Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-First Annual Meeting on May 19, 20, and 21, 2014

ALI
THE AMERICAN LAW INSTITUTE

MODEL PENAL CODE: SENTENCING

Tentative Draft No. 3
(April 24, 2014)

SUBJECTS COVERED

PART I General Provisions
   ARTICLE 6 Authorized Disposition of Offenders (§§ 6.02, 6.02A, 6.02B, 6.03, 6.04, 6.04A, 6.04B, 6.04C, 6.04D, 6.09, 6.15)
   ARTICLE 6x Collateral Consequences of Criminal Conviction (§§ 6x.01-6x.06)
   APPENDIX A Proposed Complete Table of Contents for Part I, Articles 6, 6x, 6A, 6B, and 7, and Partial Contents for Parts III and IV
   APPENDIX B Black Letter of Tentative Draft No. 3
   APPENDIX C Other Relevant Black-Letter Text

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

©2014 by The American Law Institute
All Rights Reserved

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

© 2014 by The American Law Institute
David W. Rivkin, Debevoise & Plimpton, New York, NY
Daniel B. Rodriguez, Northwestern University School of Law, Chicago, IL
Lee H. Rosenthal, U.S. District Court, Southern District of Texas, Houston, TX
Gary L. Sasso, Carlton Fields Jorden Burt, Tampa, FL
Mary M. Schroeder, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ
Anthony J. Scirica, U.S. Court of Appeals, Third Circuit, Philadelphia, PA
Marsha E. Simms, Weil, Gotshal & Manges (retired), New York, NY
Robert H. Sitkoff, Harvard Law School, Cambridge, MA
Jane Stapleton, Australian National University College of Law, Canberra, Australia;
University of Texas School of Law, Austin, TX
Laura Stein, The Clorox Company, Oakland, CA
Larry S. Stewart, Stewart Tilghman Fox Biansi & Cain, Miami, FL
Elizabeth S. Stong, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
Catherine T. Struve, University of Pennsylvania Law School, Philadelphia, PA
David K. Y. Tang, K&L Gates, Seattle, WA
Sara A. Vance, U.S. District Court, Eastern District of Louisiana, New Orleans, LA
Bill Wagner, Wagner, Vaughan & McLaughlin, Tampa, FL
Steven O. Weise, Proskauer Rose, Los Angeles, CA
Diane P. Wood, U.S. Court of Appeals, Seventh Circuit, Chicago, IL

COUNCIL EMERITI
Shirley S. Abrahamson, Wisconsin Supreme Court, Madison, WI
Philip S. Anderson, Williams & Anderson, Little Rock, AR
Sheila L. Birnbaum, Quinn Emanuel Urquhart & Sullivan, New York, NY
Bennett Boskey**, Washington, DC
Michael Boudin, U.S. Court of Appeals, First Circuit, Boston, MA
William M. Burke, Shearman & Sterling (retired), Costa Mesa, CA
Hugh Calkins, Initiatives in Urban Education Foundation, Cleveland Heights, OH
Gerhard Casper, Stanford University, Stanford, CA
William T. Coleman, Jr., O'Melveny & Myers, Washington, DC
Edward H. Cooper, University of Michigan Law School, Ann Arbor, MI
Roger C. Cramton, Cornell Law School, Ithaca, NY
George Clemon Freeman, Jr., Hunton & Williams, Richmond, VA
Conrad K. Harper, Simpson Thacher & Bartlett (retired), New York, NY
Vester T. Hughes, Jr., K&L Gates, Dallas, TX
Herma Hill Kay, University of California at Berkeley School of Law, Berkeley, CA
Pierre N. Leval, U.S. Court of Appeals, Second Circuit, New York, NY
Betsy Levin, Washington, DC
Hans A. Linde, Portland, OR
Martin Lipton, Wachtell, Lipton, Rosen & Katz, New York, NY
Myles V. Lynk, Arizona State University, Sandra Day O'Connor College of Law, Tempe, AZ
Robert MacCrone, Sullivan & Cromwell, New York, NY
Vincent L. McKusick, Pierce Atwood, Portland, ME
Robert H. Mundheim, Shearman & Sterling, New York, NY
Roswell B. Perkins***, Debevoise & Plimpton, New York, NY
Ellen Ash Peters, Connecticut Supreme Court (retired), Hartford, CT
Robert A. Stein, University of Minnesota Law School, Minneapolis, MN
Michael Traynor***, Cobalt LLP, Berkeley, CA
Patricia M. Wald, Washington, DC
William H. Webster, Milbank, Tweed, Hadley & McCloy, Washington, DC
George Whittenburg, Whittenburg Whittenburg Schachter & Harris, Amarillo, TX
Herbert P. Wilkins, Boston College Law School, Newton, MA

**Treasurer Emeritus
***President Emeritus and Chair of the Council Emeritus
We welcome written comments on this draft and ask that they be addressed to the Director and the Reporters; their contact information appears below. Unless expressed otherwise in the submission, by submitting written comments the author authorizes The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author.

**Reporters**

Professor Kevin R. Reitz  
University of Minnesota Law School  
229 19th Avenue South  
Minneapolis, MN 55455-0400  
Fax: (612) 625-2011  
Email: reitz027@umn.edu

Professor Cecelia M. Klingele  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706-1399  
Fax: (608) 262-5485  
Email: cklingele@wisc.edu

**Director**

Professor Lance Liebman  
The Executive Office  
THE AMERICAN LAW INSTITUTE  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
Fax: (215) 243-1636  
Email: director@ALI.org

**Reporters’ Conflicts of Interest**

The project’s Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.
EDWARD E. RHINE, Ohio Department of Rehabilitation and Corrections, Columbus, OH [from 2013]
THOMAS WARREN ROSS, University of North Carolina, Chapel Hill, NC
PAUL SHECHTMAN, Zuckerman Spaeder, New York, NY
VIRGINIA E. SLOAN, President, The Constitution Project, Washington, DC [from 2014]
KATE STITH-CABRANES, Yale Law School, New Haven, CT
RANDOLPH N. STONE, University of Chicago Law School, Chicago, IL [from 2003 to 2013]
ALICEMARIE H. STOTLER, U.S. District Court, Central District of California, Santa Ana, CA
WILLIAM J. STUNTZ, Harvard Law School, Cambridge, MA [Deceased 2011]
CAROLYN ENGEL TEMIN, Pennsylvania Court of Common Pleas, First Judicial District, Philadelphia, PA [from 2012]
SANDRA GUERRA THOMPSON, University of Houston Law Center, Houston, TX
MICHAEL TONRY, University of Minnesota Law School, Minneapolis, MN
PATRICIA M. WALD, Washington, DC
RICHARD B. WALKER, Kansas District Court, Ninth Judicial District, Newton, KS
GREGORY A. WEEKS, North Carolina Superior Court, Fourth Judicial Division, District 12, Fayetteville, NC [to 2013]
MICHAEL A. WOLFF, Saint Louis University School of Law, St. Louis, MO [from 2012]
FRANKLIN E. ZIMRING, University of California at Berkeley School of Law, Berkeley, CA [to 2004]

LIAISONS
For the American Academy of Appellate Lawyers (AAAL)
    HARVEY J. SEPLER, Hollywood, FL
For the American Bar Association Criminal Justice Section
    JAMES E. FELMAN, Tampa, FL
For the American Civil Liberties Union (ACLU)
    KARA DANSKY, Washington, DC
For the Brennan Center for Justice at NYU School of Law
    INIMAI M. CHETTIAR, New York, NY
For the National Association of Criminal Defense Lawyers (NACDL)
    PETER GOLDBERGER, Ardmore, PA
For the National Association of Sentencing Commissions (NASC)
    STEVEN L. CHANENSON, Villanova University School of Law, Villanova, PA

© 2014 by The American Law Institute
MEMBERS CONSULTATIVE GROUP

Model Penal Code: Sentencing
(as of February 9, 2014)

CHARLES W. ADAMS, Tulsa, OK
BURTON C. AGATA, Hempstead, NY
MARK D. AGRAST, Washington, DC
ELIZABETH K. AINSLIE, Philadelphia, PA
ELIZABETH ALEXANDER, Washington, DC
PETER C. ALEXANDER, Fort Wayne, IN
RONALD J. ALLEN, Chicago, IL
ROBERT H. ALSDORF, Seattle, WA
DIANE MARIE AMANN, Athens, GA
JOSÉ F. ANDERSON, Baltimore, MD
RICHARD T. ANDRIAS, New York
Supreme Court, Appellate Division,
First Judicial Department,
New York, NY
NANCY F. ATLAS, U.S. District Court,
Southern District of Texas,
Houston, TX
MELISSA AUBIN, Washington, DC
THOMAS EDGAR BAKER, Houston, TX
JOSEPH R. BANKOFF, Atlanta, GA
RACHEL E. BARKOW, New York, NY
RICHARD J. BARTLETT, Glens Falls, NY
JÜRGEN BASEDOW, Hamburg, Germany
MICHAEL M. BAYLSON, U.S. District
Court, Eastern District of
Pennsylvania, Philadelphia, PA
SARA SUN BEALE, Durham, NC
ROBERT A. BEHRMAN, Greetley, CO
ROBERT O. BERGER, Lexington, MA
JUDITH MITCHELL BILLINGS, Utah Court
of Appeals, Salt Lake City, UT
RICHARD C. BOSSON, New Mexico
Supreme Court, Santa Fe, NM
MARGOT BOTSFORD, Massachusetts
Supreme Judicial Court, Boston, MA
DENNIS J. BRAITHWAITE, Camden, NJ
DAVID A. BRENNEN, Lexington, KY
STEVEN A. BRICK, Alameda County
Superior Court, Oakland, CA
SAMUEL W. BUELL, Durham, NC
ELENA A. CAPPELLA, Philadelphia, PA
CATHERINE C. CARR, Philadelphia, PA
WILLIAM B. CARR, Jr., Rose Valley, PA
PETER H. CARSON, San Francisco, CA
R. MICHAEL CASSIDY, Boston, MA
LEONARDO CASTRO, Minnesota Judicial
Branch, Second Judicial District
Court, St. Paul, MN
HENRY L. CHAMBERS, Jr., Richmond, VA
GABRIEL J. CHIN, Davis, CA
DAVE S. CIOLINO, New Orleans, LA
ROGER S. CLARK, Camden, NJ
NATHAN B. COATS, Colorado Supreme
Court, Denver, CO
NEIL HOWARD COGAN, Costa Mesa, CA
NEIL P. COHEN, San Rafael, CA
LOVIDA H. COLEMAN, Jr., McLean, VA
MARY COOMBS, Miami, FL
WILLIAM S. COOPER, Elizabethtown, KY
JAMES W. CRAIG, New Orleans, LA
JOHN C. CRATSLY, Concord, MA
JAMES B. CRAVEN III, Durham, NC
MARIANO-FLORENTINO CUÉLLAR,
Stanford, CA
DENNIS E. CURTIS, New Haven, CT
JACK DAVIES, Minneapolis, MN
DAVID A. DEMERS, Florida Circuit
Court, Sixth Judicial Circuit, St.
Petersburg, FL
DEBORAH W. DENO, New York, NY
JOHN L. DIAMOND, San Francisco, CA
PAUL STEVEN DIAMOND, U.S. District
Court, Eastern District of
Pennsylvania, Philadelphia, PA
BRENT E. DICKSON, Indiana Supreme
Court, Indianapolis, IN
GORDON L. DOE, Boston, MA
WILLIAM C. DONNINO, New York
Supreme Court, Mineola, NY
TOBIAS A. DORSEY, Silver Spring, MD
WILLIAM F. DOWNE, Casper, WY
MICHAEL R. DREEBEN, Washington, DC
JOSHUA DRESSLER, Columbus, OH
JEAN NICOLAS DREY, Basel, Switzerland
DAVID F. DUMOUCHEL, Detroit, MI
MEREDITH J. DUNCAN, Houston, TX
GUY DU PONT, Montréal, QC, Canada
CHRISTINE M. DURHAM, Utah Supreme
Court, Salt Lake City, UT

© 2014 by The American Law Institute
WARREN W. EGINTON, U.S. District Court, District of Connecticut, Bridgeport, CT
DAVID N. ELLENHORN, New York, NY
SHELTON H. ELSN, New York, NY
ANNE S. EMANUEL, Atlanta, GA
JOANNE A. EPPS, Philadelphia, PA
ANTHONY C. EPSTEIN, Superior Court of the District of Columbia, Washington, DC
NORMAN L. EPSTEIN, California Court of Appeal, Second District, Division Four, Los Angeles, CA
ROGER A. FAIRFAX, Jr., Washington, DC
MARY FAN, Seattle, WA
NITA A. FARAHANY, Durham, NC
IRA M. FEINBERG, New York, NY
JAMES E. FELMAN, Tampa, FL
DAVID FOSCUE, Montesano, WA
ERIC M. FREEDMAN, Hempstead, NY
SAMUEL S. FREEDMAN, Connecticut Superior Court, Stamford, CT
STEVEN I. FRIEDLAND, Greensboro, NC
W. ROYAL FURGSON, Jr., Dallas, TX
JESSE M. FURMAN, U.S. District Court, Southern District of New York, New York, NY
ALFREDO GARCIA, Miami Gardens, FL
ANNE GARDNER, Texas Second Court of Appeals, Fort Worth, TX
E. SUSAN GARSH, Trial Court of Massachusetts, Superior Court Department, Boston, MA
FAITH E. GAY, New York, NY
MITCHELL S. GOLDBERG, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA
MURRAY C. GOLDMAN, Philadelphia, PA
YVONNE GONZALEZ ROGERS, U.S. District Court, Northern District of California, Oakland, CA
HERVÉ GOURAIG, Newark, NJ
JANE CUTLER GROENSPAN, Philadelphia, PA
MICHAEL GREENWALD, Philadelphia, PA
CHARLES E. GRIFFIN, Ridgeland, MS
JOHN J. GROGAN, Philadelphia, PA
ZACHARY J. HARMON, Washington, DC
LAWRENCE K. HELLMAN, Oklahoma City, OK
VIRGINIA ELLEN HENCH, Honolulu, HI
PETER J. HENNING, Detroit, MI
ERIC B. HENSON, Philadelphia, PA
DONALD H. J. HERMANN, Chicago, IL
RANDY HERTZ, New York, NY
BARBARA PARKER HERVEN, Texas Court of Criminal Appeals, Austin, TX
TRACY D. HESTER, Houston, TX
ERNEST R. HIGGINbotham, Dallas, TX
KENNETH L. HIRSCH, Laguna Woods, CA
LONNY S. HOFFMAN, Houston, TX
MARK R. HORNAK, U.S. District Court, Western District of Pennsylvania, Pittsburgh, PA
EDWIN E. HUDDLESON, Washington, DC
KEITH N. HYLTON, Boston, MA
JOAN K. IRION, California Court of Appeal, Fourth District, Division One, San Diego, CA
KETANSHI BROWN JACKSON, U.S. District Court, District of Columbia, Washington, DC
RALPH A. JACOBS, Philadelphia, PA
LAURENCE M. JOHNSON, Boston, MA
KATHRYN M. KASE, Houston, TX
MICHAEL EDWARD KEASLER, Texas Court of Criminal Appeals, Austin, TX
MICHAEL J. KEATING, St. Louis, MO
CYNTHIA S. KENT, Tyler, TX
MARK R. KILLENBECK, Fayetteville, AR
NANCY J. KING, Nashville, TN
RUFUS G. KING III, Superior Court of the District of Columbia, Washington, DC
LAIRD C. KIRKPATRICK, Washington, DC
KENNETH F. KIRWIN, St. Paul, MN
SUSAN R. KLEIN, Austin, TX
JOHN G. KOELTL, U.S. District Court, Southern District of New York, New York, NY
JACK M. KRESS, Saratoga Springs, NY
DANIEL J. KRISCH, Hartford, CT
LARRY KUPERS, Washington, DC
IRIS LAN, Washington, DC
HOWARD LANGER, Philadelphia, PA
DOUGLAS S. LAVINE, Connecticut Appellate Court, Hartford, CT
CYNTHIA K. LEE, Washington, DC
EVAN TSEN LEE, San Francisco, CA
STEPHEN E. LEE, Phoenix, AZ

