The American Law Institute

MODEL PENAL CODE: SENTENCING

Tentative Draft No. 1

(April 9, 2007)

SUBJECTS COVERED:

Part I. General Provisions
Article 1. Preliminary
Article 6A. Authority of the Sentencing Commission
Article 6B. Sentencing Guidelines
Article 7. Authority of the Court in Sentencing
Appendix A. Black-Letter Provisions Amended to Establish a System of Advisory Sentencing Guidelines

Submitted by the Council to the Members of
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The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, Pa. 19104-3099
Telephone: (215) 243-1600 • Telecopier: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

The American Law Institute

Model Penal Code: Sentencing
Tentative Draft No. 1

Comments and Suggestions Invited

We welcome written comments on this draft and ask that they be addressed to the Director and the Reporter; 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.

Reporter
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

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

Model Penal Code: Sentencing

REPORTER

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

ADVISERS

ANDREW ASHWORTH, All Souls College, University of Oxford, Oxford, England

ALFRED BLUMSTEIN, Carnegie Mellon University, Pittsburgh, PA

DAVID BOERNER, Seattle University School of Law, Seattle, WA [from 2004]

JUDY CLARKE, San Diego, CA; Federal Defenders of San Diego, Inc.

JOHN C. CREUZOT, Criminal District Court No. 4, Dallas County, Dallas, TX

MARGARET ELLEN CURRAN, Providence, RI

PAUL L. FRIEDMAN, U.S. District Court, District of Columbia, Washington, DC

NANCY GERTNER, U.S. District Court, District of Massachusetts, Boston, MA

DARNELL F. HAWKINS, University of Illinois at Chicago, Chicago, IL [from 2003]

RICARDO H. HINOJOSA, U.S. District Court, Southern District of Texas, McAllen, TX

ROBERT M. A. JOHNSON, Anoka County Attorney, Anoka, MN

JOETTE KATZ, Connecticut Supreme Court, Hartford, CT

KAY A. KNAPP, Minneapolis, MN

WILLIAM J. LEAHY, Chief Counsel, Massachusetts Committee for Public Counsel Services, Boston, MA

BENJAMIN LERNER, Pennsylvania Court of Common Pleas, First Judicial District, Philadelphia, PA

DENISE POSSE-BLANCO LINDBERG, Utah District Court, Third Judicial District, Salt Lake City, UT

GERARD EDMUND LYNCH, U.S. District Court, Southern District of New York, New York, NY

RAYMOND C. MARSHALL, Bingham McCutchen, San Francisco, CA

THEODORE A. MCKEE, U.S. Court of Appeals, Third Circuit, Philadelphia, PA

DANIEL J. MELTZER, Harvard Law School, Cambridge, MA

TRACY A. MINER, Mintz Levin Cohn Ferris Glovsky and Popeo, Boston, MA

NORVAL MORRIS, The University of Chicago Law School, Chicago, IL [Deceased 2004]

LOUIS H. POLLAK, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA [from 2003]

CURTIS R. REITZ, University of Pennsylvania Law School, Philadelphia, PA

THOMAS WARREN ROSS, Executive Director, Z. Smith Reynolds Foundation, Winston-Salem, NC

PAUL SHECHTMAN, Stillman & Friedman, New York, NY

KATE STITH-CABRANES, Yale Law School, New Haven, CT

RANDOLPH N. STONE, University of Chicago Law School, Chicago, IL [from 2003]

ALICEMARIE H. STOTLER, U.S. District Court, Central District of California, Santa Ana, CA

WILLIAM J. STUNTZ, Harvard Law School, Cambridge, MA

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

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
MARGARET COLGATE LOVE, Washington, DC

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

EX OFFICIO

ROSWELL B. PERKINS, New York, NY
Chair of the Council and President Emeritus, The American Law Institute

MICHAEL TRAYNOR, San Francisco, CA
President, The American Law Institute

LANCE LIEBMAN, New York, NY
Director, The American Law Institute

MEMBERS CONSULTATIVE GROUP

Model Penal Code: Sentencing

(as of March 19, 2007)

CHARLES W. ADAMS, Tulsa, OK
BURTON C. AGATA, Hempstead, NY
ROBERT H. ALSDORF, Washington Superior Court, King County, Seattle, WA
DIANE MARIE AMANN, Davis, CA
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
RICHARD J. BARTLETT, Glens Falls, NY
MICHAEL M. BAYLSON, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA
SARA SUN BEALE, Durham, NC
ROBERT O. BERGER, Boston, MA
JUDITH MITCHELL BILLINGS, Utah Court of Appeals, Salt Lake City, UT
ELSBETH L. BOTHE, Baltimore, MD
MARGOT BOTSFORD, Trial Court of Massachusetts, Superior Court Department, Boston, MA
DAVID A. BRENNEN, Athens, GA
KATHLEEN F. BRICKEY, St. Louis, MO
PAMELA H. BUCY, Tuscaloosa, AL
PETER H. CARSON, San Francisco, CA
LEONARDO CASTRO, Minneapolis, MN
HENRY L. CHAMBERS, JR., Richmond, VA
GABRIEL J. CHIN, Tucson, AZ
DANE S. CIOLINO, New Orleans, LA
ROGER S. CLARK, Camden, NJ
NATHAN B. COATS, Colorado Supreme Court, Denver, CO
NEIL P. COHEN, Knoxville, TN
LOVIDA H. COLEMAN, JR., Washington, DC
JULIAN ABELE COOK, JR., U.S. District Court, Eastern District of Michigan, Detroit, MI
MARY COOMBS, Miami, FL
WILLIAM S. COOPER, Kentucky Supreme Court, Elizabethtown, KY
JOHN C. CRATSLEY, Trial Court of Massachusetts, Superior Court Department, Concord, MA
JAMES B. CRAVEN, III, Durham, NC
DENNIS E. CURTIS, New Haven, CT
BEVERLY WINSLOW CUTLER, Alaska Superior Court, Third Judicial District, Palmer, AK
JACK DAVIES, Mendota Heights, MN
DAVID A. DEMERS, Florida Circuit Court, Sixth Judicial Circuit, St. Petersburg, FL

DEBORAH W. DENNO, 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. DOERFER, Massachusetts Appeals Court, Boston, MA

