall be part of the commission's initial and ongoing responsibilities.

§ 6A.07. Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts.

(1) The commission shall develop a correctional-population forecasting model to project future sentencing outcomes under existing or proposed legislation and sentencing guidelines. The commission shall use the model at least once each year to project sentencing outcomes under existing legislation and guidelines. The commission shall also use the model whenever new legislation affecting criminal punishment is introduced or new or amended sentencing guidelines are formally proposed, and shall generate projections of sentencing outcomes if the proposed legislation of guidelines were to take effect. The commission shall make and publish a report to the legislature and the public with each set of projections generated under this subsection.

(2) Projections under the model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs.

(3) The model shall be designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.

(4) The commission shall refine the model as needed in light of its past performance and the best available information.

§ 6A.08. Ancillary Powers of Sentencing Commission.

(1) Upon request from the commission, each agency and department of state and local government shall make its services, equipment, personnel, facilities, and information

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available to the greatest practicable extent to the commission in the execution of its functions. Information that is legally privileged under state or federal law is excepted from this Section.

(2) Upon request from the commission, law-enforcement agencies in the state shall supply arrest and criminal-history records to the commission, and [probation or pretrial services departments] shall provide copies of presentence reports to the commission.

(3) The commission shall take all reasonable steps to preserve the confidentiality of offenders about whom the commission receives information under this Section. Wherever possible, the commission shall retain information about specific offenders in a coded form that obscures their personal identities.

(4) Sentencing courts shall complete and supply a sentence report to the commission following the sentencing decision in every case. The form of the sentence report shall be as designed by the commission pursuant to § 6A.05(5)(a).

(5) The commission shall have the authority to enter partnerships or joint agreements with organizations and agencies from this and other jurisdictions, including academic departments, private associations, and other sentencing commissions, to perform research needed to carry out its duties.

(6) The commission shall have authority to apply for, accept, and use gifts, grants, or financial or other aid, in any form, from the federal government, the state, or other funding source including private associations, foundations, or corporations, to accomplish the duties set out in this Article.

§ 6A.09. Omnibus Review of Sentencing System.

(1) Every [10] years, the sentencing commission shall perform an omnibus review of the sentencing system, including:

(a) a long-term assessment of the operation of the state's sentencing laws and guidelines in meeting the purposes in § 1.02(2), and for their effects on the administration, efficiency, and resources of the court systems of the state;

(b) an assessment of the adequacy of correctional resources at the state and local levels to meet current and long-term needs, and recommendations to the legislature of means to address shortfalls in such resources, or to better coordinate the use of such resources as between state and local governments;

(c) an analysis of areas in which necessary data and research are lacking concerning the operation of the sentencing system and the effects of criminal sentences on offenders, victims, families, and communities, including a prioritization of data and research needs;

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(d) a comparative review of the experiences of other jurisdictions with similar sentencing and corrections systems;

(e) recommendations to the legislature or [the rulemaking authority] concerning any changes in statute, levels of appropriations, or rules of procedure considered necessary or desirable by the commission in light of the findings of the omnibus review; and

(f) such other subjects as determined by the commission.

(2) The commission shall make and publish a report to the legislature and the public on its activities under this Section.

<u>§ 6B.01. Definitions.</u>

In this Article, unless a different meaning is plainly required:

(1) "sentencing commission" or "commission" means the permanent sentencing commission created in § 6A.01;

(2) "sentencing guidelines" or "guidelines" means sentencing guidelines promulgated by the commission and made effective under § 6B.11, which include presumptive sentences, presumptive rules, other guidelines provisions, and commentary;

(3) "presumptive sentence" means the penalty, range of penalties, alternative penalties, or combination of penalties indicated in the guidelines as appropriate for an ordinary case within a defined class of cases;

(4) "departure sentence" or "departure" means a sentence that deviates from a presumptive sentence or rule in the guidelines;

(5) "extraordinary-departure sentence" or "extraordinary departure" means a sentence other than that specified in a statutory mandatory-penalty provision, or a sentence that deviates from a heavy presumption created by statute or controlling judicial decision and made applicable to sentencing decisions in a defined class of cases.

<u>§ 6B.02. Framework for Sentencing Guidelines.</u>

(1) The sentencing guidelines shall set forth presumptive sentences for cases in which offenders have been convicted of felonies or misdemeanors, and nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences, subject to § 6B.04.

(2) The guidelines may set forth additional presumptive rules applicable to sentencing decisions as determined by the commission, or when required by law.

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(3) The commission shall determine the best formats for expression of presumptive sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression.

(4) The commission shall promulgate guidelines that are as simple in their presentation and use as is feasible.

(5) The guidelines shall include nonbinding commentary to explain the commission's reasoning underlying each guideline provision, and to assist sentencing courts and other actors in the sentencing system in the use of the guidelines.

(6) The guidelines shall address the use of prison, jail, probation, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission. [The guidelines shall not address the death penalty.]

(7) No provision of the guidelines shall have legal force greater than presumptive force as described in this Article in the absence of express authorization in legislation or a decision of the state's highest appellate court. The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court.

(8) No sentence under the guidelines may exceed the maximum authorized penalties for the offense or offenses of conviction as set forth in §§ 6.03 through 6.11A.

(9) In promulgating guidelines or amended guidelines, the commission shall make use of the correctional-population forecasting model in § 6A.07. All guidelines or amended guidelines formally proposed by the commission shall be designed to produce aggregate sentencing outcomes that may be accommodated by the existing or funded correctional resources of state and local governments.

(10) In promulgating guidelines or amended guidelines, the commission shall comply with the provisions of [the state's administrative procedures act].

§ 6B.03. Purposes of Sentencing and Sentencing Guidelines.

(1) In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2).

(2) The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.