© 2014 by The American Law Institute
DAVID SCHUMAN, Oregon Court of Appeals, Salem, OR
ALAN R. SCHWARTZ, Florida District Court of Appeal, Third District, Miami, FL
SAMUEL W. SEYMOUR, New York, NY
ERIC A. SHUMSKY, Arlington, VA
KAMI CHAVIS SIMMONS, Winston-Salem, NC
KENNETH W. SIMONS, Boston, MA
VIRGINIA E. SLOAN, Washington, DC
ROBERT D. SLOANE, Boston, MA
GEORGE PRESCOTT SLOVER, Washington, DC
FREDERIC N. SMALKIN, Baltimore, MD
BEVERLY MCQUEARY SMITH, Central Islip, NY
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. SPIZTER, Washington, DC
EDWIN H. STERN, Newark, NJ
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
VIOLA J. TALIAFERRA, 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. UDASHER, 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
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, Minnesota Supreme Court, St. Paul, MN
LINDA R. YAÑEZ, Texas Thirteenth Court of Appeals, Edinburg, TX
MELVYN ZARR, Portland, ME

© 2014 by The American Law Institute
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 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. A Discussion Draft on penalties for criminal conduct other than imprisonment was extensively discussed at the 2012 Annual Meeting, but as planned, no vote was taken. Members reviewed another Discussion Draft at the 2013 Annual Meeting that covered topics including collateral consequences of criminal conviction, and treatment and correction.

Earlier versions of some of the material contained in this Draft can be found in a Memorandum to the Council (December 16, 2013), Council Draft No. 4 (2013), Discussion Draft No. 5 (2013), Preliminary Draft No. 9 (2013), Discussion Draft No. 4 (2012), and Preliminary Draft No. 8 (2012).
PART I. GENERAL PROVISIONS

Section 1. Preliminary

§ 1.02(2) (TD No. 1) – approved at 2007 Annual Meeting

Article 6. Authorized Disposition of Offenders

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

§§ 6.02-6.04D, 6.09, 6.15 – submitted for consideration at 2014 Annual Meeting

Article 6x. Collateral Consequences of Criminal Conviction

§§ 6x.01-6x.06 - submitted for consideration 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.07, 6B.10, 6B.11 (TD No. 1) – approved at 2007 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
Foreword

Professor Kevin Reitz of the University of Minnesota has been our Model Penal Code: Sentencing Reporter since 2001. In 2012, he was joined by Associate Reporter Cecelia Klingele of the University of Wisconsin. Kevin and Cecelia raise the possibility that the subject of this draft, punishments other than incarceration, may be the most significant part of the entire project because almost five million Americans are serving sentences of probation or parole while “only” 2.2 million are in prison or jail. They are clearly right that improving the parts of the criminal justice system that are covered in this year’s Sections has the potential to advance public safety. This is especially true of the nation’s excessive imposition of “collateral consequences” that make it more difficult for prior offenders to advance toward a normal role in society.

When this portion of the Sentencing project is approved, we will have in front of us one additional subject: the procedural issues that arise during the sentencing process, at a number of decision points, including original sentencing proceedings, judicial reconsideration of sentences, appellate sentence review, the possible use of alternative “restorative justice” procedures for some cases, and the role of victims throughout the sentencing process.

The Reporters expect to bring this final topic to the 2015 Annual Meeting.

We appreciate immensely the years and the quality of work we have received from Kevin and the contributions we are now getting from Cecelia. They and we say our annual thank you to the Advisers, to the Members Consultative Group, and to all who have sent constructive comments.

As I complete my directorial connection to this important project, I cannot resist saying that I am certain Professor Herbert Wechsler, the author of the original Model Penal Code, would be proud of this current ALI effort to update and build upon his magisterial work.

LANCE LIEBMAN
Director
The American Law Institute

April 10, 2014
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>xiii</td>
</tr>
<tr>
<td>Reporters’ Introduction</td>
<td>xix</td>
</tr>
<tr>
<td><strong>PART I. GENERAL PROVISIONS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS</strong></td>
<td></td>
</tr>
<tr>
<td>§ 6.02. Authorized Dispositions for Individuals</td>
<td>1</td>
</tr>
<tr>
<td>Comment</td>
<td>1</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>8</td>
</tr>
<tr>
<td>Original Provision</td>
<td>11</td>
</tr>
<tr>
<td>§ 6.02A. Deferred Prosecution</td>
<td>12</td>
</tr>
<tr>
<td>Comment</td>
<td>14</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>18</td>
</tr>
<tr>
<td>§ 6.02B. Deferred Adjudication</td>
<td>19</td>
</tr>
<tr>
<td>Comment</td>
<td>21</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>24</td>
</tr>
<tr>
<td>Original Provision</td>
<td>25</td>
</tr>
<tr>
<td>§ 6.03. Probation</td>
<td>27</td>
</tr>
<tr>
<td>Comment</td>
<td>29</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>40</td>
</tr>
<tr>
<td>Original Provisions</td>
<td>53</td>
</tr>
<tr>
<td>Reporters’ Introduction to Economic Sanctions Provisions</td>
<td>55</td>
</tr>
<tr>
<td>§ 6.04. Economic Sanctions; General Provisions</td>
<td>55</td>
</tr>
<tr>
<td>Comment</td>
<td>56</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>66</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>§ 6.04A. Victim Compensation</td>
<td>71</td>
</tr>
<tr>
<td>Comment</td>
<td>71</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>73</td>
</tr>
<tr>
<td>§ 6.04B. Fines</td>
<td>74</td>
</tr>
<tr>
<td>Comment</td>
<td>75</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>78</td>
</tr>
<tr>
<td>Original Provisions</td>
<td>80</td>
</tr>
<tr>
<td>§ 6.04C. Asset Forfeitures</td>
<td>82</td>
</tr>
<tr>
<td>Comment</td>
<td>83</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>84</td>
</tr>
<tr>
<td>§ 6.04D. Costs, Fees, and Assessments</td>
<td>89</td>
</tr>
<tr>
<td>Comment</td>
<td>90</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>91</td>
</tr>
<tr>
<td>§ 6.09. Postrelease Supervision</td>
<td>93</td>
</tr>
<tr>
<td>Comment</td>
<td>95</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>104</td>
</tr>
<tr>
<td>Original Provision</td>
<td>112</td>
</tr>
<tr>
<td>§ 6.15. Violations of Probation or Postrelease Supervision</td>
<td>113</td>
</tr>
<tr>
<td>Comment</td>
<td>115</td>
</tr>
<tr>
<td>Reporters’ Note</td>
<td>118</td>
</tr>
<tr>
<td>Original Provisions</td>
<td>120</td>
</tr>
</tbody>
</table>

ARTICLE 6x. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

| § 6x.01. Definitions                         | 124 |
| Comment                                      | 124 |

© 2014 by The American Law Institute
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>125</td>
</tr>
<tr>
<td>§ 6x.02. Sentencing Guidelines and Collateral Consequences ..................</td>
<td>127</td>
</tr>
<tr>
<td>Comment ..............................................................................................</td>
<td>127</td>
</tr>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>129</td>
</tr>
<tr>
<td>§ 6x.03. Voting and Jury Service ......................................................</td>
<td>131</td>
</tr>
<tr>
<td>Comment ..............................................................................................</td>
<td>131</td>
</tr>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>132</td>
</tr>
<tr>
<td>§ 6x.04. Notification of Collateral Consequences; Order of Relief ..........</td>
<td>134</td>
</tr>
<tr>
<td>Comment ..............................................................................................</td>
<td>135</td>
</tr>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>138</td>
</tr>
<tr>
<td>§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief</td>
<td>141</td>
</tr>
<tr>
<td>Following the Termination of a Sentence ..........................................</td>
<td>142</td>
</tr>
<tr>
<td>Comment ..............................................................................................</td>
<td>142</td>
</tr>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>142</td>
</tr>
<tr>
<td>§ 6x.06. Certificate of Relief from Civil Disabilities .........................</td>
<td>143</td>
</tr>
<tr>
<td>Comment ..............................................................................................</td>
<td>144</td>
</tr>
<tr>
<td>Reporters’ Note ..................................................................................</td>
<td>146</td>
</tr>
</tbody>
</table>

Appendix A. Proposed Complete Table of Contents for Part I, Articles 6, 6x, 6A, 6B, and 7, and Partial Contents for Parts III and IV ................................................. 149
Appendix B. Black Letter of Tentative Draft No. 3 ......................................................... 153
Appendix C. Other Relevant Black-Letter Text ................................................................. 171
REPORTERS’ INTRODUCTION

This Tentative Draft is the product of more than two years of work. Successive Reporters’ drafts have been presented at two rounds of meetings of the project’s Advisers and Members Consultative Group, two discussions at Annual Meetings of the Institute, and two meetings of the Council. The Council voted to approve the draft, subject to changes that have been incorporated into this document, at its January 2014 meeting.

The draft’s theme is offenders in the community. The majority of convicted offenders serve their entire sentences in the community on probation, and those who have been incarcerated usually serve a period of community supervision after release. The scale of community corrections in America is large, even compared with the numbers of persons incarcerated. At year-end 2012, when daily prison and jail populations in the United States numbered more than 2.2 million, an additional 4.8 million offenders were serving sentences of probation or parole. These counts do not include hundreds of thousands of individuals in diversion programs or serving deferred adjudications, which are often used as alternative routes to probation or programs such as drug courts and other specialized courts. The current draft is the most important of all installments in the

---

1 The Reporters are grateful to the many ALI members who participated in meeting discussions. We are indebted to many colleagues who provided written comments on earlier drafts and/or submitted to extensive interviews at our request: Andrew Ashworth, Emily Baxter, Edward Brown, Sam Buell, Inimai Chettiar, G. Jack Chin, Ronald Corbett, Kara Dansky, Walter Dickey, Jessica Eaglin, Anthony Epstein, Norm Epstein, Richard Frase, Paul Friedman, Robert Johnson, Nancy King, Michael Kramer, Wayne Logan, Margaret Love, Gerard Lynch, Douglas Marlowe, M. Isabel Medina, Dan Meltzer, Kelly Mitchell, Alan Morrison, Joan Petersilia, Meghna Philip, Breanne Pleggenkuhle, Leah Plunkett, Jed Rakoff, Curtis Reitz, Edward Rhine, Michael Smith, Edwin Stern, Faye Taxman, Sandra Guerra Thompson, Michael Tonry, Patricia Wald, and Jack Weinstein. Valuable research assistance was provided by University of Minnesota law students Bradley Emmons, David Morine, Jeanine Putnam, and Phillip Walters, and University of Wisconsin law students Courtney Lanz, Austin Mort, Andrew Price, and Emily Tremblay.

2 Work began with a pre-drafting conference on “Future Directions of the Model Penal Code: Offenders in the Community,” hosted by the Robina Institute of Criminal Law and Justice at the University of Minnesota Law School in December 2011.


4 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) (estimating more than one million adults enrolled in community-supervision programs not formally classified as probation).
MPCS project, if importance is measured in numbers of lives affected by America’s sentencing laws and policies.

The scale of U.S. community corrections is notable for other reasons. While probation and other intermediate punishments have often been promoted as alternatives to incarceration, the history of the last several decades is otherwise. Community supervision systems have expanded alongside the nation’s prisons and jails since the 1970s, and at a comparable pace. Instead of one sanction substituting for another, all of the major forms of criminal punishment in the United States have grown in parallel—and, on all scores, the magnitude of growth has been greater than elsewhere in the Western world. Today, about one of every 50 adults in America is under community supervision on any given day. In recent years, the terms “mass probation” and “mass supervision” have begun to enter the academic and policy lexicons alongside the now more familiar terms “mass imprisonment” and “mass incarceration.”

It is well-known that the U.S. incarceration rate, even with slight reductions in the past three years, is the highest in the world. New research indicates that America’s rates of probation and postrelease supervision, by international standards, are also exceptional. For example, in 2011 the nationwide probation rate for the United States was seven times the average rate among 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.

In addition to addressing probation and postrelease supervision, the Tentative Draft also includes five separate provisions on the subject of economic sanctions. These relate to “offenders in the community” because defendants are seldom in a position to make immediate payment of victim compensation, fines, or the many costs, fees, and assessments that may be levied against them. Most often, they are required to satisfy

---


6 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 (suggesting and defining the term “mass probation” to describe the rapid build-up (and racial disproportionality) of probation supervision rates.”).