WILLIAM C. DONNINO, New York Supreme Court, Mineola, NY

WILLIAM F. DOWNES, U.S. District Court, District of Wyoming, Casper, WY

JOSHUA DRESSLER, Columbus, OH

DAVID F. DUMOUCHEL, Detroit, MI

GUY DU PONT, Montréal, Québec

WARREN W. EGINTON, U.S. District Court, District of Connecticut, Bridgeport, CT

SUSAN A. EHRLICH, Arizona Court of Appeals, Phoenix, AZ

DAVID N. ELLENHORN, New York, NY

SHELDON H. ELSEN, New York, NY

JOANNE A. EPPS, Philadelphia, PA

NORMAN L. EPSTEIN, California Court of Appeal, Second District, Division Four, Los Angeles, CA

ROBERT DAVID EVANS, Washington, DC

ROBINSON OSCAR EVERETT, Durham, NC

IRA M. FEINBERG, New York, NY

NATHAN A. FISHBACH, Milwaukee, WI

DAVID FOSCUE, Washington Superior Court, Grays Harbor County, Montesano, WA

HARVEY FRANK, Philadelphia, PA

RICHARD S. FRASE, Minneapolis, MN

ERIC M. FREEDMAN, Hempstead, NY

SAMUEL S. FREEDMAN, Connecticut Superior Court, Stamford, CT

W. ROYAL FURGESON, JR., U.S. District Court, Western District of Texas, San Antonio, TX

RONALD L. GAINER, Arlington, VA

ANNE LANCASTER GARDNER, Texas Court of Appeals, Second District, Fort Worth, TX

E. SUSAN GARSH, Trial Court of Massachusetts, Superior Court Department, Boston, MA

FAITH E. GAY, New York, NY

GERALD GILLERMAN, Cambridge, MA

MURRAY C. GOLDMAN, Philadelphia, PA

HERVÉ GOURAIGE, Newark, NJ

RICHARD A. GREEN, Arlington, VA

MICHAEL GREENWALD, Wynnewood, PA

BURT W. GRIFFIN, Shaker Heights, Ohio; formerly Ohio Court of Common Pleas, Cuyahoga County, Cleveland, OH

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 HERVEY, Texas Court of Criminal Appeals, Austin, TX

TRACY D. HESTER, Houston, TX

KENNETH L. HIRSCH, Pittsburgh, PA

MARK R. HORNAK, Pittsburgh, PA

ALAN D. HORNSTEIN, New York, NY

EDWIN E. HUDDLESON, III, Washington, DC

KEITH N. HYLTON, Boston, MA

JOAN K. IRION, California Court of Appeal, Fourth District, Division One, San Diego, CA

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, Texas District Court, 114th Judicial District, Tyler, TX

MARK R. KILLENBECK, Fayetteville, AR

RUFUS G. KING III, Superior Court of the District of Columbia, Washington, DC

LAIRD C. KIRKPATRICK, Eugene, OR

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

MICHAEL JOSEPH KRAMER, SR., Noble Superior Court, Albion, IN

STEVEN C. KRANE, New York, NY

JACK M. KRESS, Sarasota Springs, NY

MIRIAM A. KRINSKY, Monterey Park, CA

DANIEL J. KRISCH, Hartford, CT

LARRY KUPERS, 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

GEORGE W. LIEBMANN, Baltimore, MD

ALLEN M. LINDEN, Federal Court of Canada, Court of Appeal, Ottawa, Ontario

WAYNE A. LOGAN, St. Paul, MN

MARGARET COLGATE LOVE, Washington, DC

ROBERT MACCRATE, New York, NY

W. CULLEN MACDONALD, New York, NY

PETRA JIMENEZ MAES, New Mexico Supreme Court, Santa Fe, NM

LINDA A. MALONE, Williamsburg, VA

MICHAEL H. MARCUS, Oregon Circuit Court, Multnomah County, Portland, OR

ELIZABETH PHILLIPS MARSH, Hamden, CT

DAVID CHARLES MASON, Missouri Circuit Court, 22nd Judicial Circuit, St. Louis, MO

DAVID MCCORD, Des Moines, IA

ROBERT LEE MCCURLEY, JR., Tuscaloosa, AL

STEPHEN J. MCEWEN, JR., The Superior Court of Pennsylvania, Media, PA

MARGARET D. MCGAUGHEY, Portland, ME

MARY A. MCLAUGHLIN, U.S. District Court, Eastern District of Pennsylvania, Philadelphia, PA

RICHARD J. MEDALIE, Hull, MA

JAMES A. MEDFORD, Greensboro, NC

M. ISABEL MEDINA, New Orleans, LA

DONALD M. MIDDLEBROOKS, U.S. District Court, Southern District of Florida, West Palm Beach, FL

MICHAEL A. MIDDLETON, Columbia, MO

MARC L. MILLER, Atlanta, GA

J. DEAN MORGAN, Seattle, WA

H. GEOFFREY MOULTON, JR., Wilmington, DE

MAURICE N. NESSEN, New York, NY

RICHARD L. NEUMEIER, Boston, MA

KEVIN C. NEWSOM, Montgomery, AL

JOHN B. OAKLEY, Davis, CA

LOUIS F. OBERDORFER, U.S. District Court, District of Columbia, Washington, DC

STEPHEN M. ORLOFSKY, Cherry Hill, NJ

LEROY PERNELL, DeKalb, IL

ELLEN S. PODGOR, Gulfport, FL

JOSEPHINE R. POTUTO, Lincoln, NE

WILLIAM H. PRYOR, JR., U.S. Court of Appeals, Eleventh Circuit, Birmingham, AL

MYRNA SHARON RAEDER, Los Angeles, CA

IRMA S. RAKER, Court of Appeals of Maryland, Rockville, MD

GERALD S. REAMEY, San Antonio, TX

BERNARD D. REAMS, JR., San Antonio, TX

ROBERT J. RIDGE, Pittsburgh, PA

MARIA P. RIVERA, California Court of Appeal, First District, Division Four, San Francisco, CA