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(3) Within the boundaries of severity permitted in subsection (2), the commission may tailor presumptive sentences for defined classes of cases to effectuate one or more of the utilitarian purposes in § 1.02(2)(a)(ii), provided there is realistic prospect for success in the realization of those purposes in ordinary cases of the kind governed by each presumptive sentence.

(4) The commission shall recognize that the best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.

(5) The guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes.

(6) The guidelines shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission consistent with this Section.

§ 6B.04. Presumptive Guidelines and Departures.

(1) The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts.

(2) The commission shall fashion presumptive sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. Presumptive sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the presumptive sentence shall specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.

(b) The guidelines shall include presumptive provisions for determinations of the severity of probation, economic sanctions, and postrelease supervision.

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(c) Where the guidelines permit the imposition of a combination of sanctions upon offenders, the guidelines shall include presumptive provisions for determining the total severity of the combined sanctions.

[(d) The guidelines shall include presumptive provisions for the determination of the severity of sanctions upon findings that offenders have violated conditions of probation or postrelease supervision.]

(4) The guidelines shall include nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences in individual cases. The commission may not quantify the effect given to specific aggravating or mitigating factors.

<u>§ 6B.06. Eligible Sentencing Considerations.</u>

(1) The commission when promulgating guidelines shall have authority to consider all factors relevant to the purposes of sentencing in § 1.02(2), with the exception of factors whose consideration has been prohibited or limited by constitutional law, express statutory provision, or controlling judicial precedent.

(2) Except as provided in this Section, the commission shall give no weight to the following factors when formulating any guidelines provision that affects the severity of sentences:

(a) an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief; and

(b) alleged criminal conduct on the part of the offender other than the current offenses of conviction and, consistent with § 6B.07, the offender's prior convictions and juvenile adjudications, or criminal conduct admitted by the offender at sentencing.

(3) The guidelines shall provide that a departure sentence or an extraordinary-departure sentence may not be based on any factor necessarily comprehended in the elements of the offenses of which the offender has been convicted, and no finding of fact may be used more than once as a ground for departure or extraordinary departure.

(4) Notwithstanding the provisions of subsection (2)(a):

(a) the personal characteristics of offenders may be included as considerations within the guidelines when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be recommended;

(b) the commission may include an offender's gender as a factor in guideline provisions designed to assess the risks of future criminality or the treatment needs of classes of offenders, or designed to assist the courts in making such assessments in

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individual cases, provided there is a reasonable basis in research or experience for doing so; and

(c) the guidelines may include offenders' financial circumstances as sentencing considerations for the purpose of determination of the amounts and terms of fines or other economic sanctions.

(5) The commission may include provisions in the guidelines that address whether, under what circumstances, and to what extent, a plea agreement or sentence agreement by the parties may supply an independent basis for a departure sentence or an extraordinary-departure sentence.

(6) The commission may include presumptive provisions in the guidelines to assist the courts in their consideration of evidence of an offender's substantial assistance to the government in a criminal investigation or prosecution.

§ 6B.07. Use of Criminal History.

(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as grounds for departures from presumptive sentences, or in other provisions of the guidelines. The commission shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2).

(a) If criminal history is used for purposes of assessing offenders' blameworthiness for their current offenses, the commission shall consider that offenders have already been punished for their prior convictions.

(b) If criminal history is used for purposes of assessing an offender's risk of reoffending, the commission shall consider that the use of criminal history by itself may over-predict those risks.

(c) The commission shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.

(2) The commission may include consideration of prior juvenile adjudications as criminal history in the guidelines, but only when the procedural safeguards attending the adjudications were comparable to those of a criminal trial. If prior juvenile adjudications are used as criminal history for purposes of assessing an offender's blameworthiness for the current offense, the offender's age at the time of the adjudicated conduct shall be a mitigating factor, to be assigned greater weight for younger ages.

(3) The commission shall fix clear limitations periods after which offenders' prior convictions and juvenile adjudications should not be taken into account to enhance

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sentence. The limitations periods may vary depending upon the current and prior offenses, but shall not exceed [10] years. The commission should create presumptive rules that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.

(4) The commission shall monitor the effects of guidelines provisions concerning criminal history, any legislation incorporating offenders' criminal history as a factor relevant to sentencing, and the consideration of criminal history by sentencing courts. The commission shall study the experiences of other jurisdictions that have incorporated criminal history into sentencing guidelines. The commission shall give particular attention to the question of whether the use of criminal history as a sentencing factor contributes to punishment disparities among racial and ethnic minorities, or other disadvantaged groups.

§ 6B.08. Multiple Sentences; Concurrent and Consecutive Terms.

(1) The commission shall develop guidelines addressing the imposition of sentence in cases involving multiple convictions for the same offender, whether imposed in a single proceeding or separate proceedings, or for a crime committed while serving a different sentence or awaiting trial on another offense.

(2) The guidelines developed pursuant to subsection (1) shall include a general presumption in favor of concurrent sentences.

(3) In a single proceeding involving multiple convictions, the guidelines shall include a presumption requiring the court to account for the existence of lesser current convictions when imposing sentence on the most serious offense for which the defendant is being sentenced.

(4) For selected categories of cases, the commission may create presumptions in favor of consecutive sentences.

(5) Sentencing courts may depart from the guideline presumptions established pursuant to subsections (2) through (4) with adequate written explanation of the reasons for its departure set forth pursuant to § 7.XX.

(6) To the degree feasible, guideline presumptions should seek to minimize disparity in total sentence severity for defendants being sentenced for multiple convictions, whether the sentences are imposed consecutively in a single proceeding, separate proceedings in the same court, or multiple proceedings in two or more jurisdictions.