7 The U.S. prison rate peaked at year-end 2009. In 2010 national prison populations dropped by 0.6 percent (the first decline since 1972), in 2011 they decreased 0.9 percent, and in 2012 they decreased by 1.8 percent. Bureau of Justice Statistics, Prisoners in 2012: Trends in Admissions and Releases, 1991-2012 (2013), at 1, 23 table 17; Bureau of Justice Statistics, Prisoners in 2011 (2012), at 1; Bureau of Justice Statistics, Prisoners in 2010 (2011), at 1. As with prison populations, community-supervision populations have been in slight decline for the past several years, see Bureau of Justice Statistics, Probation and Parole in the United States, 2012 (2013), at 1.

8 For discussions of comparative probation and postrelease supervision practices, see § 6.03, Comment e and Reporters’ Note to Comment e; § 6.09, Comment d and Reporters’ Note to Comment d.
economic penalties with installment payments during their probation or parole terms. The collective impact of these criminal-justice debts can have bearing on ex-offenders’ success in “getting back on their feet” financially and securing a place in the legitimate workplace economy. Research tells us that this process is associated with recidivism reduction. In the 50 years since the original Model Penal Code was approved, economic sanctions have proliferated in kinds, amounts, and efforts to secure their collection. The societal importance of this subfield of sentencing and corrections law has expanded accordingly.

Beyond formal sentences, criminal convictions trigger hundreds of legal disqualifications in state and federal law that include employment and licensure restrictions, exclusions from public housing and public benefits, offender registration requirements, voting and jury-service bans, and—for noncitizens—severe immigration consequences. Many of these disabilities are mandatory, and many are permanent. Alongside significant growth in America’s use of incarceration, community supervision, and economic penalties over the last several decades, there has also been a multiplication of the “collateral consequences” of conviction, and great enlargement of their effects on individuals, families, and communities. The number of persons affected is far greater than any snapshot count of correctional populations on a single day, and the sanctions’ effects are just as racially and ethnically disparate.

Although denominated as civil measures and not criminal punishments, collateral consequences carry punitive weight, and many have direct impact on the core criminal-sentencing goals of rehabilitation, reintegration, and public safety. This draft joins comprehensive studies and recommendations made by the American Bar Association and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) on the subject. Like those earlier efforts, Article 6x of the revised Code recommends that the states’ laws of criminal sentencing should reach out to address some aspects of state-imposed collateral consequences of conviction.  

---

9 As with probation and parole, there is growing evidence that the use of collateral consequences of conviction (called civil disabilities in some other countries) is also more extensive than in other countries. See Michael Pinard, Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. Rev. 457 (2010) (comparing the use of collateral sanctions in the United States, England, Canada, and South Africa); Nora V. Demleitner, Collateral Sanctions as a Tool of Exclusion and “Re-Exit”: A Comparative Perspective, in Kevin R. Reitz ed., American Exceptionalism in Crime and Punishment (forthcoming 2015) (comparing U.S. and European use of collateral consequences of conviction).

Across all of its subject matters, the policy emphasis of this Tentative Draft is public safety. The highest utilitarian goal of America’s sentencing systems is to reduce the amount of crime and victimization in society through mechanisms of rehabilitation, reintegration, incapacitation, and deterrence. When attention is focused on offenders in the community, the primary crime-reductive tools are rehabilitative and reintegrative in character. From all perspectives, the most desired outcomes are successful completion of community sentences and desistance from crime in the long term. Secondary tools of surveillance and control are necessary to respond to the system’s “failures.” The system must constantly balance its first-order goals against the hard reality that recidivism rates among offenders in the community, especially those returning from prison, have remained stubbornly high for as long as they have been measured.

An overriding negative goal, less often articulated in policy discussion, is that legislatures, sentencing commissions, courts, and corrections agencies should be watchful that their efforts do not produce more crime than would exist without their interventions. No one wants the effects of legal sanctions to amount to “public endangerment.” Research suggests, however, that this unintended outcome occurs with unsettling frequency. Much progress in public safety could be made by rethinking current practices in community supervision, economic penalties, and collateral sanctions that are themselves causes of crime.

Overview of the Draft

The draft’s major subject areas include:

- The full array of nonprison sanctions that should be authorized in a criminal code, and what limits on their maximum severity, alone or in combination, should be expressed.
- Dispositions of criminal cases that serve as alternatives to formal conviction or sentencing, including pre-charge diversion and deferred adjudication, and the characteristics of those programs.
- The collateral consequences of conviction, and how their punitive force and disabling effects on the life chances of offenders may be addressed in the law of criminal sentencing.
- The prospects of invigorating or “reinventing” probation and postrelease supervision as efficient and effective criminal-justice institutions.
- A badly needed review of the many economic sanctions that may be imposed on individual offenders, including victim compensation, fines, asset forfeitures, and the enlarging catalogue of criminal-justice costs, fees, and assessments imposed on offenders.
• The preconditions in sentencing law that will best facilitate the “reentry” of offenders released from prison into the free community, while also serving goals of public protection.

A set of policy choices is reflected throughout the draft:

• Public safety, meaning avoidance of future crimes within the bounds of deserved punishment, should be the foremost goal of sanctioning policies as applied to offenders in the community.

• Punishment is a permissible goal of community-sanctioning policy. Credible punitive force is an ingredient of community sanctions that, in appropriate cases, can help them to serve more effectively as substitutes for prison sentences.

• “Success” in community supervision should be equated with offenders’ successful reintegration into the law-abiding community and permanent desistance from crime.

• The effectiveness of community sanctions can be advanced by the use of incentives and rewards for desired behavior, as well as deterrents and punishments for noncompliance.

• Improved strategies to conserve and prioritize the use of scarce correctional resources are urgently needed. Probation and parole are perennially underfunded arms of American corrections, and this problem has worsened in the past decades. Community-supervision resources must be steered toward their highest uses—and cut back where they are wastefully expended.

• Community penalties and collateral consequences of conviction that block or impede an offender’s rehabilitation and reintegration are counterproductive to public-safety goals and should be disfavored unless there is a countervailing criminal-justice policy of overriding weight.
ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

PROPOSED NEW PROVISION

§ 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.]

(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 sanctions 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:

a. Scope. This Section is based on Model Penal Code (First) § 6.02. 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
6.02  Model Penal Code: Sentencing

The Section speaks of dispositions “for individuals.” Organizational sanctions are not included in the Model Penal Code: Sentencing revision project.¹

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 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 free-standing 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

¹ The original Code included a provision on “Penalties Against Corporations and Unincorporated Associations,” see Model Penal Code (First) § 6.04. The subject has become hugely complex since the 1962 Code was approved, and is outside the scope of the current revision effort.
Art. 6. Authorized Disposition of Offenders 

Authorized Disposition of Offenders

§ 6.02

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, 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 free-standing 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 free-standing probation as envisioned in subsection (1)(a), there is no suspended prison sentence that determines or limits the penalties 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 free-standing 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 free-standing probation is three 
years. If probation via a suspended prison sentence is added to the mix, however, 
confine ment 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 
confine ment 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 deterrent 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
Art. 6. Authorized Disposition of Offenders § 6.02

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 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 pre-conviction 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 (First) § 6.02(2), 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
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


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...
Art. 6. Authorized Disposition of Offenders § 6.02

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

h. Consolidation of authorized sanctions. On the original Code’s strategy of collecting statutory provisions on the array of sentencing dispositions in a single Article of the Code, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 1, at 46 (provision designed to “prevent the ad hoc growth of sentencing law in many different titles of a penal code, which . . . is one
reason for the chaos in sentencing that existed in so many states at the time the Model Code was drafted.

This recommendation has been widely adopted, id., at 46 n.1.

i. Specialized courts. The first documented specialty court in the United States was the Miami-Dade County (Florida) Drug Court, started in 1989. Today there are more than 2400 drug courts nationwide—roughly half of which serve adult offenders—with an estimated participant population of about 70,000.


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

ORIGINAL PROVISION

§ 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of an offense shall be sentenced otherwise than in
accordance with this Article.

[(2) The Court shall sentence a person who has been convicted of murder to
death or imprisonment, in accordance with Section 210.6.]

(3) Except as provided in Subsection (2) of this Section and subject to the
applicable provisions of the Code, the Court may suspend the imposition of sentence
on a person who has been convicted of a crime, may order him to be committed in
lieu of sentence, in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine authorized by Section 6.03; or

(b) to be placed on probation [, and, in the case of a person convicted of a
felony or misdemeanor to imprisonment for a term fixed by the Court not
exceeding thirty days to be served as a condition of probation]; or
§ 6.02  Model Penal Code: Sentencing

(c) to imprisonment for a term authorized by Section 6.05, 6.06, 6.07, 6.08, 6.09, or 7.06; or

(d) to fine and probation or fine and imprisonment, but not to probation and imprisonment [, except as authorized in paragraph (b) of this Subsection].

(4) The Court may suspend the imposition of sentence on a person who has been convicted of a violation or may sentence him to pay a fine authorized by Section 6.03.

(5) This Article does not deprive the Court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

[End of Original Provision]

PROPOSED NEW PROVISION

§ 6.02A. Deferred Prosecution.

(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.

[(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 any charge against the accused 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 written standards for its use of deferred-prosecution agreements publicly available. 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:

a. Scope. This provision, new to the Code, provides structure for the use of deferred prosecution, a long-standing 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 completion of specified conditions. The sole exception, 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, make reparation to crime victims, and 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 restoration of direct and indirect victims of the crime.

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 convinced 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
defered 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 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 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 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 or public safety demand 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 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.”
§ 6.02A  Model Penal Code: Sentencing

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.

REPORTERS’ NOTE

a. Scope. This Section, while new to the Code, has analogues in a variety of state procedures and rules governing “pre-charge diversion.” For an example of one state that gives express statutory authorization to prosecutors to create diversion programs that engage before charges have been filed, see Okla. Stat., Title 22, § 305.1 (reprinted in the Statutory Note below). For a discussion of federal
Art. 6. Authorized Disposition of Offenders

§ 6.02B


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

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

NO ORIGINAL PROVISION

PROPOSED NEW PROVISION

§ 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.
§ 6.02B  Model Penal Code: Sentencing

(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 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:

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 post-conviction 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 reason for this change is that the annulment of conviction in former § 301.5(1) is no longer an effective bar to some of the most serious collateral consequences of conviction. (The revised Code contains a separate set of provisions that seek to mute the impact of excessive collateral consequences following conviction and sentence, see §§ 6x.01-6x.06 (this volume).) In addition, because mandatory-minimum sentencing laws have proliferated since the first Code’s adoption—despite the Institute’s
§ 6.02B Model Penal Code: Sentencing

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 restoration 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
defered adjudication unless neither justice nor public safety demand 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
Art. 6. Authorized Disposition of Offenders § 6.02B

exclude offenses carrying mandatory penalties from eligibility for deferred adjudication.

In the absence of the prospect of statutory 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.ZZ(6)(b) (Tentative Draft No. 1, 2007) (provision not yet approved; submitted for informational purposes only); § 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), (10).

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, the disposition not be considered part of the defendant’s criminal record, and that collateral consequences should not be triggered by the disposition.

The Reporters have heard competing views on the question of whether expungement of records of arrests and charges ought to be authorized as part of any deferred-adjudication provision. The current draft 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. There is some existing statutory precedent for this approach. Others argue that records of criminal-case processing are so widely available on the Internet, often on
private websites, that expungement is simply not feasible. Even were the law to allow
individuals to state “truthfully” 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.

\[ j. \textit{Violations of conditions.} \] 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
defered adjudication. When 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.

\[ k. \textit{Sentencing guidelines.} \] 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.

\[ \text{TREPORTERS’ NOTE} \]

\[ a. \textit{Scope.} \] 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
Code § 18-1.3-102 (“deferred sentencing”); 11 Del. Cod. § 4218 (“probation before judgment”); N.D. R.
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.
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
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)).

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

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 (reproduced in the Statutory Note below).

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).

© 2014 by The American Law Institute
(1) In the cases specified in this Subsection the Court may order that so long as
the defendant is not convicted of another crime, the judgment shall not thereafter
constitute a conviction for the purpose of any disqualification or disability imposed
by law because of the conviction of a crime:

(a) in sentencing a young adult offender to the special term provided by
Section 6.05(2) or to any sentence other than one of imprisonment; or

(b) when the Court has theretofore suspended sentence or has sentenced
the defendant to be placed on probation and the defendant has fully complied
with the requirements imposed as a condition of such order and has satisfied
the sentence; or

(c) when the Court has theretofore sentenced the defendant to
imprisonment and the defendant has been released on parole, has fully
complied with the conditions of parole and has been discharged; or

(d) when the Court has theretofore sentenced the defendant, the defendant
has fully satisfied the sentence and has since led a law-abiding life for at least
[two] years.

(2) In the cases specified in this Subsection, the court that sentenced a
defendant may enter an order vacating the judgment of conviction:

(a) when an offender [a young adult offender] has been discharged from
probation or parole before the expiration of the maximum term thereof [; or

(b) when a defendant has fully satisfied the sentence and has since led a
law-abiding life for at least [five] years).

(3) An order entered under Subsection (1) or (2) of this Section:

(a) has only prospective operation and does not require the restoration of
the defendant to any office, employment or position forfeited or lost in
accordance with this Article; and

(b) does not preclude proof of the conviction as evidence of the commission
of the crime, whenever the fact of its commission is relevant to the
determination of an issue involving the rights or liabilities of someone other
than the defendant; and

(c) does not preclude consideration of the conviction for purposes of
sentence if the defendant subsequently is convicted of another crime; and

(d) does not preclude proof of the conviction as evidence of the commission
of the crime, whenever the fact of its commission is relevant to the exercise of
the discretion of a court, agency or official authorized to pass upon the
competency of the defendant to perform a function or to exercise a right or
Art. 6. Authorized Disposition of Offenders  

§ 6.03

privilege that such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order; and

(e) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, except that the issuance of the order may be adduced for the purpose of his rehabilitation; and

(f) does not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.

[End of Original Provision]

PROPOSED NEW PROVISION

§ 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.

(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 compensation 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.