J BRUCE ROBERTSON, New Zealand Court of Appeal, Wellington, New Zealand

JAMES L. ROBERTSON, Jackson, MS

JAMES K. ROBINSON, Washington, DC

RONALD S. ROLFE, New York, NY

ARNOLD R. ROSENFELD, Boston, MA

MARK B. ROTENBERG, Minneapolis, MN

JOSEPH P. RUSSONIELLO, San Francisco, CA

LEILA NADYA SADAT, St. Louis, MO

FELICIA SARNER, Philadelphia, PA

JAMES E. SCARBORO, Denver, CO

DAVID A. SCHLUETER, San Antonio, TX

MARY M. SCHROEDER, U.S. Court of Appeals, Ninth Circuit, Phoenix, AZ

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

KENNETH W. SIMONS, Boston, MA

FREDERIC N. SMALKIN, Baltimore, MD

BEVERLY MCQUEARY SMITH, Huntington, NY

D. BROOKS SMITH, U.S. Court of Appeals, Third Circuit, Duncansville, PA

STEVEN R. SMITH, San Diego, CA

MARGARET POLES SPENCER, Virginia Circuit Court, Thirteenth Judicial Circuit, Richmond, VA

ARTHUR B. SPITZER, Washington, DC

EDWIN H. STERN, New Jersey Superior Court, Appellate Division, Morristown, NJ

JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH

VIOLA J. TALIAFERRO, Bloomington, IN

MICHELE TARUFFO, Pavia, Italy

ANDREW E. TASLITZ, Washington, DC

ELIZABETH G. TAYLOR, Washington, DC

CAROLYN ENGEL TEMIN, Pennsylvania Court of Common Pleas, First Judicial District, Philadelphia, PA

WILLIAM H. THEIS, Winnetka, IL

H. WOODRUFF TURNER, Pittsburgh, PA

STANLEY A. TWARDY, JR., Stamford, CT

MICHAEL VITIELLO, Sacramento, CA

RONALD FREDERICK WATERMAN, Helena, MT

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

MICHAEL A. WOLFF, Supreme Court of Missouri, Jefferson City, MO

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

RONALD F. WRIGHT, Winston-Salem, NC

LINDA R. YAÑEZ, Texas Court of Appeals, Thirteenth District, Edinburg, TX

FRED C. ZACHARIAS, San Diego, CA

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Earlier versions of the material contained in this Draft can be found in:

Council Draft No. 1 (2006)

Discussion Draft (2006)

Foreword

This year's Annual Meeting will consider for the first time approving a Tentative Draft of new recommendations, as part of the Model Penal Code, of state statutory provisions concerning criminal sentencing. It is almost 50 years since the Institute approved Professor Herbert Wechsler's sentencing Sections of the original MPC. As our current Reporter, Professor Kevin Reitz, says in his Introductory Memorandum, today's intellectual and political thinking about sentencing would be unrecognizable to those who studied the subject in the mid-20th century. Almost 6½ times as many Americans are in prison or jail. The dominant purposes of sentencing have changed. And there is far greater awareness that prisons do not house a cross-section of the U.S. population.

In today's context, certain states have attracted attention by establishing sentencing commissions and sentencing guideline systems that seem to work well and, in many instances, have led to smaller inmate populations. Kevin Reitz is an expert on the various state systems and is part of a network of individuals who study and work in this important area of law. Thus the Tentative Draft draws heavily on state experience and seeks to influence choices that must be made by states that wish to improve current guideline systems as well as states that do not currently have guidelines and wish to adopt them. This is therefore classic ALI work: educated by practices in the 50 states, the project aims to identify the best rules and practices and thus make it easier for states to improve their legal systems.

The draft is also influenced by the experience of the federal sentencing guideline system, although that system receives fewer accolades from experts than most state systems. Both state and federal law on this subject must now respond to recent Supreme Court jurisprudence, and in particular to holdings that certain factual determinations tradi-

tionally made by trial judges at time of sentencing should instead be made by juries. Assisted by his Advisers and by the Members Consultative Group, Professor Reitz has responded to the Supreme Court decisions and this draft shows the results. The draft recommends a presumptive sentencing guidelines system but also offers, in an appendix, statutory language that would create a system of advisory rather than presumptive guidelines, a direction that has recently been taken by three states.

Included in this draft are materials on the purposes of sentencing; on creation and operation of a sentencing commission; on the purposes of a criminal sentencing system; on how a guidelines system should function; and, as stated above, on the possible alternative of an advisory system. There is more work to be done in this project, but a large percentage of the major subjects are addressed here.

The ALI appreciates the work of the Reporter and those who have helped him. We look forward to stimulating and constructive discussion at the Annual Meeting.

LANCE LIEBMAN
Director
The American Law Institute

March 21, 2007

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REPORTER'S INTRODUCTORY MEMORANDUM

Kevin R. Reitz[†]

Reporter

Within American criminal law, it would be difficult to find a subject of greater social importance than the sentencing of offenders. It would likewise be difficult to identify an area of greater policy flux. The nation held an estimated total of 357,292 inmates in its prisons and jails in 1970. This increased to a total of 2,320,359 in 2005. Corrected for population change, there was a near quintupling of the incarceration rate from 1970 to 2005. By the late 20th century, the U.S. incarceration rate was higher than that known in any other nation in the world, and nearly two-thirds of those confined were members of racial and ethnic minority groups.[1]

Alongside these changes, beginning in the mid-1970s, comprehensive sentencing reforms in diverse permutations have been enacted in many states and in the federal system. The products of such legislation have included "statutory determinate" sentencing systems, patchworks of mandatory-penalty provisions, and a multiplicity of schemes (each

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[†] James Annenberg Levee Professor of Criminal Procedure, University of Minnesota Law School. The Reporter thanks Jared Butcher, David de Ruig, Carrie Ryan Gallia, and Victoria Spichinetsky, all of whom provided essential research assistance for the preparation of this draft.

[1] Margaret Werner Cahalan, Bureau of Justice Statistics, Historical Corrections Statistics in the United States, 1850-1984 (1986), at pp. 32 table 3-4, 76 table 4-1; Bureau of Justice Statistics, Prisoners in 2005 (2006), p. 1; The Sentencing Project, New Incarceration Figures: Growth in Population Continues (2005), p. 4 (table displaying "Ten Leading Nations in Incarceration Rates").

different from the others) instituting sentencing commissions and sentencing guidelines.[2] The trend of legislative experimentation continues to push forward in the 2000s, into additional jurisdictions, and spawning an increasing heterogeneity of approaches.