(7) Except as may be provided by the sentencing commission pursuant to subsection (4), when consecutive sentences are imposed, there shall be a heavy presumption in the guidelines that the total sentence length will not exceed double the maximum term of the presumptive sentence for the most serious of the offender's current convictions. Deviation from this presumption shall be treated as an extraordinary departure under § 7.XX(3).

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§ 6B.09. Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending.

(1) The sentencing commission shall develop instruments or processes to assess the needs of offenders for rehabilitative treatment, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(2) The commission shall develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(3) The commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

§ 6B.10. Offenses Not Covered by Sentencing Guidelines.

(1) The sentencing commission shall promulgate guidelines applicable to all felony and misdemeanor offenses under state law except as provided in this Section.

(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad that presumptive sentences cannot reasonably be fashioned, or for other sufficient reasons that inclusion in the guidelines would be of marginal utility.

(3) Offenses not covered in the guidelines shall be sentenced in the discretion of the sentencing court subject to § 7.XX(5).

(4) The commission may promulgate presumptive rules to be used by sentencing courts in cases where offenses have inadvertently or otherwise been omitted from the guidelines.

§ 6B.11. Effective Date of Sentencing Guidelines and Amendments.

(1) The sentencing commission shall promulgate its initial set of proposed sentencing guidelines no later than [date]. The proposed guidelines shall take effect [180 days later] unless disapproved by act of the legislature.

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(2) Proposed amendments to the guidelines may be promulgated as needed in the judgment of the commission, but no more frequently than once per year. Proposed amendments must be submitted to the legislature no later than [date] in a given year, and shall take effect [180 days later] unless disapproved by act of the legislature.

(3) New or amended guidelines shall apply to offenses committed after their effective date. If new or amended guidelines decrease the sentence severity of prior law, the commission shall recommend to the legislature procedures under which the sentences of offenders currently serving or otherwise subject to sentences under the prior law may be adjusted to conform with the new or amended guidelines.

Alternative § 6B.11. Effective Date of Sentencing Guidelines and Amendments.

(1) The sentencing commission shall submit its initial set of proposed sentencing guidelines to the legislature no later than [date]. The proposed guidelines shall take effect when enacted into law by the legislature.

(2) The sentencing commission shall submit proposed amendments to the guidelines to the legislature as needed in the judgment of the commission, but no more frequently than once per year. Proposed amendments must be submitted no later than [date] in a given year, and shall take effect when enacted into law by the legislature.

(3) New or amended guidelines shall apply to offenses committed after their effective date. If new or amended guidelines decrease the sentence severity of prior law, the commission shall recommend to the legislature procedures under which the sentences of offenders currently serving or otherwise subject to sentences under the prior law may be adjusted to conform with the new or amended guidelines.

§ 7.XX. Judicial Authority to Individualize Sentences.

(1) The courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2).

(2) In sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a).

(a) A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.

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(b) A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.

(c) A sentencing court may not base any decision affecting a sentence upon a factor prohibited by statute, constitutional law, or controlling judicial decision, and may not violate a limitation imposed by the same authorities.

(d) The degree of a departure from the guidelines in an individual case shall be determined by the sentencing court in light of the purposes of § 1.02(2)(a).

(3) The legislature or the courts may create rules or standards relating to sentencing that carry a heavy presumption of binding effect. Deviation from such a heavy presumption in an individual case shall be treated as an extraordinary departure. A sentencing court may impose a sentence that is an extraordinary departure only when extraordinary and compelling circumstances demonstrate in an individual case that a sentence in conformity with the heavy presumption would be unreasonable in light of the purposes in § 1.02(2)(a).

(a) There shall be a heavy presumption in the guidelines that a departure sentence to incarceration may not exceed a term twice that of the maximum presumptive sentence for the offense. A more severe sentence shall be treated as an extraordinary departure.

(b) Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).

(4) Whenever a sentencing court renders a sentencing decision that is a departure or an extraordinary departure, the court shall provide an explanation of its reasons on the record, including an explanation of the degree of the departure or extraordinary departure.

(5) Sentences of individual offenders for offenses not covered by the guidelines shall be rendered by sentencing courts consistent with the purposes of § 1.02(2)(a). The sentencing court shall consult the guidelines for their treatment of analogous offenses, if any, as benchmarks for proportionate punishment, and for any presumptive provisions applicable to offenses not covered by the guidelines. For all sentences that include a term of incarceration under this subsection, the sentencing court shall provide an explanation on the record of its reasons for the sentence imposed.

(6) All findings of fact contemplated in this Section shall be made by the court or a jury as provided in §§ 7.07A and 7.07B.

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(7) No sentence imposed by a sentencing court may exceed the maximum authorized penalties for the offense or offenses of conviction as set forth in §§ 6.03 through 6.11A.

§ 7.02. Choices Among Sanctions.

(1) Sentencing courts should grant a deferred adjudication to defendants when considerations of justice and public safety do not require that they be subjected to the stigma and collateral consequences associated with formal conviction.

(2) Sentencing courts should impose a sentence of unconditional discharge when a more severe sanction is not necessary to serve the purposes of sentencing in § 1.02(2)(a)(i). In assessing whether such a sentence is proportionate in an individual case, the court shall consider that unconditional discharge carries the following punitive effects:

(a) the stigma attached to the conviction itself;

(b) the fact that the instant conviction can be used as criminal history in a later prosecution of the offender; and

(c) the effects of collateral consequences likely to be applied to the defendant under state and federal law.

(3) Sentencing courts may impose probation when necessary to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, or reduce the risks that they will commit new offenses. In deciding whether to impose probation, the sentencing court shall take the following considerations into account:

(a) Probation should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Probation should not be viewed as a default sanction when other sanctions are not imposed.

(c) Community corrections resources should not be used for unnecessary probation sentences.

(4) Sentencing courts may impose incarceration when necessary to incapacitate dangerous offenders or when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. In deciding whether to impose incarceration, the sentencing court shall take the following considerations into account:

(a) Incarceration should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Prison and jail resources should not be used for unnecessary sentences of incarceration.