(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 compensation].
Comment:

a. Scope. The Institute finds probation in the United States to be 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 about improvements in the effectiveness of community supervision, even if funding levels do not increase in the near-term.
§ 6.03  Model Penal Code: Sentencing

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 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

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.ZZ (Tentative Draft No. 1, 2007) (provision submitted for informational purposes
only, not yet approved). 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 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.ZZ (Tentative Draft No. 1, 2007) (draft provision on appellate sentence review not yet approved by the Institute).

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, 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”
instrunents 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 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.

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 (First) § 301.2(1).
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 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...
Art. 6. Authorized Disposition of Offenders § 6.03

with offenders’ work and family obligations. Corrections professionals report that many probationers are unable to comply with them. Over-burdensome 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 to requirements the system is prepared to enforce, see § 6.15. This admonition applies to the specific conditions itemized in subsection (8), or any additional conditions a judge may impose. Ideally, every condition should relate to the best available estimates of the risks that the probationer will reoffend and his or her treatment needs. The process of setting conditions may be informed by credible risk-and-needs assessments under subsection (4). In some cases, conditions can be imposed solely for their punitive effect, to hold offenders accountable for their criminal conduct, see subsection (2).

Subsection (8)(c) encourages the use of community service as a condition of probation in appropriate cases. Community service is especially useful as a substitute for an economic sanction that cannot be imposed because of the financial circumstances of the offender, see § 6.04(6). Seen as in-kind labor, community service can in theory be translated into a dollar value. Certain drawbacks should be kept in mind, however. Community-service requirements can interfere with an offender’s employment obligations. 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. In addition, research indicates that community-service sentences 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 an offender.

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 periods of each day. As such technology becomes
increasingly available, and less expensive to employ, there is a danger of net-widening and overuse. When this 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) authorizes GPS-like conditions of supervision, yet places an important limitation upon them: They may not be employed unless justified by the risk of criminal behavior presented by the particular offender and the capacity of monitoring to address those risks.

Subsection (8)(f) speaks to a condition that is frequently included in probation terms today, that the offender 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 risk of recidivism, it is increasingly difficult for ex-offenders to secure ongoing employment. Some of the difficulty stems from the growing numbers of civil disabilities and employment disqualifications imposed by law, see Article 6x.

Subsection (8)(h) would allow for a limited period of incarceration to be imposed as a condition of probation—a common practice sometimes called a “split sentence.” One national survey found that split sentences were used in roughly one-quarter of all felony cases. The length 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 free-standing penalties with their own terms and conditions, timelines for compliance, and sanctions for violations. Because the revised Code gives priority to collection of victim compensation over other economic sanctions, see § 6.04(10), sentencing courts are given authority to designate full or installment payments of victim compensation as a condition of probation. Failure to comply with the court’s payment schedule for a victim-compensation 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 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.

**1. 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 compensation 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 compensation than on other economic sanctions, see § 6.03(10). On principle a jurisdiction may take the view that victim-compensation 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 the net amount of compensation 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

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

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

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

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

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

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; 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 Probation Violations (2007); see also Alfred Blumstein & 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

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 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 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
Art. 6. Authorized Disposition of Offenders § 6.03

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 with the first
reductions in probation and parole reoffending in over a decade, reversing an 11-year rise. See Elizabeth K.
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. 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) (two-year limit for violent felonies; 18-month or 12-month limits for all other offenses); Fla. Stat. § 948.04 (two-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. … [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 & 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:
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).

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

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.

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-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.
Art. 6. Authorized Disposition of Offenders § 6.03

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).

ORIGINAL PROVISIONS

§ 301.1. Conditions of Suspension or Probation.

(1) When the Court suspends the imposition of sentence on a person who has been convicted of a crime or sentences him to be placed on probation, it shall attach such reasonable conditions, authorized by this Section, as it deems necessary to insure that he will lead a law-abiding life or likely to assist him to do so.

(2) The Court, as a condition of its order, may require the defendant:

(a) to meet his family responsibilities;

(b) to devote himself to a specific employment or occupation;

(c) to undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose;

(d) to pursue a prescribed secular course of study or vocational training;

(e) to attend or reside in a facility established for the instruction, recreation or residence of persons on probation;

(f) to refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;

(g) to have in his possession no firearm or other dangerous weapon unless granted written permission;

(h) to make restitution of the fruits of his crime or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby;
§ 6.03  Model Penal Code: Sentencing

(i) to remain within the jurisdiction of the Court and to notify the Court or the probation officer of any change in his address or his employment;

(j) to report as directed to the Court or the probation officer and to permit the officer to visit his home;

(k) to post a bond, with or without surety, conditioned on the performance of any of the foregoing obligations;

(l) to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.

[(3) When the Court sentences a person who has been convicted of a felony or misdemeanor to be placed on probation, it may require him to serve a term of imprisonment not exceeding thirty days as an additional condition of its order. The term of imprisonment imposed hereunder shall be treated as part of the term of probation, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment served hereunder shall not be credited toward service of such subsequent sentence.]

(4) The defendant shall be given a copy of this Article and written notice of any requirements imposed pursuant to this Section, stated with sufficient specificity to enable him to guide himself accordingly.

§ 301.2. Period of Suspension or Probation; Modification of Conditions; Discharge of Defendant.

(1) When the Court has suspended sentence or has sentenced a defendant to be placed on probation, the period of the suspension or probation shall be five years upon conviction of a felony or two years upon conviction of a misdemeanor or a petty misdemeanor, unless the defendant is sooner discharged by order of the Court. The Court, on application of a probation officer or of the defendant, or on its own motion, may discharge the defendant at any time. On conviction of a violation, a suspended sentence constitutes an unconditional discharge.

(2) During the period of the suspension or probation, the Court, on application of a probation officer or of the defendant, or on its own motion, may modify the requirements imposed on the defendant or add further requirements authorized by Section 301.1. The Court shall eliminate any requirement that imposes an unreasonable burden on the defendant.

(3) Upon the termination of the period of suspension or probation or the earlier discharge of the defendant, the defendant shall be relieved of any obligations imposed by the order of the Court and shall have satisfied his sentence for the crime.
REPORTERS’ INTRODUCTION TO ECONOMIC SANCTIONS PROVISIONS

The original Model Penal Code recommended only one economic sanction: the fine. In contrast, the revised Code includes separate provisions on victim compensation, fines (both traditional and means-based), asset forfeitures, and costs, fees, and assessments (which themselves come in hundreds of different forms). All of these are prefaced with an umbrella provision of principles and limitations, see § 6.04 et seq., below. The new Code’s expanded treatment reflects the growing use and diversity of economic sanctions in American criminal-justice systems—and their heightened policy significance.

PROPOSED NEW PROVISION


(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 compensation] 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 [other than victim compensation] 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 a prison sanction 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.
§ 6.04  Model Penal Code: Sentencing

(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 compensation].

(10) If the court imposes multiple economic sanctions including victim compensation, the court shall order that payment of victim compensation 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.

Comment:

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

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

In contrast to the policies in many other Western democracies, the growth of monetary sanctions in America has not displaced the use of prison and jail sentences. Large upswings in national incarceration rates have run alongside the multiplication of
Art. 6. Authorized Disposition of Offenders § 6.04

offenders’ debt burdens. Meanwhile, as economic and other penalties have become more severe, wealth and income inequalities have become increasingly pronounced in our society, with those on the lowest rungs of the economic ladder most frequently arrested, charged, and convicted of crimes—and most frequently faced with the challenge of reintegration into the law-abiding work economy while burdened with a criminal record.

Some of the new economic-sanctioning policies have raised questions of conflict of interest in the administration of criminal law, felt most by agencies authorized to seize or collect assets from offenders and then retain some or all of those assets for their own use. Asset forfeitures and a variety of criminal-justice costs, fees, and assessments, little used before the 1970s and 1980s, 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 and phenomena. 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 compensation are often submerged, and society’s interest in seeing offenders reintegrated into the law-abiding community is not well represented. 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 when current knowledge and ethical sensibilities allow, while leaving considerable room for experimentation and development of the law at the state level.


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 tariffs. This principle of restraint is required not because criminals deserve society’s munificence, but because it is a proven route to increased public safety. Many stakeholders have interests in offenders’ successful integration into communities and the legitimate workplace. These include offenders’ families, communities, prospective crime victims, and society at large. Much like bankruptcy law, a primary goal of the sentencing system should be to reposition ex-offenders so they may become productive and successful participants in the law-abiding economy, see § 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 into the law-abiding community.

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 compensation, 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 great 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 said, 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.” 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 somewhat more on administration than the funds collected, and seldom realize a “profit.” In addition, offenders’ failures to make payment frequently result in 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 one of the few sanctioning tools available to a nation engaged in the downsizing of its prison systems. These claims are predictive in nature, and do not rely on solid precedent in U.S. legal history. 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.

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 must be a system of interchangeability between fines and other non-incarcerative 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 have been 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 when compared to ordinary taxpayers. A working justice system and corrections system is the responsibility of all citizens, and should be funded accordingly.

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 sources of funding. 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 in their own cases. Reflecting the difficult tension between these considerations, the Code offers alternative provisions governing economic sanctions of costs, fees, and assessments. In the first alternative, they are prohibited entirely. In the second, they are permitted reluctantly and with safeguards attached.

c. Antecedents in the original Code. The revised Code’s position on economic sanctions resembles that of the 1962 Model Penal Code, although a great deal of updated analysis has become necessary in the intervening years. The original Code’s treatment of economic sanctions was collapsed into two provisions dealing almost exclusively with fines, §§ 6.03 and 7.02. The official Comment to original § 7.02 began with the clear statement that, “This section articulates the policy of the Model Code to discourage use of fines as a routine or even frequent punishment for the commission of crime.” As explained in the official Comment to original § 7.02:

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

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

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.

d. Types of economic sanctions. Subsection (1) catalogues the economic sanctions governed by the general provisions of § 6.04. These include victim compensation (§ 6.04A), fines and means-based fines (§ 6.04B), asset forfeitures (§ 6.04C), and costs,
fees, and assessments (§ 6.04D). All of these may be imposed by sentencing courts as
free-standing sanctions, singly or in combination.

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

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

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 keyed to the wealth and earning power
of individual defendants. Even for relatively 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 compensation from the three-year cutoff date. In general, the revised
Code gives elevated importance to victim compensation as compared with all other
economic sanctions. Further, in those rare instances in which a sentenced offender comes
into wealth years after a victim compensation 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. 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.”).

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) (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”); § 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 (Tentative Draft No. 1, 2007).

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 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 intended to supplement 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 who have been 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) & 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 risks that they will reoffend. Among the utilitarian goals of punishment, therefore, there is no strong countervailing purpose that can 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 when drafting the revised Code. Although too specific to be included in § 6.04, the following language would be consistent with the spirit of subsection (6):

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.

Bracketed language in subsection (6) would allow states to carve out an exception to the reasonable-subsistence principal for victim-compensation orders under § 6.04A. This falls within a range of reasonable disagreement about policy choices and priorities. The bracketed wording would give greater weight to victims’ interests in compensation than to society’s interest in the offenders’ rehabilitation and resulting public-safety benefits. It would permit the imposition and enforcement of a victim-compensation order even if this would render the offender unable to meet the reasonable expenses for himself and his family. In some instances, a victim’s need for compensation will be every bit as pressing as the basic financial needs of the offender and his family. Even when the financial stresses on individual victims and offenders are in equipoise, the argument is compelling that innocent victims must be preferred. Because the revised Code gives heightened importance to victim compensation among economic sanctions, see subsection (10), this is an especially difficult equation to resolve. Ultimately, the Code seeks to highlight and explicate the issue, which must be resolved in the best judgment of each state.

i. Bar on the use of imprisonment 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 incarceration 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 in theory be translated into 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 reflected in specific provisions relating to asset forfeitures and criminal-justice costs, fees, and assessments, see §§ 6.04C(2) (“The legitimate purposes of 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 …”).

k. Building incentives into economic sanctions. Social-science research for many decades has shown that behavioral change is more readily facilitated through a system of rewards than a system of 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 many 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 compensation 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-compensation 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 compensation 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 the court may contemplate imposing on them. Consistent with practice 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 compensation 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 this provision 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 sentenced offenders often hold little certainty or stability, and that the basic circumstances of their lives are fluid and subject to downward trajectories. As with probationary sanctions, the workability of economic sanctions 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
§ 6.04  Model Penal Code: Sentencing

economic penalties “at any time,” and requires modification when the penalties are shown in application to violate any of the substantive requirements of § 6.04 as a whole.

REPORTERS’ NOTE


[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. 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 U.S. 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

© 2014 by The American Law Institute
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.”). 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). In contrast, see R. Barry Ruback and Valerie Clark, Economic Sanctions in Pennsylvania: Complex and Inconsistent, 49 Duquesne L. Rev. 751, 754 (2011) (“fines in the United States tend to be used primarily in courts of limited jurisdiction, particularly traffic courts. Fines are also used in lower courts for minor offenses, such as shoplifting, especially for first-time offenders who have enough money to pay the fine.”) (footnotes omitted).

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 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.”).

c. Antecedents in the original Code. The original Code’s position, that the use of fines should be discouraged, is reflected in several states that have adopted versions of original § 7.02. See 5 Hawaii Stat.
§ 6.04  Model Penal Code: Sentencing

§ 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. 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 not regulate the severity of economic
sanctions directly, but attaches 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

[I]n 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. …

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.

© 2014 by The American Law Institute
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, the consideration comes up in the enforcement setting, and only when the enforcement authority (typically a judge or parole board) contemplates the use of imprisonment 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 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 payment of 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 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.”)

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

PROPOSED NEW PROVISION

§ 6.04A. Victim Compensation.

(1) The court shall order victim compensation when a crime victim has suffered injuries that would support an award of compensatory damages under state law, if the amount of compensation can be calculated with reasonable accuracy.

(2) The purposes of victim compensation are to compensate crime victims for injuries suffered as a result of criminal conduct and promote offenders’ rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims.

(3) When an offender has caused losses that would be compensable under this Section, but there is no identifiable victim in the case, the offender may be ordered to make an equivalent payment into a victims’ compensation fund.