The sentencing articles of the original Model Penal Code, drafted in the 1950s and early 1960s, have not been influential in the bulk of sentencing code revisions undertaken since the mid-1970s. Although the Code's recommendations, for their time, were a vast improvement over preexisting American law, they were built on assumptions that have fallen into uncertainty or disfavor. These included beliefs that the overarching purpose of criminal punishment should be rehabilitation, and that judges and (especially) parole boards should be given far-ranging and unreview-

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Roughly two-thirds of U.S. prisoners are either black or Hispanic. Nationwide, Hispanics and American Indians are imprisoned at rates roughly 2.5 times the imprisonment rate for white Americans. For African Americans, the "disparity ratio" of their current imprisonment rate compared with white Americans is nearly 8:1 across the nation as a whole. See Michael Tonry, Malign Neglect: Race, Crime and Punishment in America (New York: Oxford University Press, 1995). Current disparities by race and ethnicity may be calculated using data published by the U.S. Justice Department. See *Prisoners in 2005*, at p. 8 tables 10 & 11.

American expansionism in criminal punishment has not been limited to prisons and jails. The growth in community corrections has been comparable to that in confinement. From 1976 to 2005, the numbers of probationers and parolees across the country increased from 1.5 to nearly 5 million. Bureau of Justice Statistics, Probation and Parole in the United States, 2005 (2006), p. 1; Cahalan, *Historical Corrections Statistics*, at p. 180 table 7-8A.

[2] For a discussion of the comparative operations and advantages of different American sentencing systems, see Model Penal Code: Sentencing, Report (2003), pp. 18-27, 41-125.

able discretion to individualize sanctions to the "treatment" needs of each offender. This approach, known as "indeterminate sentencing," was the invention of Progressive reformers at the close of the 19th century.[3] The 1962 Code was hardly revolutionary in working upon such foundations, which had achieved near-consensus status as the stated objectives of U.S. sentencing structures during the middle third of the 20th century.[4]

Forty-five years of upheaval have so changed the landscape of American sentencing law as to make it unrecognizable to the policymaker of 1962. Few in the 1960s could have foreseen the weakening of rehabilitation as the general justificatory aim of punishment, the invention in the 1970s of sentencing commissions and guidelines, the abolition of parole-release authority in 16 jurisdictions, the new ethos of experimentation with intermediate sanctions that would gather momentum in the 1980s, or the unprecedented growth in sentenced populations through the 1970s, 1980s, 1990s, and early 2000s. For a host of reasons, the architecture of the 1962 Code's sentencing provisions no longer fits current realities.

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[3] For an excellent history, see David J. Rothman, Jr., Conscience and Convenience: The Asylum and its Alternatives in Progressive America (Boston: Little, Brown and Company 1980).

[4] Historians of indeterminate sentencing, as well as contemporary observers, have charged that the expressed ideal of rehabilitative treatment was seldom pursued with sustained commitment or adequate resources in U.S. justice systems. See Rothman, *Conscience and Convenience*, chapters 2 through 5; Francis A. Allen, Legal Values and the Rehabilitative Ideal, in Francis A. Allen, The Borderland of Criminal Justice: Essays in Law and Criminology (1964).

The design of new sentencing laws for the 21st century is a complex undertaking. Tentative Draft No. 1 includes a sizeable first installment of the Model Penal Code revision. Standing alone, it provides significant assistance to American lawmakers.[5] The draft has been molded by several years of discussion among the Advisers, Members Consultative Group, Council, and interested parties outside the Institute. It assembles most of the large building blocks of a sentencing-reform project. These include new underpinnings of punishment theory and new institutional arrangements of sentencing authority. The most important proposals in Tentative Draft No. 1 are:

- A new statement of sentencing purposes, borrowing from the theories of Norval Morris, that overlays limits of proportionality upon the pursuit of utilitarian goals, and makes these purposes applicable to decisions throughout the sentencing system.
- The recommendation that every state should charter a permanent sentencing commission with authority to promulgate sentencing guidelines, using successful state systems as salutary models and avoiding the defects of the federal system.

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[5] Early materials from the Model Penal Code: Sentencing project have already been put to use in a number of states during the planning stages of sentencing-reform efforts. See William H. Pryor, Jr., Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943 (2005) (discussing recent history in Alabama); State of California, Little Hoover Commission, Solving California's Corrections Crisis: Time is Running Out (2007) (recommending that California create a permanent sentencing commission borrowing from the proposed ALI model); Colorado Lawyers Committee, Task Force on Sentencing, Report on the Sentencing System in Colorado: A Serious Fiscal Problem on the Horizon (2006) (same).

- Provisions to safeguard judicial discretion to individualize sentences.

A New Structural Design for the Code

A growing number of states since 1980 have enacted sentencing reforms that include a sentencing commission with authority to promulgate sentencing guidelines. Alone among contemporary U.S. sentencing systems, the commission-guidelines reforms have been perceived as successful in most states where they have been introduced.[6] In the last 25 years, American jurisdictions with sentencing systems similar to that in the revised Code have seen slower rates of prison growth than experienced in states using other sentencing structures. Two of these states, North Carolina and Ohio—neither historically soft on crime—have seen declines in their imprisonment rates since adopting comprehensive sentencing reforms.[7]

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[6] As Michael Tonry wrote, in his comprehensive study of sentencing reform since the 1970s:

> After nearly two decades of experimentation, the guideline-setting sentencing commission is the only reform strategy that commands widespread support and continues to be the subject of new legislation. . . . [S]entencing commissions and their guidelines have proven themselves as the most effective prescription thus far offered for the ills of lawlessness, arbitrariness, disparity, and discrimination that were widely believed to characterize indeterminate sentencing.

Michael Tonry, Sentencing Matters (1996), pp. 28, 71.

[7] Indeterminate sentencing systems, of the kind recommended in the original Model Penal Code, have been the primary engines of U.S. prison growth since the 1970s. See Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696, 707 (1995); Model Penal Code: Sentencing, Report (2003), at 75; Kevin R. Reitz, Don't Blame Determinacy: U.S. Incarceration Growth

Marvin Frankel first proposed the creation of a "commission on sentencing" in his classic writings of the early 1970s, empowered to author "guidelines" for the use of judicial sentencing discretion.[8] By 2007, 17 states, the District of Columbia, and the federal system were operating with sentencing guidelines promulgated by a sentencing commission, and several additional states were actively exploring such a framework.[9] After five years of study, the commis-

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Has Been Driven by Other Forces, 84 Tex. L. Rev. 1788, 1794-1801 (2006). In a 2005 study by the Vera Institute, principal investigator Don Stemen and his coauthors concluded:

> We consistently found that states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states. . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates. The stability of the combined policies was noticeable in all analyses conducted, after controlling for all other policies and social variables.