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(5) Notwithstanding subsection (4), a sentence of incarceration of no more than [60] days may be imposed, with the offender's consent, as an alternative to a sentence of probation.

(6) Sentencing courts may impose postrelease supervision to follow a term of incarceration when necessary to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, reduce the risks that they will commit new offenses, or address their needs for housing, employment, family support, medical care, and mental-health care during their transition from prison to the community. In deciding whether to impose postrelease supervision, the sentencing court shall take the following considerations into account:

(a) Postrelease supervision should not be imposed unless it is reasonable to believe it will serve one or more of the purposes of the sanction.

(b) Postrelease supervision should not be viewed as a default sanction to follow a term of incarceration.

(c) Community corrections resources should not be used for unnecessary sentences of postrelease supervision.

§ 7.03. Eligible Sentencing Considerations.

(1) When determining the severity and types of sanctions to impose on a convicted offender, the courts may consider factors relevant to the purposes of sentencing in § 1.02(2), with the exception of factors prohibited or limited by constitutional law, express statutory provision, or controlling judicial precedent.

(2) Except as provided in this Section, the courts shall give no weight to the following factors when determining the severity of sentences:

(a) an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief; and

(b) alleged criminal conduct on the part of the offender other than the current offenses of conviction, criminal conduct admitted by the offender and, consistent with § 6B.07, the offender's prior convictions and juvenile adjudications.

(3) A departure sentence or an extraordinary-departure sentence may not be based on any factor necessarily included in the elements of the offense of which the offender has been convicted, and no finding of fact may be used more than once as a ground for departure or extraordinary departure.

(4) Notwithstanding subsection (2)(a), the courts may consider the following factors when determining the severity and types of sanctions to impose on a convicted offender:

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(a) The courts may consider the personal characteristics of offenders when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be imposed.

(b) The courts may consider an offender's gender when relevant to an assessment of the risks of future criminality or the treatment needs of offenders.

(c) The courts may consider offenders' financial circumstances for the purpose of determination of economic sanctions.

(5) The fact that the defendant has entered a plea agreement may be credited against the severity of sentence as provided in the sentencing guidelines. A plea agreement or sentence agreement standing alone shall not be sufficient ground to support a departure or extraordinary departure, even if agreed upon by the parties. Departure and extraordinary departure sentences following such agreements must be supported by facts sufficient to meet the relevant legal standard for departure.

(6) Following a motion by the government or defense, or on the court's own motion, the sentencing court may consider offenders' substantial assistance to the government in criminal investigations or prosecutions as grounds to reduce the severity of sentences that would otherwise be imposed. The courts shall consider any relevant sentencing guidelines in making such determinations.

§ 7.04. Sentences upon Multiple Convictions.

(1) The sentencing court shall consult all relevant guidelines and presumptions established by the sentencing commission pursuant to § 6B.08 when imposing sentence on a defendant who is

(a) being sentenced in the same proceeding for more than one conviction;

(b) the subject of multiple criminal proceedings in the same jurisdiction or a foreign jurisdiction; or

(c) already serving a sentence arising out of a different criminal case.

(2) Except as otherwise provided in this Section, multiple terms of imprisonment shall run concurrently or consecutively as the court determines when the sentence is imposed. The court may order its sentence to be served concurrent with or consecutive to any sentence the defendant is already serving, but may not specify whether the sentence it imposes will be served concurrent with or consecutive to any pending sentence that has yet to be imposed in another jurisdiction.

(3) The court shall not sentence to probation a defendant who is under sentence of imprisonment [with more than 30 days remaining] or simultaneously impose a sentence of probation and a sentence of imprisonment on separate counts.

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§ 7.07. Sentencing Proceedings; Presentence Investigation and Report.

(1) Before imposing sentence, the court shall order a presentence investigation whenever a defendant has been convicted of a felony and the court is contemplating a sentence of incarceration or a period of probation in excess of the time served by the defendant while awaiting conviction and sentencing on the felony offense.

(2) The court may order a presentence investigation in any other case, sua sponte or at the request of one or more parties.

(3) With the agreement of the parties, the court may order a presentence investigation to be completed before the entry of a judgment of conviction.

(4) The presentence investigation report may include an analysis of the applicable sentencing guidelines, the circumstances attending the commission of the crime, the effect of the crime on any identified victim, the defendant's criminal history, physical and mental condition, family situation and background, and any other matters that the court deems relevant to assessing an appropriate sentence for the crime of conviction. In cases involving suspected mental illness or impairment, or in cases involving sexual offenses or sexually motivated crimes, the court may order a mental-health or psychosexual evaluation by a licensed mental-health professional to be conducted as part of the investigation, although the defendant may not be compelled to make any statement in connection with the presentence investigation.

(5) The presentence investigation report shall be prepared, presented, and used as provided by the rule of court, except that the court shall provide the defendant or attorneys in the case with a copy of the complete report and recommendations at least [10] days before sentencing. Before making the report available to the parties, the court may issue an appropriate protective order regarding sensitive information for the safety of witnesses or to limit the disclosure of otherwise-protected confidential information.

(6) Within a reasonable time after the production of the presentence investigation report, and prior to sentencing, the parties shall be given fair opportunity to controvert or supplement factual information contained in the report. When a factual issue relevant to the sentence is raised by either party, the government shall bear the burden of proving the disputed fact by clear and convincing evidence. The court shall make findings resolving factual disputes relevant to the sentence, and order the report to be corrected, clarified, or supplemented accordingly prior to imposing sentence.

(7) After sentencing, a copy of the final version of the presentence investigation report and any mental-health examination shall be transmitted to the correctional agency to whose custody the defendant is committed. A copy of the report, redacted in accordance with any court-issued protective order, shall also be provided to the defendant.