Comment:

a. Scope. All states now authorize victim-compensation orders (often called victim restitution) to be part of criminal sentences. There is an important split in authority in state legislation on the question of whether victim compensation should be mandatory or discretionary with the sentencing judge. The revised Code takes a middle position. Subsection (1) renders victim-compensation orders mandatory so long as the offender has the means to make payments within the “reasonable-subsistence” standard of § 6.04(6). Because many offenders are indigent, this would place a significant limitation on the use of victim-compensation sanctions. As a matter of policy, this arrangement privileges the societal goal of public safety through the reintegration of offenders over victims’ claims to compensation—but does so only in cases in which the offender is of marginal financial means, and therefore unlikely to be able to make full payment. The Institute recognizes that this is a debatable policy choice, see § 6.04(6) and Comment h. There is bracketed alternative language in § 6.04(6) that would exempt victim compensation from the reasonable-subsistence standard (“No economic sanction [other than victim
compensation] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.”)

States that choose to enact the bracketed language would in effect be rendering victim-compensation sanctions mandatory in every case in which their amounts can be calculated with reasonable accuracy.

In its black-letter provisions on payments to crime victims, the Code avoids the term “restitution” and substitutes the term “compensation.” The Institute’s Restatement Third, Restitution and Unjust Enrichment, has advocated careful definition of “restitution” as a legal term of art in the civil realm. It produces confusion in both civil and criminal law if the same term is used to different effects in the two settings. See Restatement Third, Restitution and Unjust Enrichment § 1, Comment e(2). That being said, the Institute recognizes that, in state and federal sentencing codes, the word “restitution” is ubiquitous—and cannot be avoided altogether in discussions of law and policy. The same is true of the current literature of victims’ rights, and everyday parlance on the subject. Accordingly, in Comment and Reporters’ Notes, the words restitution and compensation are used interchangeably, especially in quoted excerpts from statutory and secondary sources. The Institute recommends that, in the future, state legislatures should adopt terminology consistent with § 6.04A.

b. Purposes. The primary purpose of victim compensation as a criminal sanction is to compensate crime victims for injuries suffered as a result of criminal conduct when those injuries would support an award of compensatory damages under state law. A leading goal of the Code’s sentencing system is the “restoration of crime victims,” see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007). Crime victims have an undeniable moral claim to compensation from those who brought about their injuries. They also hold legal rights to recovery, although these would have to be vindicated in civil lawsuits in the absence of the criminal sanction of victim compensation. Section 6.04A does not create new entitlements for crime victims so much as it spares them the many transaction costs and long delays that usually attend civil litigation.

A secondary purpose of victim compensation is to promote offenders’ rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims. Worldwide, experiments in “restorative justice” have pursued the theory that—at least in some cases—the criminal process can be aimed toward the healing of victims, offenders, and communities alike. Restorative-justice remedies often take the form of mediated agreements on appropriate sanctions that include the assent of both victims and offenders—and sometimes that of their families and representatives of their communities. One prominent goal of 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 in some settings. One theoretical 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 a crucial psychological component of the
process. While § 6.04A does not adopt a restorative-justice program, growing experience
in that field supports the belief that an offender’s payment of victim compensation can
also facilitate rehabilitation and reduce recidivism.

c. Victims’ compensation fund. Subsection (3) provides that a victim-compensation
fund should be created and maintained. Monies received into the fund must be held for
the compensation of identified victims of other criminal offenses, where the offenders in
those cases have not made full compensation. Offenders who have caused harms that
would otherwise be compensable under subsection (1) should not realize a windfall in
particular cases simply because their victims are unidentifiable. For example, in child-
pornography cases, it is seldom possible to locate all victims of the production of such
pornography. This subsection would require that defendants in such cases make
payments, and that they be deposited into a fund held available for other victims. Given
the high priority of victim compensation among all economic sanctions, the Code further
recommends that assets forfeited under § 6.04D should be deposited into the victim-

REPORTERS’ NOTE

a. Scope. All states now authorize victim compensation, commonly called restitution, as a criminal
sanction, see Peggy M. Tobolowsky, Mario T. Gaboury, Arrick L. Jackson, & Ashley G. Blackburn, Crime
Victim Rights and Remedies, 2nd ed. (2010), at 157. Some state codes grant courts discretion on the
question of whether victim compensation will be ordered in individual cases, and sometimes recognize the
defendant’s ability to pay as determinative. See 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) & (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”); Vermont Stat. § 7043(a)(1) (“Restitution
shall be considered in every case in which a victim of a crime … has suffered a material loss.”). Some
states remove sentencing judges’ discretion over restitution awards, see, e.g., Colo. Rev. Stat. § 18-1.3-205
(“[a]s a condition of every sentence to probation, the court shall order that the defendant make full
restitution”); Del. Code § 4204(9) (“Wherever a victim of crime suffers a monetary loss as a result of the
defendant’s criminal conduct, the sentencing court shall impose as a special condition of the sentence that
the defendant make payment of restitution to the victim in such amount as to make the victim whole,
insofar as possible, for the loss sustained. Notwithstanding any law, rule or regulation to the contrary, for
the purposes of ensuring the payment of restitution the court shall retain jurisdiction over the offender until
the amount of restitution ordered has been paid in full.”); 18 Pa. C.S. § 1106(c)(1) (“The court shall order
§ 6.04A  Model Penal Code: Sentencing

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 American Bar Association policy is that sanctions of “restitution or reparation” should be authorized but not mandated in the criminal code. See American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.15(a).


PROPOSED NEW PROVISION

§ 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.
(h) An amount up to [five times] the pecuniary gain derived from the
offense by the offender or [five 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.

Comment:

a. Scope. This provision authorizes two alternative systems of fines: traditional fines,
to be set in accordance with the schedule of maximum penalty amounts, and means-based
fines, which vary according to the wealth and income of defendants. Subsection (7)
provides that these are mutually exclusive punishments. While a state may choose to
authorize both types of fines, they may not be imposed in the same case.
b. Traditional fines. The 1962 Model Penal Code sought to sharply limit the use of fines as criminal penalties. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 7.02, Comment [1] (“This section articulates the policy of the Model Code to discourage use of 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 (First), § 6.03 (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 compensation] 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 subsections (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 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 compensation] 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 subsections (1)(a) through (g). The provision has roots in Model Penal Code (First) § 6.03(5) (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 authorizes sentencing courts to apply a multiplier of up to five 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 five in subsection (1)(h) is stated in brackets. Existing state legislation on this model includes multipliers of two or three—but the Code deems an even higher multiplier appropriate for financial crimes where the expected rewards to the offender or losses to victims are large in amount, yet the risk of apprehension, conviction, and punishment are low. This is a debatable policy choice that must be assessed separately by each state legislature. The inclination toward severity in this provision’s bracketed language must be understood in light of the revised 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 compensation, 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.”

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

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 $2,000 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); Ore. 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).

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

The formula in § 6.04B(1)(h) is of a kind with legislation in many states, although none has adopted a multiplier of five. At least one state allows fines in the amount of three times the offender’s pecuniary gain, the gain sought by the offender, or losses suffered by crime victims, see Alaska Stat. § 12.55.035(c)(2), (3). The more common formula, following the Model Penal Code (First) § 6.03(5), is to allow maximum fines of double the amount of the offender’s gain—although the base measure is often supplemented by the amount of loss to victims, as well. See N.J. Stat. § 2C:43-3(e) (“Any higher amount equal to double the pecuniary gain to the offender or loss to the victim caused by the conduct constituting the offense by the offender.”). The problem of fine amounts too low to be effective deterrents in the setting of corporate crime was first noted by John C. Coffee, “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry Into the Problems of Corporate Punishment, 79 Mich. L. Rev. 386, 389-393 (1981) (discussing “the deterrence trap” in the economic incentives of prevention of corporate offending).

d. Means-based fines. “Day fines” or “means-based fines” have been used successfully in a modest number of European states, including Germany, Finland, Sweden, and Denmark. Their purchase elsewhere has been small. See Pat O’Malley, Politicizing the Case for Fines, 10 Criminology & Pub. Pol’y 546, 546
§ 6.04B  Model Penal Code: Sentencing

(2011) (“day fines are not universally used outside the United States; in fact, only a handful of countries use them, and some jurisdictions including the English, Dutch, French, and Australian have decided not to go down that path.”). The raison d’être of the day fine is to replace confinement sentences with financial penalties that are meaningful, enforceable, and scaled to the wealth of individual defendants. In theory, day fines can vary greatly in absolute amount, yet hold equivalent retributive force when imposed on differently situated offenders. Similar schemes have been tested and have met with little success in pilot programs in the United States. See Susan Turner and Judith Greene, The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County, 21 Justice System J. 1 (1999); Bureau of Justice Assistance, How to Use Day Fines (Structured Fines) as a Criminal Sanction (1996); Sally T. Hillsman and Judith A. Greene, The Use of Fines an Intermediate Sanction, in James M. Byrne, Arthur J. Lurigio, and Joan Petersilia eds., Smart Sentencing: The Emergence of Intermediate Sanctions (1992); Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System (1990), at 140-147; Judith Greene and Sally Hillsman, Tailoring Criminal Fines to the Financial Means of the Offender, 72 Judicature 38 (1988).

In the United States, a small number of state legislatures authorized the creation of day-fine programs in the 1980s and 1990s, but none has come into widespread use. For example, a 1994 Alaska statute instructed the state supreme court to develop a system of day fines for misdemeanants, with a schedule of presumptive sentences expressed in day-fine units, but no program was ever created and the law was repealed in 2009. Alaska Stat. § 12.55.036 (See Statutory Note below). 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).

ORIGINAL PROVISIONS

§ 6.03. Fines.

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

(1) $10,000, when the conviction is of a felony of the first or second degree;
(2) $5,000, when the conviction is of a felony of the third degree;
(3) $1,000, when the conviction is of a misdemeanor;
(4) $500, when the conviction is of a petty misdemeanor or a violation;
Art. 6. Authorized Disposition of Offenders

(5) any higher amount equal to double the pecuniary gain derived from the offense by the offender;

(6) any higher amount specifically authorized by statute.


(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) 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.

§ 302.1. Time and Method of Payment; Disposition of Funds.

(1) When a defendant is sentenced to pay a fine, the Court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith.

(2) When a defendant sentenced to pay a fine is also sentenced to probation, the Court may make the payment of the fine a condition of probation.

(3) The defendant shall pay a fine or any installment thereof to the [insert appropriate agency of the State or local subdivision]. In the event of default in payment, such agency shall take appropriate action for its collection.
§ 6.04B Model Penal Code: Sentencing

(4) Unless otherwise provided by law, all fines collected shall be paid over to the [State Department of Taxation and Finance] and shall become part of the general funds of the State and shall be subject to general appropriation.

[End of Original Provisions]

PROPOSED NEW PROVISION

§ 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:

(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.
Art. 6. Authorized Disposition of Offenders

§ 6.04C

Comment:

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 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 compensation should be given priority over other economic sanctions, see § 6.04(10) (“If the court imposes multiple economic sanctions including victim compensation, the court shall order that payment of victim compensation 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

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 Fiscal Year 2011, by Recipient Agency, at http://www.justice.gov/jmd/afp/02fundreport/2011affr/report2b.htm. The large dollar amounts involved have become meaningful components of many law-enforcement budgets. One survey of police agencies found that more than 60 percent reported they were dependent or “addicted” to the flow of assets garnered through forfeitures, that the great majority of forfeited assets are connected with the drug trade, and are often used to fund special police drug task forces. See John L. Worrall, Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement, 29 J. of Crim. Justice 171, 221 (2001); see also Gregory Vecchi and Robert T. Sigler, Asset Forfeiture: A Study of Policy and Its Practice (2001).
b. Purposes of forfeiture. Proponents of asset forfeiture, as currently practiced, openly justify it as a means of raising revenue for law-enforcement activities, in addition to its crime-suppressive purposes. See John L. Worrall and Tomislav V. Kovandzic, Is Policing For-Profit? Answers from Asset Forfeiture, 7 Criminology & Public Policy 219, 237, 239 (2008) (“Budget constraints have forced police executives to seek additional sources of revenue for their agencies. ... Forfeiture is one other such source. ... It is difficult to fault law-enforcement agencies for exploiting legal arrangements that maximize their potential to offset the high costs associated with America’s war on drugs.”). See also Legislation Opposed by the National Fraternal Order of Police, Fraternal Order of Police, http://www.fop.net/legislative/oppose.shtml (last visited April 18, 2012) (showing that the Fraternal Order of Police, a national organization representing thousands of law-enforcement officers, opposes any weakening of the Civil Asset Forfeiture Reform Act of 2000); 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) (reporting survey results that “40% of police executives agreed that funds from civil-asset forfeiture were ‘necessary as a budget supplement’”). The use of forfeited assets as budgetary relief may create a vicious circle, however, with no net gain to police departments over the long term. There is evidence that some local governments have reduced appropriations to police, in anticipation of continuing revenues from forfeiture proceeds. See also Katherine Baicker and Mireille Jacobson, Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets, 91 J. of Pub. Economics 2113 (2007).

c. Criminal and civil forfeiture. The grayness of the line between criminal and civil forfeiture has been explored in a long line of Supreme Court decisions. See The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) (“no personal conviction of the offender is necessary to enforce a forfeiture in rem ....”); Boyd v. United States, 116 U.S. 616, 634 (1886) (“proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.”); United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971) (citing Boyd v. United States, 116 U.S. 616, 634 (1886); Austin v. United States, 509 U.S. 602, 621-622 (1993) (“In light of the historical understanding of forfeiture as punishment ... and the evidence that Congress understood [certain civil forfeiture] provisions as serving to deter and to punish, we cannot conclude that forfeiture under [those forfeiture statutes] serves solely a remedial purpose.”) (subjecting civil forfeitures to an excessive-fines inquiry under the Eighth Amendment); United States v. James Daniel Good Real Property, 510 U.S. 43, 81-82 (1993) (Thomas, J., concurring in part and dissenting in part) (“like the majority, I am disturbed by the breadth of new civil forfeiture statutes .... Given that current practice under [the law] appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.”); United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that in rem forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment). See also Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002) (opinion by Sotomayor, J.). For commentary on the case law, see Joy Chatman, Note, Losing the Battle, But Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v. United States, 38 St. Louis U. L.J. 739, 747 (1994); Barry L. Johnson, Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian, 2000 U. Ill. L. Rev. 461 (2000).