Don Stemen et al., Vera Inst. Of Justice, Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975–2002 (2005), at 143. This is not to say that the sentencing structure recommended in the revised Code invariably slows or halts prison growth. A handful of jurisdictions, most notably the federal system, have used sentencing guidelines to implement a program of planned prison growth—and have succeeded convincingly. See Michael Tonry, The Success of Judge Frankel's Sentencing Commission, 64 U. Colo. L. Rev. 713 (1993) (concluding that the prison-growth management tools used by sentencing commissions are policy neutral and can be used to implement effectively whatever policies are fed into them).

[8] See Marvin E. Frankel, Criminal Sentences: Law Without Order (1973), pp. 118-123; Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1 (1972).

[9] The jurisdictions with sentencing-guidelines systems, listed by earliest effective date, are Utah (1979), Minnesota (1980), Pennsylvania (1982), Maryland (1983), Michigan (1984), Washington (1984),

sion-guidelines model became the cornerstone of the American Bar Association's Criminal Justice Standards for Sentencing, published in 1994.[10] The ABA reaffirmed its commitment to the sentencing-commission model in its 2004 Kennedy Commission reports.[11] In 2006, the bipartisan Constitution Project also recommended the commission-guidelines structure to federal and state policymakers as part of its ongoing sentencing initiative.[12]

The advantages of a well-designed commission-guidelines sentencing system are discussed throughout Tentative

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Delaware (1987), United States (1987), Oregon (1989), Tennessee (1989), Virginia (1991), Kansas (1993), Arkansas (1994), North Carolina (1994), Ohio (1996), Missouri (1997), Wisconsin (2003), District of Columbia (2004), and Alabama (2006). Reform efforts to create a permanent sentencing commission as recommended in the revised Model Penal Code are moving ahead in California, Colorado, Connecticut, and New Jersey. See § 6A.01, Reporter's Note to Comment *b*.

[10] ABA, Standards for Criminal Justice, Sentencing, Third Edition (1994). In 1996, a report prepared for the U.S. Department of Justice's Bureau of Justice Assistance, incorporating a 50-state survey of the law and operation of American sentencing structures, similarly concluded that "the most promising structured sentencing model" to address problems of disparity, incarceration rates, and prison crowding, was "sentencing guidelines developed by sentencing commissions." Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996), p. 127.

[11] See American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), p. 37 ("The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored").

[12] The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), pp. 22-25.

Draft No. 1,[13] but a shorthand catalogue includes the following:

- The consistent application of law, policy, and principle to individual sentencing decisions.
- The articulation of starting points for sentencing decisions, as opposed to the total absence of such guidance in the cavernous penalty ranges of indeterminate sentencing codes.
- New visibility of the decision rules for sentencing, giving rise to new opportunities to study and debate those rules.
- A vastly improved capacity for systemwide policymaking, including an ongoing process of ensuring that penalties for discrete crime classifications make sense when matched against one another.
- The enlargement of judicial discretion to make effective choices about punishments in the cases before them, particularly in prison cases.
- Improved information about how the sentencing system operates, and the creation of an ethic in legislative and other domains that high-quality information should drive policy.
- The ability to make accurate predictions of future sentencing patterns, in the aggregate and line-by-line by offense type, enabling the production of credible fiscal-impact forecasts when changes in guidelines or laws affecting punishment are proposed. (In most guideline states, this capacity has been used to retard prison growth as compared to that in other states without sentencing commissions or guidelines.)

[13] For an extended background discussion, see Model Penal Code: Sentencing, Report (2003), at pp. 63-125.

- New tools to better understand and attack imbalances in criminal punishments as they affect minority communities.
- The development of a common law of sentencing, through which sentencing judges explain their decisions in selected cases, appellate courts may review those decisions, and judges are the primary actors in the evolution of sentencing policy.
- The formation of sentencing commissions composed of representatives from all sectors of the criminal-justice system and from the general public, to work toward informed positions of sentencing policy that carry credibility as reflecting the views of all relevant constituencies.
- The removal of at least some policymaking about criminal punishment from the glare of the political process.
- A sensible alternative to the proliferation of mandatory-penalty laws; one that can produce predictable sentencing results overall, and can reflect public concern about violent crime, while preserving judicial discretion in individual cases.

The New Constitutional Law of Sentencing

The Model Penal Code revision suffered a delay following the Supreme Court's June 2004 decision in Blakely v. Washington.[14] By a 5-4 vote, *Blakely* extended the Sixth Amendment jury trial right to certain factual determina-

[14] 542 U.S. 296 (2004). For a full discussion of *Blakely*, related cases, and their implications for the Code revision, see Model Penal Code: Sentencing, Preliminary Draft No. 4 (August 16, 2005), pp. 1-30.

tions at sentencing that traditionally had been made by trial-court judges.[15] The Court extended its reasoning in *Blakely* to the federal sentencing guidelines in United States v. Booker,[16] and to the California statutory sentencing scheme in Cunningham v. California.[17]

We now have three years of perspective on the *Blakely* "revolution." States with presumptive sentencing-guidelines systems, similar in structure to the revised Code's recommendations, have been affected by *Blakely*—but not very much. Most affected states quickly realized that their systems generated only a small number of cases in which juries would potentially be required at sentencing—and most of those cases would be resolved by guilty pleas and jury-trial waivers. By 2005, the legislatures in the majority of affected states had authorized new procedures for jury factfinding at sentencing, limited to occasions in which it is constitutionally required.[18] After sustained study by the Reporter, Advisers, Members Consultative Group, and Council, the revised Code takes the same approach.

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[15] The decision came as a surprise to most observers. *Blakely* overruled contrary precedent from every federal Court of Appeals. Every state appellate bench to have considered the Sixth Amendment claim raised in *Blakely* had also rejected it, with the exception of the Kansas courts. See Preliminary Draft No. 4 at p. 6 and nn.15 and 16. *Blakely*'s meaning, scope, and impact were initially unclear. By some accounts, the constitutional landscape of sentencing had changed momentously. Concluding her dissent in *Blakely*, for example, Justice O'Connor wrote, "What I have most feared has now come to pass: Over twenty years of sentencing reform are all but lost." 542 U.S. at 326 (O'Connor, J., dissenting).

[16] 543 U.S. 220 (2005).

[17] 127 S. Ct. 856 (2007).