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(8) If, after sentence has been imposed, a contested fact not relevant to the sentencing proceedings becomes relevant for correctional purposes, including security classification or program assignment, the defendant may petition the sentencing court for correction of the alleged factual error.

(a) In any proceeding under this subsection, the defendant bears the burden of proving by a preponderance of the evidence that an alleged fact is erroneous.

(b) If, after a review of the written record or an evidentiary hearing, the court determines that one or more errors exist, the court shall order that the report be amended, and that the correctional agency update its records accordingly.

§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law.

(1) The court shall impose sentence within a reasonable time following a defendant's conviction of a felony or misdemeanor. Sentencing proceedings shall be governed by the rules of criminal procedure, in conformity with this Article.

(2) At sentencing, the court may rely upon facts necessary to the conviction, facts admitted by the defendant, and facts in the presentence report that are not contested by the parties.

(3) Additional findings of fact and conclusions of law at sentencing shall be made by the court at sentencing, except as provided in § 7.07B. The court shall provide on the record an explanation of the reason for its resolution of any disputed matters of fact or law relevant to the sentence.

(4) The burden of proof for contested factual issues at sentencing shall be a preponderance of the evidence, except as provided in § 7.07B.

(5) At the conclusion of sentencing proceedings or within [20] days thereafter, the court shall rule upon any remaining issues submitted by the parties, provide an explanation on the record of the reasons for its rulings, and enter an appropriate order.

§ 7.07B. Sentencing Proceedings; Jury Factfinding.

(1) "Jury-sentencing facts," for purposes of this Section, are facts that, under the federal or state constitution, must be found by a jury before those facts may serve as a basis for a sentencing decision.

(2) Except as provided in subsection (8), unless admitted by the defendant, a jury-sentencing fact may not form the basis of a sentencing decision unless it is first tried to a jury and proven beyond a reasonable doubt.

(3) The government must provide prior written notice to the defendant of its intention to establish one or more jury-sentencing facts.

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(a) Notice must be given no later than [20] days before trial or entry of a guilty plea, although later notice may be permitted by the court upon a showing of good cause for delay. The timing of notice must in all cases allow the defendant reasonable time to prepare for the proceeding at which the existence of the jury-sentencing fact will be determined

(b) The court may foreclose presentation of evidence on an alleged jury-sentencing fact if the court finds that, even if the fact were proven, it would not affect the court's sentencing decision.

(4) Factual issues under this Section may be determined along with guilt or innocence in a bifurcated sentencing factfinding proceeding or in bifurcated jury deliberations at trial, as the court determines in the interest of justice.

(a) The jury shall be instructed to return a special verdict as to each alleged jury-sentencing fact.

(b) In a case that has gone to trial, the sentencing proceeding ordinarily should be conducted before the trial jury as soon as practicable after a guilty verdict has been returned. In addition to evidence presented by the parties at the bifurcated proceeding, the jury may consider relevant evidence received during the trial.

(c) When necessary, the court shall impanel a new jury for a bifurcated proceeding. The selection of jurors shall be governed by the rules applicable to the selection of jurors for the trial of criminal cases.

(5) The law and rules of criminal trial procedure and pretrial discovery shall apply at a bifurcated proceeding.

(6) Determination of the existence of a jury-sentencing fact shall not control the court's decision as to whether a specific penalty is appropriate under applicable legal standards. Discretion as to the weight to be given the jury-sentencing fact remains with the court.

(7) The court may on its own motion raise any factual consideration that would be open to the government under subsection (3). If the court elects to do so, the court shall invite the parties to present evidence and arguments on the issue at trial or at a bifurcated proceeding, consistent with subsections (4) and (5), and may on its own motion, when sufficient evidence has been presented, instruct the jury to make a finding under subsection (4)(a). The court shall allow the parties reasonable time to prepare for the proceeding at which the existence of the fact will be determined.

(8) The defendant may waive the right to jury determination of facts under this Section, provided the waiver is knowing and intelligent. The rules of procedure that govern a defendant's waiver of the right to a jury trial on the issue of guilt shall apply to a waiver of a defendant's rights under this provision. Upon receipt of a defendant's waiver, the

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court shall make findings of fact under this Section. For facts not admitted by the defendant, the court shall employ the reasonable-doubt standard of proof.

<u>§ 7.07C. Sentencing Proceedings; Victims' Rights.</u>

(1) For purposes of this Section, a "victim" is any person who has suffered physical, emotional, or financial harm as the direct result of the commission of a criminal offense. If deceased, incapacitated, or a minor, the victim may be represented by the victim's estate, spouse, parent, legal guardian, sibling, grandparent, significant other, or other representative, as determined by the court.

(2) Upon an offender's conviction, in any prosecution for a felony or assaultive misdemeanor in which there is an identifiable victim, the prosecutor shall make reasonable efforts to notify the victim of his or her rights under this Section and that he or she may have the right to victim restitution under § 6.04A.

(3) After being contacted by the prosecutor pursuant to subsection (2), the victim must file a request with the prosecutor in order to receive further notifications under this Section. The request must include the victim's current address or other information necessary to contact the victim.

(4) Victims shall have the right to receive timely notice of and be present at any sentencing hearing in their case.

(5) Victims shall have the right to make a victim impact statement as provided below:

(a) The victim may submit a written victim impact statement to the court prior to the sentencing hearing.

(b) The victim may submit a written victim impact statement to the officer responsible for preparing the presentence report for inclusion in the report.

(c) The victim may make an oral victim impact statement of reasonable length at the sentencing hearing.

(d) A victim impact statement may be unsworn~~,~~ unless the victim elects to provide testimony under oath.

(e) A victim impact statement may be made in a form other than those specified in subsection (5)(a) through (d) if approved by the court.