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


The majority of states allow law-enforcement agencies to retain some portion of forfeited assets, usually determined by formula and sometimes subject to a ceiling amount. See Ala. Code § 20-2-93(e) (distribution is based on contribution to seizure); Alaska Stat. § 17.30.122 (distribution is at the discretion of the commissioner of administration, within specified limits); Ariz. Rev. Stat. § 13-4315 (balance of forfeiture proceeds are paid into state or local antiracketeering fund, for reimbursements for forfeiture costs, informants, and injured persons as specified); Ark. Stat. § 5-64-505(k) (distribution of up to $250,000 is based on contribution to seizure, and any excess is to be spent at the discretion of the state drug director); Cal. Health & Safety Code § 11489(a)(2)(A) (65 percent); Colo. Rev. Stat. § 16-13-506 (After costs of forfeiture sale, 10 percent goes to judiciary, 10 percent to state law enforcement, 1.5 percent to the district attorney, and the balance to the seizing agency.); Conn. Gen. Stat. §§ 54-36h(f), 54-36i(c) (70 percent goes to the Department of Public Safety and local police departments); Fla. Stat. § 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
Art. 6. Authorized Disposition of Offenders § 6.04C

collection 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:

© 2014 by The American Law Institute
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.


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) (“The 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) (“It 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
Art. 6. Authorized Disposition of Offenders

§ 6.04D

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 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.

PROPOSED NEW ALTERNATIVE PROVISIONS

§ 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.

(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.
Comment:

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.
d. Conflicts of interest. In current law, the agencies that impose costs, fees, and assessments are frequently the beneficiaries of the funds received. The Code treats this as a conflict of interest that is resolved in part by the requirements of prior judicial approval and the establishment at sentencing of a total dollar amount that may be collected, see subsection (3) and § 6.04(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.”). Subsection (4) adds that no costs, fees, or assessments may be imposed in excess of actual expenditures in the offender’s case. Any program to collect costs, fees, and assessments is further subject to § 6.04(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.”).

REPORTERS’ NOTE


A study of economic sanctions imposed on convicted felony and misdemeanor offenders in Pennsylvania during 2006-2007 found a staggering total of 2629 different types of economic sanctions in use across the state, at different levels of government. R. Barry Ruback and Valerie Clark, Economic Sanctions in Pennsylvania: Complex and Inconsistent, 49 Duquesne L. Rev. 751, 761 (2011) (“Of the 2,629 different sanctions, eighty-two were state costs/fees, fifty-eight were state fines, 2,371 were county costs/fees, seventy-nine were county fines, and thirty-five were restitution”). The array of economic sanctions in use varied widely from county to county, as did the mean and median dollar amounts of sanctions imposed on individual offenders. Id. at 767, 770 (“Across the sixty-seven counties in Pennsylvania, the number of different economic sanctions imposed varied from forty to one hundred forty-seven. … Most of the variation between counties in the number of different economic sanctions imposed came from sanctions unique to each county.”).
States maintain little data on the assessment and collection of costs and fees, and are often reluctant to make public the information they have. See American Civil Liberties Union, In for a Penny: The Rise of America’s New 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
PROPOSED NEW PROVISION

§ 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.

(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:
§ 6.09    Model Penal Code: Sentencing

(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 compensation 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

© 2014 by The American Law Institute
include shortening of the supervision term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim compensation].

Comment:

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 Government’s 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.

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 B (“Reporter’s 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 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 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 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 and nonpartisan sentencing commission. The statutory outlines
of § 6.09 can be given considerable substantive content by guidelines devoted to the
subject of postrelease-supervision sanctions, and their appropriate elements in particular
types of cases. 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.”). The Code anticipates that sentencing guidelines will be developed to help
courts make use of relevant information about offenders’ risks and needs in individual
cases.

g. Length of postrelease-supervision terms. One recommendation of the original
Code that failed to gain wide influence was that durations of parole terms should be fixed
through individualized consideration of each case, and should not be based on the balance
of the prison sentence unserved by offenders upon release. See Model Penal Code (First)
§ 6.10(2). The unserved-prison-term rule, still common in many states, has the perverse
effect of imposing the longest supervision terms on offenders who have been released the
earliest, either by parole boards or through the accrual of good-time credits. In most
instances, these will be the inmates with records of best behavior while institutionalized.
For offenders with disciplinary records so poor that they were required to serve their full
maximum sentences (called “maxing out”), no postrelease supervision is provided at all
in many state systems.

The new Code reasserts the Institute’s original position on this score. Subsection (5)
provides that “[t]he 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.” The
revised Code goes further than its predecessor in recommending that all decisions relating
to the imposition of postrelease supervision must respond to the policy considerations in
subsection (2), and be informed by risk-and-needs assessments as set forth in subsection
(4), as well as sentencing guidelines promulgated by an expert, nonpartisan sentencing
commission, see Articles 6A and 6B (Tentative Draft No. 1, 2007).

Subsection (6) provides that postrelease-supervision terms may extend for a period
of up to five years. One driving force behind § 6.09 is the judgment that parole-
supervision agencies across the United States are grossly under-resourced and have
access to too few outside services to meet the needs of their clientele. The original Code
also recommended a maximum five-year parole term for felony offenders, see Model
Penal Code (First) § 6.10(2).

For the mass of parolees, a supervision period no longer than one or two years
should be sufficient, particularly if energy and resources now wasted on much longer
supervision terms is reallocated to the most critical, early months following release. The
Code’s choice of a five-year period is informed by criminological research into the
behavior of prison releasees. The first year following exit from prison is when most
reoffending occurs, with diminishing rates of criminal involvement in subsequent years.
In the aggregate, each successive year of supervision yields 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

© 2014 by The American Law Institute
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 compensation] 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.

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 free-standing penalties with their own terms and conditions, timelines for compliance, and sanctions for violations. Because the revised Code gives priority to collection of victim compensation 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 compensation 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:

**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 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 compensation 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 compensation than on other economic sanctions, see § 6.03(10). On principle a jurisdiction may take the view that victim-compensation 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 compensation 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**

*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 releases 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 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

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 de-emphasize the casework portion of their role … yet there is wide variation across agencies.

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).
§ 6.09

Model Penal Code: Sentencing

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 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.,
Art. 6. Authorized Disposition of Offenders § 6.09

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 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 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)
Art. 6. Authorized Disposition of Offenders § 6.09

(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 Model Penal Code (First), § 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).

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).

1. 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 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”).

ORIGINAL PROVISION

§ 6.10. First Release of All Offenders on Parole; Sentence of Imprisonment Includes Separate Parole Term; Length of Parole Term; Length of Recommitment and Reparole After Revocation of Parole; Final Unconditional Release.

(1) First Release of All Offenders on Parole. An offender sentenced to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09 or 7.06 shall be released conditionally on parole at or before the expiration of the maximum of such term, in accordance with Article 305.
(2) **Sentence of Imprisonment Includes Separate Parole Term; Length of Parole**

A sentence to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09 or 7.06 includes as a separate portion of the sentence a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender’s first conditional release on parole. The minimum of such term is one year and the maximum is five years, unless the sentence was imposed under Section 6.05(2) or Section 6.09, in which case the maximum is two years.

(3) **Length of Recommitment and Reparole After Revocation of Parole.** If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Board of Parole but shall not exceed in aggregate length the unserved balance of the maximum parole term provided by Subsection (2) of this Section.

(4) **Final Unconditional Release.** When the maximum of his parole term has expired or he has been sooner discharged from parole under Section 305.12, an offender shall be deemed to have served his sentence and shall be released unconditionally.

[End of Original Provision]

PROPOSED NEW PROVISION

§ 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:

1. The right to counsel;
2. The right to be present and to make a statement to the court;
3. The right to testify or remain silent; and
4. 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:

a. Scope. This provision replaces §§ 301.2-301.4 and 305.15-305.17 of the Model Penal Code (First), which addressed violations of probation and parole in several independent provisions. 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
§ 6.15  Model Penal Code: Sentencing

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 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
(First) §§ 301.4, 305.15(1). 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.

**g. Sentence credit.** Unlike the original Code, which provided sentence credit to individuals for time served in the community prior to revocation, the proposed provision gives sentence credit upon revocation only for time served in custody awaiting the revocation hearing. Individuals who are successful in meeting the conditions of their community supervision may be eligible for sentence reduction pursuant to § 6.03(9) and § 6.09(11); however, those who do not comply receive no credit for time spent on conditional release.

**h. Lengths of revocation of probation and postrelease supervision.** When the court determines that revocation is the only appropriate response to rule violations, the court may order any period of confinement up to the maximum length of the probation or postrelease-supervision term originally imposed, with credit for any time served. See § 6.15, Comment g, above.

**i. Revocation of a suspended sentence.** The bracketed language in subsection (3)(e) is recommended only to states that have chosen to adopt § 6.02(2), which authorizes the use of suspended prison sentences as one route to the use of probation sanctions. The bracketed language in subsection (3)(e) is inapplicable to jurisdictions that have rejected § 6.02(2). Where a judge has already imposed a prison sentence, but has stayed it to allow the individual to serve a term of probation pursuant to § 6.02(2), the maximum sentence upon revocation is the full term of the suspended sentence. Subsection (3)(e) allows the court to impose the full suspended sentence, but it does not require that result. Upon revocation, the court may impose any lesser sanction, including a shorter term of confinement or any other penalty enumerated in subsection (3).
REPORTERS’ NOTE

a. Scope. Approximately one out of every 47 U.S. adults is currently serving a term of conditional release in the United States, subject to imprisonment for any violation of the rules of supervision. Lauren E. Glaze, Thomas P. Bonezor & Fan Zhang, Probation and Parole in the United States, 2009, Bureau of Just. Stat. 2 (2010). When a person fails to comply with release conditions, the result is often imprisonment. In a growing number of jurisdictions, more than half of new prison admissions are attributable to revocation, rather than to conviction for a new criminal offense. See, e.g., Louisiana Justice Reinvestment Initiative, Vera Inst. Just. (2010) (reporting that 56 percent of 2009 La. Prison admissions were the result of probation or parole revocations). As resource constraints continue, there is a growing need for laws that help reduce unnecessary revocations and aid in the success of community supervision.

There is wide variation in the ways in which jurisdictions throughout the country allocate authority over revocation decisions. In most jurisdictions, judges are responsible for probation revocation, while parole boards, administrative agencies, and departments of corrections have responsibility for sanctioning violations of postrelease supervision. See, e.g., Pew Center on the States, Smart Responses to Parole and Probation Violations 3 (2007) (discussing difficulty of gathering probation-revocation data from courts and therefore relying on parole-revocation 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.
Art. 6. Authorized Disposition of Offenders

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.

c. Warrant requirement. The original Code authorized probation officers to arrest an individual on probation without a warrant whenever there was “probable cause to believe” that the person had “failed to comply with” a release condition or had “committed another crime.” Model Penal Code (First) § 301.3(1)(b). Parole officers were ordinarily required to obtain authorization from the parole board prior to making an arrest, but could arrest a parolee without a warrant when there was “reasonable cause to believe that a parolee has violated or is about to violate a condition of his parole and that an emergency situation exists, so that awaiting action by the Board of Parole . . . would create an undue risk to the public or to the parolee.” Model Penal Code (First) § 305.16(2). Proposed subsection (1)(g) authorizes agents to seek a warrant for an individual’s arrest when there is probable cause to believe he or she has violated a condition of release, and public safety demands it. When exigent circumstances exist, subsection (1)(g) authorizes supervising agents to arrest without a warrant.

Subsection (1)(g) follows the federal practice of requiring officers to obtain a warrant before making any arrest in the absence of exigent circumstances. Given the speed with which warrants can now be secured, there are few practical impediments to obtaining timely warrants. See, e.g., Donald L. Beci, Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence, 73 Denv. U. L. Rev. 293, 296-299 (1996). Further, requiring a judicial check on the power to arrest encourages more thoughtful, less reactive responses to rule violations.

d. Timeliness and certainty of response. Research suggests that when supervising officers respond to rule violations immediately by imposing certain-but-fair consequences, individuals under supervision have higher rates of compliance and lower rates of recidivism. See, e.g., Angela Hawken & Mark Kleiman,
§ 6.15 Model Penal Code: Sentencing

Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawai'i's HOPE (2009); Faye S. Taxman, David Soule & Adam Gelb, Graduated Sanctions: Stepping Into Accountable Systems and Offenders, 79 Prison Journal 182 (1999). Consequently, the provision requires supervising agents to respond to detected rule violations in some way—how they should respond, however, will turn on the reasons for and seriousness of the violation. In many cases, re-education or a verbal warning may suffice.

ORIGINAL PROVISIONS

Section 301.2. Period of Suspension or Probation; Modification of Conditions; Discharge of Defendant.

(1) When the Court has suspended sentence or has sentenced a defendant to be placed on probation, the period of the suspension or probation shall be five years upon conviction of a felony or two years upon conviction of a misdemeanor or a petty misdemeanor, unless the defendant is sooner discharged by order of the Court. The Court, on application of a probation officer or of the defendant, or on its own motion, may discharge the defendant at any time. On conviction of a violation, a suspended sentence constitutes an unconditional discharge.

(2) During the period of the suspension or probation, the Court, on application of a probation officer or of the defendant, or on its own motion, may modify the requirements imposed on the defendant or add further requirements authorized by Section 301.1. The Court shall eliminate any requirement that imposes an unreasonable burden on the defendant.

(3) Upon the termination of the period of suspension or probation or the earlier discharge of the defendant, the defendant shall be relieved of any obligations imposed by the order of the Court and shall have satisfied his sentence for the crime.

Section 301.3. Summons or Arrest of Defendant Under Suspended Sentence or on Probation; Commitment Without Bail; Revocation and Resentence.

(1) At any time before the discharge of the defendant or the termination of the period of suspension or probation:

(a) the Court may summon the defendant to appear before it or may issue a warrant for his arrest;

(b) a probation or peace officer, having probable cause to believe that the defendant has failed to comply with a requirement imposed as a
Art. 6. Authorized Disposition of Offenders

§ 6.15

case of the order or that he has committed another crime, may arrest
him without a warrant;

c) the Court, if there is probable cause to believe that the defendant
has committed another crime or if he has been held to answer therefore,
may commit him without bail, pending a determination of the charge by the
Court having jurisdiction thereof;

d) the Court, if satisfied that the defendant has inexcusably failed to
comply with a substantial requirement imposed as a condition of the order
or if he has been convicted of another crime, may revoke the suspension or
probation and sentence or resentence the defendant, as provided in this
Section.