[18] See § 7.07B and Comment and Reporter's Note.

The courts in two jurisdictions, and the legislature in one, have responded to *Blakely* by substituting advisory sentencing guidelines for guidelines that formerly held presumptive legal force.[19] An advisory structure is less desirable than a system that imposes measured legal restrictions on the discretion of sentencing courts. Under the Supreme Court's tangled case law, however, judicial factfinding at sentencing under advisory guidelines does not implicate the Sixth Amendment.[20]

Many of the advantages of presumptive sentencing guidelines can be realized in a well-constructed advisory system.[21] The revised Code offers a second tier of recommendations, collected in Appendix A, designed to convert the Code's presumptive guidelines system into an effective advisory guidelines system with appellate sentence review.[22]

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[19] The judicial rulings, which converted presumptive guidelines systems into advisory systems through severability analysis, are *Booker* and State v. Foster, 845 N.E.2d 470, 497 (Ohio 2006). Tennessee is the only state in which the legislature converted a former presumptive guidelines system into an advisory system.

[20] See § 7.07B, Reporter's Note to Comment *a*. For a discussion of the many exceptions to the new Sixth Amendment rule announced in *Blakely*, most of them unfortunate as a matter of policy, see Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1114-1116 (2005).

[21] See § 1.02(2), Comment *p* and Reporter's Note to Comment *p*.

[22] These recommendations are discussed in a series of Comments throughout the revised Code. See §§ 1.02(2), Comments *p* and *q*, 6B.01, Comment *b*, 6B.02, Comment *k*, 6B.03, Comment *g*, 6B.04, Comment *f*, 6B.07, Comment *g*, 6B.08, Comment *h*, 6B.10, Comment *e*, 7.XX, Comment *h*, and 7.ZZ, Comment *l*. For discussions of the preconditions of effective advisory guidelines systems, see Kim S. Hunt and Michael Connelly, Advisory Guidelines in the post-Blakely Era, 17 Fed. Sent'g Rep. 233 (2005); Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2005).

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

§ 1.02(2). Purposes; Principles of Construction.

(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 (a)(i); and

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (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 (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.

Comment:

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

Subsection (2)(a) sets forth goals for decisions affecting the sentencing of individual offenders. It continues the original Code's investment in utilitarian crime-reductive goals, including offender rehabilitation and the incapacitation of dangerous offenders, but incorporates meaningful proportionality limitations not envisioned in the original Code. The revised provision adds new references to utilitarian goals of victim and community restoration, also to be limited by considerations of proportionality. See Comment *b* below. Under the new scheme, no crime-reductive or restorative purpose of sentencing may justify a punishment outside the "range of severity" proportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender.

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

New § 1.02(2) is cross-referenced frequently in the revised Code, and is made a required basis for decision-making and explanation by identified officials throughout the sentencing system. See §§ 6A.01(2)(e), 6A.04(3)(a), 6A.05(2)(e) and (4)(b), 6A.09(1)(a), 6B.03, 6B.06(1), 7.XX-(1), (2), (3), and (5), and 7.ZZ(1), (2), and (6)(a).

b. Utilitarian purposes within limits. Subsection (2)(a) provides a framework for consideration of multiple sen-

tencing purposes in individual cases. It borrows from the theoretical writings of Norval Morris.

Subsection (2)(a) is addressed to all official actors within the sentencing system empowered to make "decisions *affecting* the sentencing of individual offenders." These include decisionmakers at the case-specific level as well as policymakers concerned with the governance of whole categories of cases, to the extent that their policy decisions affect the sentencing of individuals. Subsection 1.02(2)(a) thus sets out fundamental policy bases for the actions of sentencing courts, appellate courts, the sentencing commission, correctional officials, probation departments and other community corrections agencies, the agencies charged with prison-release decisions and postrelease supervision, and those officials who fix sanctions upon sentence violations.

Illustrations:

1. A sentencing court, when pronouncing sentence in a particular case, must select a sentence that comports with the purposes in § 1.02(2)(a). See § 7.XX(1) and Comment *b*.

2. An appellate court, when reviewing the sentence in a particular case, must do so in light of the purposes in § 1.02(2)(a). See § 7.ZZ(1) and Comment *b*.

3. A sentencing commission, when promulgating sentencing guidelines, must effectuate the purposes of § 1.02(2)(a) to the extent that the guidelines will be applied in individual cases. See § 6B.03(1) and Comments *b* and *c*.

The starting precept of subsections (2)(a)(i) and (2)(a)(ii) is that utilitarian goals such as rehabilitation, incapacitation, general deterrence, and victim and community

restoration should not be allowed to produce sentences more or less severe than those deserved by offenders on moral grounds. Deontological concerns of justice or "desert" place a ceiling on government's legitimate power to attempt to change an offender or otherwise influence future events. So too, an appeal to utilitarian goals should not support a penalty that is too lenient as a matter of justice to reflect the gravity of an offense, the harm to a victim, and the blameworthiness of the offender.

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

Subsection 1.02(2)(a)(i) codifies the conception of latitude in morally permissible sentences when it speaks of a "*range* of severity" of proportionate punishments. Subsection (2)(a)(ii) makes further reference to the idea of a permissive range when it refers to "the *boundaries* of proportionality in subsection (a)(i)."

Responsible decisionmakers in each sentencing system must strive toward informed moral judgments concerning those sentences that fall within, or outside, acceptable boundaries of proportionality. There are no tools in law or philosophy that can render this undertaking an exact science. Indeed, different communities, and different jurisdictions, may be expected to arrive at divergent judgments about the ranges of punitive severity that will be deemed proportionate in specific cases, or across classes of cases. Short of constitutional limitations on cruel or unusual sentences, which are generally quite distant, prudential—or subconstitutional—proportionality limitations in a democratic society are best derived through cooperative and collective assessments of community sentiment.

Recognizing the inevitability—and desirability—of jurisdictional variations in a federalist system, the revised Penal Code does not recommend a single, lockstep approach to be followed in all states. Nor does the Code propound detailed benchmarks of what penalties may be considered proportionate for what crimes. Instead, the Code gives conceptual and institutional structure to the moral reasoning process for the derivation of proportionality limits. Subsection (2)(a)(i) instructs decisionmakers to give weight to familiar deontological indices: the gravity of offenses, the injuries done to crime victims, and the blameworthiness of offenders. In speaking of "proportionality," the provision also directs attention to the comparative severity of punishments in other cases.