(f) In a case with multiple victims, the court may fashion an appropriate process for receipt of victim impact information at the sentencing hearing.

(6) The content of a victim impact statement shall relate solely to the impact of the crime on the victim and the victim's family. The impact statement may not address alleged criminal conduct for which the defendant has not been convicted.

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(7) A victim impact statement may not include a recommendation concerning the sentence to be imposed on the defendant.

(8) Any content of a victim's impact statement not authorized in this Section shall be disregarded by the sentencing court.

(9) Any statement provided to the court prior to the sentencing hearing shall be shared with the defendant and prosecutor within a reasonable time in advance of the hearing. The court shall provide the defendant and prosecutor reasonable opportunity to challenge the factual assertions in a victim's impact statement. If necessary, the court shall adjourn the sentencing hearing to allow reasonable time for the defendant to prepare a response.

(10) If the victim has given sworn testimony at a sentencing hearing, the defendant shall have the right to cross-examine the victim.

(11) A failure to honor a victim's rights under this Section shall not be cause for invalidating a sentence or for the resentencing of a defendant.

§ 7.08. Sentence Modification.

(1) At any time from the imposition of a sentence through its termination, after giving prior notice to the parties, the court may reduce a sentence to correct an arithmetical, technical, or other clear error in recording or calculating the sentence, either *sua sponte* or upon motion of the parties or the department of corrections.

(2) Upon the government's motion made prior to the termination of sentence, the court may reduce a sentence if the defendant provided substantial assistance in investigating or prosecuting another person's crime or criminal case when the assistance, or its full value, was not known to the court at the time of sentencing. A sentence reduction under this subsection may reduce the sentence to a level below any otherwise-applicable mandatory-minimum term of imprisonment under state law.

(3) Except as otherwise specified by the legislature, when doing so advances the purposes of sentencing set forth in § 1.02(2), the court may at any time prior to the termination of sentence, upon petition by either party or the department of corrections reduce the sentence of a defendant who is:

(a) serving a term of confinement, probation, or postrelease supervision based on a guideline sentencing range that has subsequently been lowered by the sentencing commission and made retroactive;

(b) serving a sentence for violation of a criminal statute that has subsequently been repealed by the legislature or interpreted by [the State Supreme Court or the United States Supreme Court] not to reach the conduct for which the defendant was convicted.

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(4) Whenever an original sentence has been modified pursuant to this Section, the government and any crime victims who have registered for such notice as required by § 7.07C(3) are entitled to notice.

§ 7.09. Appellate Review of Sentences.

(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that preserves substantial judicial discretion to individualize sentences within a framework of law.

(2) An appeal from a sentence may be taken by the defendant or the government on grounds that a sentence is unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of the purposes stated in § 1.02(2)(a). The right to appeal from a sentence shall be as of right on the same terms as a first appeal from a criminal conviction.

(3) A sentence that is the same as a specific sentence recommended by the defendant or the government, or is the same as a specific sentence agreed upon by the defendant and the government, may not be appealed by a party that made the recommendation or entered the agreement, unless the sentence is unconstitutional, outside the court's jurisdiction to impose, or outside the range of statutory penalties authorized for the offense(s) of conviction. A defendant must also have an opportunity, through direct appeal or collateral review, to challenge a sentence that is the product of ineffective assistance of counsel.

(4) No waiver of the right to take an appeal from sentence shall be permitted or honored by the appellate courts if the waiver is contained in a plea agreement or is otherwise obtained prior to sentencing proceedings in the case. This provision does not apply to waivers of appellate issues that occur at sentencing proceedings through procedural default.

(5) The standard of review of sentencing decisions in individual cases shall be as follows:

(a) The appellate courts shall exercise de novo review of claims of errors of law. Whether a particular consideration is a legally permissible ground for departure from the sentencing guidelines is a question of law within the meaning of this Section. The permissibility of a departure factor shall be determined in light of the purposes in § 1.02(2).

(b) The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.

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(c) Findings of facts made by the sentencing court or a jury at sentencing proceedings shall not be overturned unless clearly erroneous.

(d) When based on a legally permissible departure consideration, the appellate courts shall uphold sentencing courts' decisions to depart from sentencing guidelines and the appropriate degree of departures unless such decisions lack a substantial basis in the record demonstrating defensible grounds for departure. The appellate courts shall uphold sentencing courts' decisions to impose presumptive-guidelines sentences unless the failure to depart in an individual case was clearly unreasonable and an abuse of discretion in light of the purposes in § 1.02(2).

(e) The appellate courts shall exercise de novo review of sentencing courts' decisions to make extraordinary departures from sentencing guidelines as defined in §§ 6B.01 and 7.XX(3).

(f) The appellate courts may reverse and remand any sentence not supported by an explanation of the sentencing court's reasoning as required in § 7.XX(4) or (5).

(6) When authorized under the terms of this provision, an appellate court may affirm or reverse a sentence pronounced by a sentencing court, remand a case for resentencing, or order that the sentencing court fix sentence as directed by the appellate court.

(7) The appellate court shall issue a written opinion whenever it reverses, remands, or modifies the judgment of the sentencing court. The appellate court should issue a written opinion in any other case in which the court believes that a written opinion will provide needed guidance to sentencing judges, the sentencing commission, or others in the sentencing and corrections system.

(8) The appellate courts may provide by rule for summary disposition of cases arising under this Section when no substantial question is presented by the appeal, provided the summary disposition contains a statement of why the questions presented are not substantial.

(9) When appellate courts reverse, remand, or modify the judgments of sentencing courts, prosecutors shall make reasonable efforts to notify victims who have requested such notification under § 7.07C(3).

§ 305.1. Good-Time Reductions of Prison Terms; Reductions for Program Participation.