(2) When the Court revokes a suspension or probation, it may impose on the
defendant any sentence that might have been imposed originally for the crime of
which he was convicted, except that the defendant shall not be sentenced to
imprisonment unless:

(a) he has been convicted of another crime; or

(b) his conduct indicates that his continued liberty involves undue risk
that he will commit another crime; or

(c) such disposition is essential to vindicate the authority of the Court.

Section 301.4. Notice and Hearing on Revocation or Modification of Conditions of
Suspension or Probation.

The Court shall not revoke a suspension or probation or increase the
requirements imposed thereby on the defendant except after a hearing upon written
notice to the defendant of the grounds on which such action is proposed. The
defendant shall have the right to hear and controvert the evidence against him, to
offer evidence in his defense and to be represented by counsel.

Section 305.15. Revocation of Parole for Violation of Condition; Hearing.

(1) When a parolee has been returned to the institution, the Board of Parole
shall hold a hearing within sixty days of his return to determine whether his parole
should be revoked. The parolee shall have reasonable notice of the charges filed.
The institutional parole staff shall render reasonable aid to the parolee in
preparation for the hearing and he shall be permitted to advise with his own legal
counsel. At the hearing the parolee may admit, deny, or explain the violation
charged, and he may present proof, including affidavits and other evidence, in
support of his contention. A verbatim record of the hearing shall be made and 
preserved.

(2) The Board may order revocation of parole if it is satisfied, upon substantial 
evidence, that:

(a) the parolee has failed, without a satisfactory excuse, to comply with 
a substantial requirement imposed as a condition of his parole; and

(b) the violation of condition involves:

(i) the commission of another crime; or

(ii) conduct indicating a substantial risk that the parolee will 
commit another crime; or

(iii) conduct indicating that the parolee is unwilling to comply with 
proper conditions of parole.

(3) Parole revocation shall be by majority vote of the Board.

Section 305.16. Sanctions Short of Revocation for Violation of Condition of Parole.

(1) If the Parole Administrator has reasonable cause to believe that a parolee 
has violated a condition of parole, he shall notify the Board of Parole, and shall 
cause the appropriate district parole supervisor to submit the parolee’s record to 
the Board. After consideration of the records submitted, and after such further 
investigation as it may deem appropriate, the Board may order:

(a) that the parolee receive a reprimand and warning from the Board;

(b) that parole supervision and reporting be intensified;

(c) that reductions for good behavior be forfeited or withheld;

(d) that the parolee be remanded, without revocation of parole, to a 
residence facility specified in Section 305.14 for such a period and under 
such supervision or treatment as the Board may deem appropriate;

(e) that the parolee be required to conform to one or more additional 
conditions of parole that may be imposed in accordance with Section 
305.13;

(f) that the parolee be arrested and returned to prison, there to await a 
hearing to determine whether his parole should be revoked.

(2) If a parole officer or district parole supervisor has reasonable cause to 
believe that a parolee has violated or is about to violate a condition of his parole and 
that an emergency situation exists, so that awaiting action by the Board of Parole
under Subsection (1) of this Section would create an undue risk to the public or to
the parolee, such parole officer or district parole supervisor may arrest such parolee
without a warrant, and may call on any peace officer to assist him in so doing. The
parolee, whether arrested hereunder with or without a warrant, shall be detained in
the local jail, lockup, or other detention facility, pending action by the Board of
Parole. Immediately after such arrest and detention, the parole officer or district
parole supervisor concerned shall notify the Board and submit a written report of
the reason for such arrest. After consideration of such written report, the Board [or
a member of the Board] shall, with all practicable speed, make a preliminary
determination, and shall either order the parolee’s release from detention or order
his return to the institution from which he was paroled, there to await a hearing to
determine whether or not his parole shall be revoked. The Board’s preliminary
determination to order the parolee’s release from detention shall not, however, be
deemed to bar further proceedings under Subsection (1) of this Section.

Section 305.17. Duration of Reimprisonment and Re-parole After Revocation.

(1) A parolee whose parole is revoked for violation of the conditions of parole
shall be recommitted for the remainder of his maximum parole term, after credit
thereon for the period served on parole prior to the violation and for reductions for
good behavior earned while on parole.

(2) A parolee whose parole has been revoked may be considered by the Board of
Parole for re-parole at any time. He shall be entitled to a hearing and consideration
for re-parole after serving a further period of imprisonment equal to one third of
the remainder of his maximum parole term, or after serving a period of six months,
whichever is longer.

(3) Except in the case of a parolee who has absconded from the jurisdiction or
from his place of residence, action revoking a parolee’s parole and recommitting
him for violation of the conditions of parole must be taken before the expiration of
his maximum parole term less reductions for good behavior. A parolee who has
absconded from the jurisdiction, or from his place of residence, shall be treated as a
parole violator and whenever he is apprehended shall be subject to recommitment
or to supervision for the balance of his parole term remaining on the date when he
absconded.

[End of Original Provisions]
ARTICLE 6x. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

PROPOSED NEW PROVISION

§ 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.

Comment:

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 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 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 non-individualized 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**

*a. Collateral consequences, generally.* In America today, more than 65 million people have a criminal record. Michelle Natividad Rodriguez & Maurice Emsellem, 65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment, The National Employment Law Project (2011). 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 & 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. 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 & 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 & 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 misdemeanor 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 provide a safeguard against enforcement of sanctions that do not serve legitimate regulatory purposes in specific cases.

---

**NO ORIGINAL PROVISION**

---

**PROPOSED NEW PROVISION**

§ 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.

   (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 regularly updated.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under § 6x.04, and may develop formal guidelines for use in ruling on such petitions. The authority and limitations of any such guidelines are governed by Article 6B of this Code, subject to the courts’ authority to individualize sentences under § 7.XX.

**Comment:**

a. **Scope.** The goal of this provision is two-fold. First, to require sentencing commissions 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 when making charging, plea, and sentencing decisions. Second, to require commissions to guide courts in exercising their discretionary power under § 6x.04 to convert otherwise-mandatory collateral consequences into discretionary collateral consequences.

Subsection (1) 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. This subsection also requires the commission to regularly maintain and publish its compendium, making it a reliable and easily accessible resource for defendants, victims, lawyers, and the public at every stage of a criminal prosecution.
Subsection (2) requires sentencing commissions to provide guidance to courts, either in the form of grid guidelines or more descriptive guidance, on how to exercise their discretion to grant relief from mandatory collateral consequences under § 6x.04. Such guidance might set forth the types of consequences most or least likely to meet the standard for relief with respect to any given offense category, or provide judges with relevant data to consider when weighing the public-safety benefits of specific mandatory collateral consequences as they apply to particular categories of offenders.

b. Information collected. Under subsection (1), the sentencing commission is required to “compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction’s] statutes and administrative regulations.” Section 6x.02(1)(a) requires the sentencing commission to 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 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 publication may prove the most 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 ensures that the compendium is accessible both to legal professionals and to general users who want to know the full consequences of conviction for 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 ideally 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 Section 6x.04(2).

e. Challenges of nonstatutory collateral consequences. Many collateral consequences 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, ideally states should mandate that all collateral consequences be imposed at the state, rather than the local,
level. Regardless, 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. This Section allows individual commissions to guide courts in a variety of ways, including but not limited to, the development of formal guidelines. Requiring commissions to provide guidance 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 include bulletins providing relevant data or supplemental information about the purposes and operation of various mandatory collateral consequences, or lists of collateral consequences most or least likely to advance public safety for certain categories of offenses or offenders.

REPORTERS’ NOTE

  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 postconviction 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.

  While such a task is daunting, it is not impossible. 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 is now available online to the public and nearly complete. See www.abacollateralconsequences.org. In several jurisdictions, nonprofit organizations or academic institutions already collect and make public state-specific information on collateral consequences. See North Carolina’s C-CAT tool, ccat.sog.unc.edu; Ohio’s CIVICC website, civiccohio.org; New York’s Collateral Consequences of Criminal Charges Calculator, calculator.law.columbia.edu. While these efforts mark an important first step in providing the public with access to information about collateral consequences, ongoing maintenance is essential to keep information accurate. Making the sentencing commission responsible for monitoring relevant legislation and updating the database periodically ensures that information remains reliable and that policymakers are aware of the ways in which collateral consequences affect those convicted of specific crimes.
§ 6x.02  Model Penal Code: Sentencing

b. Information collected and maintained. In many jurisdictions, the number of collateral consequences that attach upon conviction number in the hundreds. Love, Roberts & Klingele, Collateral Consequences of Criminal Conviction at 513-516 (reporting an average of more than 1000 collateral consequences per felony conviction in the first states surveyed by ABA inventory). 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) (2010), § 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”).

c. Distribution. While sentencing commissions may choose to distribute information in any form they deem appropriate, the ever-changing nature of collateral consequences makes an online database an easy and inexpensive way to provide the information required by subsection (1)(a). See Hon. Michael A. Wolff, Incorporating Collateral Consequences into Sentencing Guidelines and Recommendations Post-Padilla, 31 St. Louis U. Pub. L. Rev. 183 (2011) (“Sentencing commissions have websites that impart a great deal of information about proposed sentences. It would not be that difficult to include a listing of collateral consequences and disqualifications that flow from various kinds of felonies”). There are several existing examples of web-based compilations, including the American Bar Association’s National Inventory of Collateral Consequences, www.abacollateralconsequences.org, New York’s Collateral Consequences of Criminal Charges Calculator, calculator.law.columbia.edu, Ohio’s Civil Impacts of Criminal Convictions (CIVICC) database, civiccohio.org, and North Carolina’s C-CAT database, ccat.sog.unc.edu.

d. Organization. Statutes imposing collateral consequences often do not make specific reference to the offenses that trigger their imposition. Instead, they apply to broad categories of offenders such as those convicted of felonies, misdemeanors, crimes of violence, or crimes of moral turpitude. These classifications often include different offenses in different jurisdictions; consequently, in order for defendants and criminal-justice system actors to fully understand the legal ramifications of conviction in any given case, it is important that the compendium connect collateral consequences to the specific statutory offenses to which each applies.

e. Challenges of nonstatutory collateral consequences. While sentencing commissions are not required under § 6x.02 to collect information on municipal ordinances imposing collateral consequences, such consequences remain a problematic area of law. Cataloging them is next to impossible given the frequency with which they change; however, they work to bar convicted individuals from employment, housing, and a host of other public benefits. Because municipalities and counties derive their authority to legislate from the state, states have the legal authority to preempt local laws, including zoning and licensing restrictions that impose overly restrictive burdens on convicted individuals. See Amy P. Meek, Street
Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level, Ohio St. L. J. 52 (forthcoming 2014).

f. Guiding courts on petitions for relief. Presently, few states authorize courts to grant relief from mandatory collateral consequences, and those that do offer no guidance in how judicial discretion should be exercised in this context. Nevertheless, judges and sentencing commissions have grown increasingly aware of the importance of offering advice on collateral consequences, and are becoming more involved in cataloguing and understanding the legitimate and illegitimate uses of collateral consequences. In 2008, the New Mexico Sentencing Commission, at the behest of the legislature, conducted a study of “the collateral consequences of criminal arrest, conviction and extended periods of incarceration and to make recommendations on how to neutralize or eliminate those consequences.” Dan Cathey, Alex Adams & Chris Miller, New Mexico Sentencing Commission, Collateral Consequences in New Mexico: A First Look (2008). The Alabama Sentencing Commission already provides judges with a list of common collateral consequences in its judicial benchbook. Ala. Sent’g Comm., Sentencing Reference Manual for Circuit and District Judges (2012). In short, commissions have shown themselves capable of contributing knowledge and expertise relevant to the issue of collateral consequences.

§ 6x.03. Voting and Jury Service.

(1) No person convicted of a crime shall be disqualified 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 from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

Comment:

a. Scope. This provision closely tracks § 306.3 of the Model Penal Code (First), with one primary difference. The original Code required that incarcerated voters be disenfranchised 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.
§ 6x.03  Model Penal Code: Sentencing

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.

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 requires 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

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. 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.

PROPOSED NEW PROVISION

§ 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.

(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 any 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 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.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.
Art. 6x. Collateral Consequences of Criminal Conviction § 6x.04

(3) When an administrative or other official is required by law to make an individualized determination whether a benefit or opportunity should be afforded to any individual, an order of relief under this Section does not bar a denial of the opportunity or benefit sought.

Comment:

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 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. 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 the time of sentencing. (This information is made available by the sentencing commission, which is charged under § 6x.02(1) with “compile, maintain, and publish 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.

e. Notice. Subsection 6x.04(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 doing so, the discretionary decisionmaker may deny the sought-after benefit or opportunity if it finds that the facts underlying the conviction are reasonably related to the individual’s competency to exercise the benefit or opportunity the individual seeks to obtain.

REPORTERS’ NOTE

a. Scope. Although new to the Code with the current revision, 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. Original § 306.6(1) allowed a court to order that a previously entered judgment 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 (First) § 306.6(1). 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 (First) § 306.6(2). 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 Colorado and Ohio have recently enacted legislation that permits courts to grant relief from certain collateral consequences (particularly those related to employment) for designated categories of convicted individuals. See Col. Rev. Stat. § 18-1.3-213 (2013); Ohio Stat. § 2953.25 (2012) (establishing a judicial process for issuing certificates of qualification for employment, which remove specific mandatory collateral consequences related to employment). A number of additional states have introduced legislation to authorize various forms of judicial relief from mandatory collateral consequences. 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 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 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);
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.
§ 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
(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.05  Model Penal Code: Sentencing

Comment:

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 6x.05(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 6x.05(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).

c. Consideration of extrajurisdictional 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

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

© 2014 by The American Law Institute
§ 6x.06. Certificate of Relief from Civil Disabilities.

(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 relief from civil disabilities, 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] should issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences, unless the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect.

(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 relief from civil disabilities 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 the cultural, educational, or economic limitations affecting petitioners.

(4) A certificate of relief from civil disabilities removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this state as a result of prior convictions except as provided by Article 213. A court may specify that the certificate should issue with additional 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 relief from civil disabilities 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 employee or former employee.