The division of institutional authority within the sentencing system lends clarity to the task of defining proportionality limitations. The Code gives the sentencing commission initial discretion to set "presumptive" standards for proportionate punishments through the creation of sentencing guidelines, see Comment *c* below. (The commission is also

empowered to write guidelines that further utilitarian goals, see § 6B.03(1) and Comment *c*.) The commission's value judgments are entitled to respect by later-in-time decision-makers so long as the commission is well-constituted, with a balanced membership of diverse stakeholders from inside and outside the criminal-justice system. See Comment *c* below. Even so, the ranges of penalties expressed in sentencing guidelines must not be viewed as fixed statements of the boundaries of proportionality for all cases. No matter how sagacious a commission may be, it does its work in the abstract, without exposure to the textured facts and circumstances of individual cases. At the end of the day, the trial and appellate courts must hold dispositive authority in particular cases to accept the judgments of proportionality reflected in sentencing guidelines, or to rule that the considerations in subsection (2)(a)(i) move an individual case above or below the range of penalties specified in guidelines, see Comment *d* below. In short, the sentencing guidelines should be viewed as "first drafts" of proportionate sentences for ordinary cases, not as final pronouncements for all cases.

The proportionality limitations stated in subsection (2)(a)(i) allow generous room—an acknowledged "range" of sentence severity—for the consideration of utilitarian goals. Subsection (2)(a)(ii) recognizes the fundamental importance of goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding society. Many of these goals serve interests of public safety through crime avoidance, while others are directed toward victim reparation, offender reintegration, and the restoration of affected communities. These are compelling objectives in a humane society, and the compass given to interests of crime victims and commu-

nities goes well beyond the utilitarian palate of the original Model Penal Code.

The revised Code is intended to encourage the pursuit of utilitarian ends, in an expanding universe of cases, and with ever-greater attention to proper implementation and evaluation, see Comment *n* below. The Code's reluctance to cut instrumentalism free of moral constraint is central to this effort. A free society should not tolerate the open proclamation that ends such as "offender rehabilitation," or the "incapacitation" of offenders, may be pursued by unjust means. Proportionality limitations do not demean, but legitimate, investment in a strong utilitarian agenda.

Illustrations:

4. In a barroom-assault case with no serious victim injury, the judge is persuaded that the goals of offender rehabilitation and victim restoration can realistically and most effectively be pursued through a combination of intermediate punishments tailored to supervise the defendant in the community (perhaps a period of home confinement with electronic monitoring will enter the judge's thinking), address the defendant's alcohol problem (if he has one and appears amenable to an outpatient treatment program), and keep the defendant employed so there is a good chance that financial reparations to the victim will be forthcoming. If the judge is also persuaded that such a package of sanctions would fall within the range of sentences that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender, subsection (2)(a) would allow the judge to impose such an order. This is true even if the judge would ordinarily have imposed a sentence of incarceration for an offense of this kind, or if the sentencing

guidelines in the case set forth a presumptive sentence of incarceration. The trial judge's judgment about the proportionality of the resulting sentence is subject to appellate review under the statutory standard for proportionality review in § 7.ZZ(6)(b).

5. In a barroom-brawl case otherwise similar to Illustration 4, the defendant is remorseless and combative; he has a prior history of convictions for violent offenses; he refuses to acknowledge his serious alcohol addiction and evinces no willingness to participate in a treatment regime. If the judge has realistic grounds to think that a substantial term of confinement will protect the public from the defendant's future criminality, the revised Code would allow the sentence unless it falls outside the range of penalties that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender. This is true even if the judge would ordinarily have imposed a lighter sentence for an offense of this kind, or if the sentencing guidelines in the case set out a lighter presumptive sentence.

6. A sentencing commission has promulgated guidelines for certain classes of theft, fraud, and drug offenses that make a term of incarceration the presumptive sentence in each case. Based on empirical research into the recidivism rates of such offenders, however, the commission has generated instruments that may be used by sentencing judges in particular cases to identify offenders who present unusually low risks of future recidivism. The sentencing commission may recommend to sentencing judges that identified low-risk offenders should receive intermediate sanctions rather than terms of confinement, provided those intermediate sanctions fall within the range of penal-

ties that are proportionate to the gravity of the offense, the harm done to the victim, and the blameworthiness of the offender in each case. The trial judge's judgment about the proportionality of the resulting sentence is subject to appellate review under the statutory standard for proportionality review in § 7.ZZ(6)(b).

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

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

d. Subconstitutional proportionality analysis in the courts. The sentencing commission is not the sole, or even the most powerful, actor in the revised Code's sentencing

structure with authority to make proportionality determinations. The commission's sentencing guidelines hold only "presumptive" legal authority; they are not mandatory. Judicial precedent carries legal force superior to that of sentencing guidelines, see § 6B.02(1) and (7). The final arbiters of proportionality in individual cases, under the revised Code, are the courts.

Both the trial and appellate courts are ceded responsibility to ensure that sentences are not unjustly lenient or severe on the criteria of § 1.02(2)(a). See §§ 7.XX(2)(a) and (3)(b); 7.ZZ(6)(b). These statutory powers are considerably more robust than the narrow judicial authority to invalidate "grossly disproportionate" penalties under the Supreme Court's Eighth Amendment jurisprudence. The drafters intend to inculcate a meaningful practice of "subconstitutional proportionality" analysis in the trial and appellate benches. In extreme cases, the courts' powers of proportionality review in the revised Code may even be employed to override mandatory-penalty provisions, see §§ 7.XX(3)(b), 7.ZZ(6)(b).

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

One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through the administration of a criminal sanction. Thus, for example, the mere apprehension that a defendant might be dangerous in the future (formed, for example, by a judge or a parole board) would not be enough to support an extended prison term on incapacitative grounds. There must be some reasonable ground for the prediction. Alternatively, a trial judge should not be permitted to impose an especially severe sentence on the theory that it will act as a deterrent to others, unless it is reasonable to conclude that general deterrence will result from the incremental increase in severity of punishment. Or, to give a final example, a sentencer should not be allowed to vary a penalty based on an unsupported hope that a defendant can be rehabilitated. There should be a reasonable basis for thinking that an appropriate intervention exists and that a particular offender (or class of offenders) has a realistic chance of success under its auspices.