(1) Prisoners shall receive credits of [15] percent of their full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A. Prisoners' dates of release under this subsection shall be calculated at the beginning of their term of imprisonment.

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(2) Prisoners shall receive additional credits of up to [15 percent of their full terms of imprisonment as imposed by the sentencing court] [120 days] for satisfactory participation in vocational, educational, or other rehabilitative programs.

(3) Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.

(4) Credits under this provision may only be revoked upon a finding by a preponderance of the evidence that the prisoner has committed a criminal offense or a serious violation of the rules of the institution, and the amount of credits forfeited shall be proportionate to that conduct.

§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in Appendix A, containing Principles of Legislation. See page 564.

§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons.

(1) An offender under any sentence of imprisonment shall be eligible for judicial modification of sentence in circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence.

(2) The department of corrections shall notify prisoners of their rights under this provision when it becomes aware of a reasonable basis for a prisoner's eligibility, and shall provide prisoners with adequate assistance for the preparation of applications, which may be provided by nonlawyers.

(3) The courts shall create procedures for timely assignment of cases under this provision to an individual trial court, and may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under the standard of subsection (7).

(4) The trial courts shall have discretion to determine whether a hearing is required before ruling on an application under this provision.

(5) If the prisoner is indigent, the trial court may appoint counsel to represent the prisoner.

(6) The procedures for hearings under this Section shall include the following minimum requirements:

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(a) The prosecuting authority that brought the charges of conviction against the prisoner shall be allowed to represent the state's interests at the hearing;

(b) Notice of the hearing shall be provided to any crime victim or victim's representative, if they can be located with reasonable efforts;

(c) The trial court shall render its decision within a reasonable time of the hearing;

(d) The court shall state the reasons for its decision on the record;

(e) The prisoner and the government may petition for discretionary review of the trial court's decision in the [court of appeals].

(7) The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the purposes of sentencing in § 1.02(2).

(8) The court may modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law.

(9) When a prisoner who suffers from a physical or mental infirmity is ordered released under this provision, the department of corrections as part of the prisoner's reentry plan shall identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

(10) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by courts when considering the modification of prison sentences under this provision.

§ 305.8. Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation.

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. The text of this provision is included in Appendix A, containing Principles of Legislation. See page 587 .

§ 6.14. Victim-Offender Conferencing; Principles for Legislation.

The language below sets out principles that should be advanced by laws that authorize courts to experiment with the use of victim-offender conferencing in criminal cases.

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1. When consistent with the safeguards set forth in this provision, trial courts should be permitted to authorize victim-offender conferencing in appropriate criminal cases, either as an alternative to traditional adjudication or as a supplement to the adjudicative process.

2. As used in this provision, victim-offender conferencing is any formalized opportunity for guided exchange between one or more defendants and crime victims.

3. The primary purpose of victim-offender conferencing should be to repair harm to crime victims, families, and communities; to facilitate the rehabilitation and reintegration of offenders into the law-abiding community; and to increase a sense among victims and offenders that their views have been heard and that a fair process has been employed for the resolution of harm caused by acts of crime.

4. Victim-offender conferencing should be used only when all participating victims and defendants have given informed consent to participation. Additional eligibility requirements, such as the accused's willingness to accept responsibility for the offense, may also be imposed by the court.

5. When the participating victim(s) and defendant(s) have given informed consent, and the prosecutor and court have given their approval, victim-offender conferencing may be used to devise a final disposition at sentencing, as part of a deferred-prosecution agreement under § 6.02A, or as part of a deferred-adjudication program under § 6.02B if any agreed-upon disposition reached by the participants is first presented to the court for approval.

a. Before approving a recommended disposition, the court should find that:

i. The participants have freely consented to the recommendation; and

ii. The recommended disposition is not disproportionate to the crime.

b. If the court approves the recommended disposition, the disposition should be allowed to supplant any or all other authorized disposition, and should be permitted to supersede any mandatory-minimum term of imprisonment under state law.

c. If a victim-offender conference does not yield agreement on an appropriate disposition, or if the court refuses to approve a recommended disposition, then all other originally authorized sentencing dispositions should be available.

d. When a victim-offender conference does not yield an agreement on an appropriate disposition, no admission made by the defendant as part of that process should be admissible in any proceeding against the defendant.

6. Notwithstanding paragraph (5), when requested by a victim or defendant, and with the consent of the participating victim(s) and defendant(s), the court should be permitted to

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may make victim-offender conferencing available for purposes other than fashioning a disposition.

7. In deciding how to respond to a request made pursuant to either paragraph (5) or (6), the court should be authorized to seek the advice of a trained facilitator or mediator on the case's appropriateness for victim-offender conferencing. In making such a determination, the facilitator should consider factors such as the relationship between the parties, the nature and severity of the offense, and any imbalances of power between the defendant(s) and victim(s).

8. Victim-offender conferences should be designed to help participating victims and defendants reach mutual agreement about issues that concern them both including—when appropriate—what the disposition of the case should be. Any victim-offender conference utilized under this Section should allow participants adequate opportunity to express their views about the crime, the harm it caused, and what reparation is needed. The practice should be led by a neutral, trained facilitator with responsibility for ensuring that all participants have the opportunity to be heard. The judge assigned to the case may not serve as a victim-offender conference facilitator for that case.

9. With the consent of the participating victim(s) and defendant(s), a victim-offender conference may include additional participants, such as friends and family members of victims and offenders and representatives of the community in which the offense occurred, and may require that some or all additional participants join in any agreement on a recommended disposition.

10. A participating defendant or victim should be permitted to withdraw at any time from participation in a victim-offender conference with no prejudice to the continuation of the case in a traditional adjudicative forum.

11. The [sentencing commission] should ensure that victim-offender conferences used under this Section are appropriately monitored and evaluated to ensure that they are not being used in ways inconsistent with the principles set forth in § 1.02.