Comment:

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 (First) § 306.6, Explanatory Note. A certificate of relief from civil disabilities 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 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 relief from civil disabilities, 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 relief from civil disabilities 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
varies 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. Section 6x.06(3)(a). 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 that he or she has successfully reintegrated into the law-abiding community.
Section 6x.06(3)(b). Rehabilitation is personal, and therefore proof of reintegration will
differ from one individual to the next. In determining whether the petitioner has met his
or her burden, the [court or designated agency] should consider the lack of reconviction,
but may also consider the amount of time that has passed since the individual’s most
recent conviction, and factors such as participation in treatment for mental-health or
substance-abuse problems linked to past criminal offending.

d. Effect of relief. A certificate of relief from civil disabilities removes all mandatory
collateral consequences, with two potential exceptions. First, for individuals convicted of
sexual offenses, the restrictions on relief set forth in Article 213 apply. Second, the [court or designated agency] may grant the certificate with exceptions “when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences.” Section 6x.06(4).

Like an order of relief issued under § 6x.04, the effect of a certificate of relief from civil disabilities is to remove the mandatory nature of a collateral consequence, and not to prohibit the imposition of discretionary collateral consequences by authorized decisionmakers. A discretionary decisionmaker may deny a benefit or opportunity notwithstanding the certificate of relief from civil disabilities if it finds that the facts underlying the conviction continue to call into question the individual’s competency to exercise the benefit or opportunity the individual seeks to obtain, even in light of the individual’s post-sentencing conduct. In evaluating the individual’s post-sentencing conduct, weight should be given to the court’s issuance of the certificate of relief from civil disabilities, which “may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.” Section 6x.06(4).

e. Protection for employers. In addition to removing all mandatory collateral consequences except as otherwise provided, a certificate of relief from civil disabilities provides protection to employers who hire certificate recipients. Subsection (5) provides that “[i]nformation regarding the criminal history of an individual who has received a certificate of relief from civil disabilities 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 employee or former employee.” Section 6x.06(5).

REPORTERS’ NOTE

a. Scope. This new provision is derived from § 306.6(2) of the original Code. The original provision authorized courts to vacate the conviction of any “[young adult offender] . . . discharged from probation or parole before the expiration of the maximum term” or of any defendant who “[fully satisfied]” his or her sentence and thereafter “[led a law-abiding life for at least [five] years].” Model Penal Code (First) § 306.6(2)(b). Once the court granted relief, the vacated conviction could not be used as the basis for imposing a collateral sanction (a “disability” in the language of the original Code), though it could still be considered in connection with discretionary collateral consequences. See Model Penal Code (First) § 306.6(3)(d) (permitting the consideration of the vacated crime by “a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege that such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order”). See also Margaret Colgate Love, Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code, 30 Fordham Urb. L.J. 1705, 1708 (2003).
Section 6x.06 provides a mechanism for erasing the stigma of a criminal conviction without hiding the fact of conviction itself. Section 6x.06 does not authorize the court to vacate a sentence, but it does offer a formal mechanism for ameliorating the effects of collateral consequences on individuals who have succeeded in reintegrating into their communities following criminal conviction. This mechanism provides a way for individuals who have reformed their lives to eliminate any lingering mandatory collateral consequences that may inhibit their social and economic prospects.

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. Kurylchek, Robert Brame, and Shawn D. Bushway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Crime & Pub’l 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 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.
APPENDIX A

Model Penal Code: Sentencing

Proposed Complete Table of Contents for Part I, Articles 6, 6x, 6A, 6B, and 7, and Partial Contents for Parts III and IV

Note that all provisions will be renumbered when the MPCS revision project is completed.

- Provisions in black have been approved by the Institute in Tentative Drafts No. 1 (approved May 16, 2007) and No. 2 (approved May 17, 2011).
- Provisions with a single underline are contained in this draft and are a part of the drafting cycle for Tentative Draft No. 3.
- Provisions with a broken underline have not yet been drafted. Several of these may be added to the provisions that go forward in Tentative Draft No. 3, but most are planned for two drafting cycles ahead, looking to Tentative Draft No. 4.
- There is no settled plan for revision of Parts III and IV of the original Code. A general plan for revision was included in Preliminary Draft No. 6 (April 11, 2008) at 85-89. A selective revision of Parts III and IV could be contained in a 5th Tentative Draft.

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

§ 1.02(2). Purposes; Principles of Construction

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

§ 6.01. Grading of Felonies and Misdemeanors
§ 6.02. Authorized Dispositions for Individuals
§ 6.02A. Deferred Prosecution
§ 6.02B. Deferred Adjudication
§ 6.03. Probation
§ 6.04A. Victim Compensation
§ 6.04B. Fines

© 2014 by The American Law Institute
§ 6.04C. Asset Forfeitures

§ 6.04D. Costs, Fees, and Assessments

§ 6.06. Sentence of Imprisonment

§ 6.07. Credit for Time of Detention Prior to Sentence

§ 6.09. Postrelease Supervision

§ 6.11A. Sentencing of Offenders Under the Age of 18


§ 6.15. Violations of Probation or Postrelease Supervision

ARTICLE 6x. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

§ 6x.01. Definitions

§ 6x.02. Sentencing Guidelines and Collateral Consequences

§ 6x.03. Voting and Jury Service

§ 6x.04. Notification of Collateral Consequences; Order of Relief

§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.

§ 6x.06. Certificate of Relief from Civil Disabilities

ARTICLE 6A. AUTHORITY OF THE SENTENCING COMMISSION

§ 6A.01. Establishment and Purposes of Sentencing Commission

§ 6A.02. Membership of Sentencing Commission

Alternative § 6A.02. Membership of Sentencing Commission

§ 6A.03. Staff of Sentencing Commission

§ 6A.04. Initial Responsibilities of Sentencing Commission

§ 6A.05. Ongoing Responsibilities of Sentencing Commission

§ 6A.06. Community Corrections Strategy

§ 6A.07. Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts
Appendix A

§ 6A.08. Ancillary Powers of Sentencing Commission

§ 6A.09. Omnibus Review of Sentencing System

ARTICLE 6B. SENTENCING GUIDELINES

§ 6B.01. Definitions

§ 6B.02. Framework for Sentencing Guidelines

§ 6B.03. Purposes of Sentencing and Sentencing Guidelines

§ 6B.04. Presumptive Guidelines and Departures

§ 6B.05. Selection Among and Use of Sanctions

§ 6B.06. Eligible Sentencing Considerations

§ 6B.07. Use of Criminal History

§ 6B.08. Sentences Upon Convictions of Multiple Offenses; Consecutive and Concurrent Sentences

§ 6B.09. Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending

§ 6B.10. Offenses Not Covered by Sentencing Guidelines

§ 6B.11. Effective Date of Sentencing Guidelines and Amendments

ARTICLE 7. AUTHORITY OF THE COURT IN SENTENCING

§ 7.XX. Judicial Authority to Individualize Sentences

§ 7.02. Choices Among Sanctions

§ 7.03. Eligible Sentencing Considerations

§ 7.04. Sentences Upon Multiple Convictions

§ 7.07. Sentencing Proceedings; Presentence Investigation and Report

§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law

§ 7.07B. Sentencing Proceedings; Jury Factfinding

§ 7.07C. Sentencing Proceedings; Victims’ Rights

§ 7.08. Reconsideration of Sentence

§ 7.09. Appellate Review of Sentences
PART III. TREATMENT AND CORRECTION

ARTICLE 300. RESEARCH AND EVALUATION

§ 300.1. Criminal-Justice Research Agency

ARTICLE 305. PRISON RELEASE AND POSTRELEASE SUPERVISION

§ 305.1. Good Time Reductions of Prison Terms; Reductions for Program Participation

§ 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation

§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons

§ 305.8. Emergency Release Authority.

***********
§ 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.

(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 sanctions 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.

§ 6.02A. Deferred Prosecution.

(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.

[(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
Appendix B

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 any charge against the accused 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 written standards for its use of deferred-prosecution agreements publicly available. 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.

§ 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.

(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.

(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 compensation 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.

(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 compensation].


(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 compensation] 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 [other than victim compensation] 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 a prison sanction 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 compensation].

(10) If the court imposes multiple economic sanctions including victim compensation, the court shall order that payment of victim compensation 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 Compensation.

(1) The court shall order victim compensation when a crime victim has suffered injuries that would support an award of compensatory damages under state law, if the amount of compensation can be calculated with reasonable accuracy.

(2) The purposes of victim compensation are to compensate crime victims for injuries suffered as a result of criminal conduct and promote offenders’
rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims.

(3) When an offender has caused losses that would be compensable under this Section, but there is no identifiable victim in the case, the offender may be ordered to make an equivalent payment into a victims’ compensation fund.

§ 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;
(f) [$5000] in the case of a misdemeanor; and
(g) [$1000] in the case of a petty misdemeanor.

(h) An amount up to [five times] the pecuniary gain derived from the offense by the offender or [five 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:

(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.

(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.

§ 6.09. 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.

(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 compensation 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 compensation].

§ 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:
   1. The right to counsel;
   2. The right to be present and to make a statement to the court;
   3. The right to testify or remain silent; and
   4. 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.

§ 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.

   (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
   regularly updated.

(2) The sentencing commission shall provide guidance for courts considering petitions
for orders of relief from mandatory collateral consequences under § 6x.04, and may
develop formal guidelines for use in ruling on such petitions. The authority and limitations
of any such guidelines are governed by Article 6B of this Code, subject to the courts’
authority to individualize sentences under § 7.XX.
Appendix B

§ 6x.03. Voting and Jury Service.

(1) No person convicted of a crime shall be disqualified 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 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.

   (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 any 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 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.

   (d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) When an administrative or other official is required by law to make an individualized determination whether a benefit or opportunity should be afforded to any
individual, an order of relief under this Section does not bar a denial of the opportunity or
benefit sought.

§ 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
(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 Relief from Civil Disabilities.

(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 relief from civil disabilities, 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] should issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences, unless the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect.

(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 relief from civil disabilities 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 the cultural, educational, or economic limitations affecting petitioners.

(4) A certificate of relief from civil disabilities removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this state as a result of prior convictions except as provided by Article 213. A court may specify that the certificate should issue with additional 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 relief from civil disabilities 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 employee or former employee.
§ 1.02(2). Purposes: Principles of Construction. (TD No. 1) (approved 2007)

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

(a) in decisions affecting the sentencing of individual offenders:
    (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
    (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (2)(a)(i); and
    (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (2)(a)(i) and (2)(a)(ii);
(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 encourage the use of intermediate sanctions;
    (v) to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources;
    (vi) to ensure that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of
subsistence, personal safety, medical and mental-health care, and opportunities to rehabilitate themselves;

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

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

§ 6.01. Grading of Felonies and Misdemeanors. (TD No. 2) (approved 2011)

(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.
§ 6.06. Sentence of Imprisonment. (TD No. 2) (approved 2011)

(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 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.]

(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 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].

(3) The court is not required to impose a minimum term of imprisonment for any offense under this Code. This provision supersedes any contrary provision in the Code.

(4) Offenders sentenced to a term of 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.

   [(5) For offenses committed after the effective date of this provision, the authority of the parole board to grant parole release to imprisoned offenders is abolished.]

§ 6.11A. Sentencing of Offenders Under the Age of 18. (TD No. 2) (approved 2011)

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;

   (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.
Appendix C

(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.]

§ 6A.01. Establishment and Purposes of Sentencing Commission. (TD No. 1) (approved 2007)

(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.
§ 6A.02. Membership of Sentencing Commission. (TD No. 1) (approved 2007)

(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.


(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]:

© 2014 by The American Law Institute
Appendix C

(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;
(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. (TD No. 1) (approved 2007)

(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.

(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. (TD No. 1) (approved 2007)

(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.

§ 6A.05. Ongoing Responsibilities of Sentencing Commission. (TD No. 1) (approved 2007)

(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:

(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.

(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. (TD No. 1) (approved 2007)

(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;

(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. (TD No. 1) (approved 2007)

(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.


(1) Upon request from the commission, each agency and department of state and local government shall make its services, equipment, personnel, facilities, and information 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.


(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;

(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.

§ 6B.01. Definitions. (TD No. 1) (approved 2007)

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.


(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.

(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. [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 §§ 6.06 through 6.09.

(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. (TD No. 1) (approved 2007)

(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 or restorative 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. (TD No. 1) (approved 2007)

(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 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.

[(d) The guidelines shall include presumptive provisions 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 as grounds for departure from presumptive sentences in individual cases. The commission may not quantify the effect given to specific aggravating or mitigating factors.

§ 6B.06. Eligible Sentencing Considerations. (TD No. 1) (approved 2007)

(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 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, (TD No. 1) (approved 2007)

(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as an aggravating factor enumerated as a ground for departure from a presumptive sentence, or as a component of other presumptive provisions or recommendations in the guidelines. The commission may develop different approaches to the use of criminal history for different categories of cases.

(2) The commission may include consideration of prior juvenile adjudications as criminal history in the guidelines, but only when the procedural safeguards attending juvenile adjudications are comparable to those of a criminal trial.

(3) The commission shall fix 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 in no event exceed [10] years for prior juvenile adjudications. The commission may 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 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.09. Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending, (TD No. 2) (approved 2011)

(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.


(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 why 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. (TD No. 1) (approved 2007)

(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.

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. (TD No. 1) (approved 2007)

(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.

   (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.

(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 §§ 6.06 through 6.09.

§ 7.07A. Sentencing Proceedings; Findings of Fact and Conclusions of Law (TD No. 1) (approved 2007)

(1) Following a defendant’s conviction of a felony or misdemeanor, the court shall impose sentence within a reasonable time. 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, except as provided in § 7.07B.
(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 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.

§ 7.07B. Sentencing Proceedings; Jury Factfinding (TD No. 1) (approved 2007)

(1) “Jury-sentencing facts,” for purposes of this Section, are facts subject to a defendant’s right, under the federal or state constitution, to trial by jury before those facts may serve as a basis for a sentencing decision.

(2) 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 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.

(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.

(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 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 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.

§ 305.1. Good-Time Reductions of Prison Terms; Reductions for Program Participation. (TD No. 2) (approved 2011)

(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.

(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. (TD No. 2) (approved 2011)

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.

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 the sentence-modification proceedings should be given to the relevant prosecuting authorities and any victims, if they can be located with reasonable efforts, of the offenses for which the prisoner is incarcerated.

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.

§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons. (TD No. 2) (approved 2011)

(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;

(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.