§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation.

> ***The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language below sets out principles that a legislature should seek to effectuate through enactment of such a provision.***

1. The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.

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2. After first eligibility, a prisoner's right to apply for sentence modification shall recur at intervals not to exceed 10 years.

3. The department of corrections shall ensure that prisoners are notified of their rights under this provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers. The judicial panel or other judicial decisionmaker shall have discretion to appoint counsel to represent applicant prisoners who are indigent.

4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence. The judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under this standard.

5. The judicial panel or other judicial decisionmaker shall be empowered to modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law.

6. Notice of sentence-modification proceedings should be given to victims, if they can be located with reasonable efforts, and to the relevant prosecuting authorities. Any victim's impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker. Victims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.

7. An adequate record of proceedings under this provision shall be maintained, and the judicial panel or other judicial decisionmaker shall be required to provide a statement of reasons for its decisions on the record.

8. There shall be a mechanism for review of decisions under this provision, which may be discretionary rather than mandatory.

9. The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by the judicial panel or other judicial decisionmaker when considering applications under this provision.

10. The legislature should instruct the sentencing commission to recommend procedures for the retroactive application of this provision to prisoners who were sentenced before its effective date, and should authorize retroactivity procedures in light of the commission's advice.

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§ 305.8. Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation.

1.1. The legislature shall create a framework for "control release" from prison, jail, probation, and postrelease supervision when correctional populations exceed the operational capacities of relevant agencies and institutions.

1.2. The legislature should empower correctional agencies to establish and periodically revise standards of their operational capacities with respect to different correctional populations, subject to review by the courts, the sentencing commission, or other qualified body.

a. For incarcerated populations, operational capacity should reflect a threshold beyond which an institution cannot guarantee the safety and humane treatment of inmates, cannot reasonably respond to the risks and needs of individual inmates, or cannot provide reasonable health-care and mental-health-care services.

b. For populations under community supervision, operational capacity should reflect a threshold beyond which [the supervising agency] cannot supervise the offenders under its charge in accordance with [professional standards] [standards promulgated by a statewide standards certification workgroup].

c. "Populations" under this provision include correctional subpopulations who require different facilities, levels of security, supervision, or services, such as male versus female inmates, or probation caseloads divided by risk, needs, or offense category.

d. Standards of operational capacity shall be made available to the public together with explanations of how the standards were derived.

1.3. The control-release authority under this provision shall not be limited by any mandatory-minimum term of incarceration or supervision under state law.

1.4. Once control release is granted from a term of incarceration or supervision under this Section, the balance of that term is permanently discharged. Control release from one sanction does not release the offender from any other sanctions remaining in their sentences.

1.5. The legislature may authorize or require the sentencing commission to promulgate guidelines to assist the relevant agencies in the control-release decisionmaking process.

1.6. The special powers created by this provision should remain in effect so long as the circumstances of overcrowding exist.

1.7. The legislature should provide that the control-release framework creates no enforceable right of action on the part of any prisoner, jail inmate, probationer, or individual on postrelease supervision.

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1.8. Priorities for control-release eligibility shall be based on uniform criteria that are made publicly available.

1.9. All measures taken under this Section entail the lowest possible risk to public safety.

Prison Populations

2.1. When an inmate population exceeds the operational capacity of available prison resources for [30] consecutive days, the director of the department of corrections shall be authorized to declare an overcrowding state of emergency. Following such a declaration, the Department should be empowered to take the following actions for affected prisoners:

a. advance any prisoner's release date by as much as [90] days.

b. award good-time allowances to any prisoner of up to [double] the credits earned under § 305.1.

2.2. If the above measures are not sufficient to resolve the state of emergency, the department of corrections may:

a. advance any prisoner's release date by up to one year in conformity with control-release guidelines promulgated by the sentencing commission; or

b. advance any prisoner's release date by any amount of time in conformity with reliable risk-assessment processes and procedures.

Jail Populations

3.1. When [the officer in charge of a city or county jail] determines that an inmate population has exceeded the jail's operational capacity for [30] consecutive days, or has exceeded [120 percent] of the jail's operational capacity for [8 days within a 30-day period], [the officer] should be authorized to petition [the chief judge of the judicial district] to declare an overcrowding state of emergency. The court should be required to issue the emergency declaration if it finds by a preponderance of the evidence that [the officer's] determination is correct. Following such a declaration, [the officer] should be empowered to take the following actions for affected inmates:

a. advance any inmate's release date by as much as [90] days.

b. release any inmate convicted solely of nonviolent offenses after completion of [one-half] of the inmate's sentence.

Probation Populations

4.1. When a [chief of probation] determines that a probation population has exceeded the probation department's operational capacity for [30] consecutive days, the [chief of probation] should be authorized to petition [the chief judge of the judicial district] to declare an overcrowding state of emergency. The court should be required to issue the

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emergency declaration if it finds by a preponderance of the evidence that [the chief of probation's] determination is correct. Following such a declaration, [the chief of probation] should be empowered to take the following actions for affected probationers:

a. advance the date of discharge from supervision for any probationer by as much as six months;

b. discharge any probationer who has been in substantial compliance with sentence conditions for a continuous period of one year or more.

Postrelease Supervision Populations

5.1 When the director of the department of corrections determines that the postrelease supervision population exceeds the operational capacity of the postrelease supervision system for [30] consecutive days, the director shall be authorized to declare an overcrowding state of emergency. Following such a declaration, the department should be empowered to take the following actions for affected individuals on postrelease supervision:

a. advance the date of discharge from supervision for any individual on postrelease supervision by as much as six months;

b. for those convicted solely of nonviolent offenses, discharge any individual on postrelease supervision who has been in substantial compliance with sentence conditions for a continuous period of one year or more.

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