The question of whether a particular utilitarian end is reasonably feasible is at root an empirical one. A priority of the revised Code is to promote assessment research within the sentencing system, see § 1.02(2)(b)(vii) and Comment *n*, below. Still, for years to come, there will remain a shortage of basic research on the effectiveness of criminal sanctions. Evaluation studies do not currently exist for many programs, or are of poor quality. Funding for research addresses only a small fraction of the need. Some forms of programming—for example, those with multiple overlapping interventions—defy straightforward evaluation. New and experimental programs, whatever their nature, require time in operation before initial assessments can be performed. The threshold of reasonable feasibility does not require sci-

entific proof that a given sanction imposed on a particular offender will yield a known instrumental result. It demands only that there be grounds that support a reasonable belief that the utilitarian benefit will be realized.

Subsection (2)(a)(ii) makes no attempt to prioritize among its enumerated objectives. Guidance in parsing among utilitarian purposes may be provided in sentencing guidelines, see § 6B.03(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"). The commission may play a useful role in making research on offender risk assessment or the effectiveness of criminal sanctions accessible to sentencing courts, or in crafting guidelines that are built on improving empirical knowledge. Because the commission's guidelines carry only presumptive force, however, the ultimate responsibility to develop a jurisprudence of utilitarian sentencing, and to apply it in specific cases, lies with the courts.

f. Prohibition on unnecessary severity. Subsection (2)(a)(iii) incorporates the principle of "parsimony" in punishment. Few can disagree with the principle's content, yet it provides a useful algorithm for the exercise of sentencing discretion.

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

will suffice to serve defined goals, or whether a harsher sentence of *2x* is needed, the rule of parsimony resolves the doubt in favor of the less severe option.

The parsimony principle also operates in cases in which a decisionmaker has no basis to suppose that any utilitarian goal can be furthered with reasonable prospect of success. Given the shortfalls in our knowledge about effective rehabilitative programs, or the individualized risks of future offending, or the general deterrent effect of punishments, sentencing authorities will sometimes find themselves in a state of low confidence about the reasonable feasibility of sanctions aimed toward utilitarian ends. In such cases, the parsimony principle counsels selection of a penalty at the low end of the range of proportionate sentences in subsection (2)(a)(i).

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

To give several examples: A sentencing court in the daily discharge of its duties is called upon to honor the goal of uniformity—or consistency of analysis—when sentencing individual offenders, see subsection (2)(b)(ii), to be alert to the goal of the elimination of inequities in punishment across population groups, see subsection (2)(b)(iii), and to be sympathetic to the encouragement of the use of intermediate sanctions in appropriate cases, see subsection (2)(b)(iv). The appellate courts must be cognizant of all the

purposes just mentioned, and must exert their authority in a way that ensures the preservation of substantial judicial discretion to individualize sentences within a framework of law, see subsection (2)(b)(i). The sentencing commission must likewise be sensitive to the legislative mandate to preserve judicial sentencing discretion—and, indeed, bears responsibility to further the aspirations laid out in nearly every subdivision of § 1.02(2)(b). For example, the sentencing commission is expressly charged with monitoring and addressing inequities in sentencing across racial and ethnic groups, see §§ 6A.05(4); 6A.07(3); 6B.07(4). It is also given special responsibility to advance the use of intermediate sanctions, see § 6B.06, and to ensure that sentencing policies make the best use of available or funded correctional resources, see §§ 6A.07; 6B.02(9), and to conduct ongoing research on sentencing policy and practices, see § 6A.05-(2)(c).

h. Preservation of judicial discretion. Subsection (2)(b)-(i) announces a central institutional philosophy of the revised Code: that substantial judicial discretion to individualize penalties within a framework of law must be preserved in a sound sentencing system. All contemporary sentencing-guidelines systems at the state level have been designed and implemented in recognition of this principle. The failure to provide adequate room for judicial sentencing discretion, however, has been a frequently voiced complaint in the federal system.

Close controls on trial courts serve no good purpose. Experience in state guideline systems has shown that judges tend to make use of presumptive guidelines penalties in the large majority of cases, even in systems that allow considerable latitude for judicial discretion to deviate from the guidelines. This history teaches that the goals of policymaking, planning, resource management, and proportionality in

punishment can be furthered without tight constraints on the authority of sentencing judges.

The drafters of the revised Code view judicial discretion as an essential feature of the sentencing structure, not an unwanted element. It is not desirable to dispense criminal penalties with cookie-cutter regularity according to formal criteria. Sentences prescribed in advance by a legislature or agency may be fitting in many cases, but no prefabricated punishment will be appropriate for all cases. For this among other reasons, the revised Code continues the original Code's condemnation of all statutory mandatory punishments, see § 6B.05 (to be drafted). What should not be done through mandatory penalties should not be done through sentencing guidelines or other means.

Elsewhere, the Code gives operational force to the injunction in subsection (2)(b)(i). The Code's approach to the preservation of judicial authority can best be grasped through a combined reading of §§ 6B.04 (Presumptive Guidelines and Departures); 7.XX (Judicial Authority to Individualize Sentences); and 7.ZZ (Appellate Review of Sentences).

i. Consistency of analysis. Subsection (2)(b)(ii) states the goal of uniformity in criminal punishment. "Uniformity" is an end that is often voiced, but seldom defined. Subsection (2)(b)(ii) orients the sentencing system toward consistency of analysis, applied even-handedly to all defendants who appear for sentencing. All convicted offenders are entitled to the same "reasoned pursuit" of the purposes set out in subsection (2)(a).

Without explicit reference points, uniformity is an empty concept. It is possible, but not desirable, to set formalistic criteria for uniform punishments. All felons of the third degree, for instance, could be assigned "uniform" sen-

tences of four years in prison. No one defends such a proposal, but a comparable rigidity of response is built into other, more sophisticated, programs. The federal sentencing guidelines, dazzling in their complexity, achieve high levels of sentence uniformity when assessed against formal guidelines criteria. The desirability of outcomes under federal law thus depends on what one thinks of those formal criteria—and there are numerous critics.

Many theories, extant since the 1970s, have measured sentence uniformity solely against the formal offenses of conviction, or current offenses together with prior convictions, or current offenses in light of defined aggravating and mitigating circumstances. Some of these theories posit a degree of exactness in retributive penalties that differs markedly from the assumptions of subsection (2)(a), see Comment *b*, above. The revised Code does not codify a "just deserts" philosophy of criminal penalties.

Relatively fixed understandings of uniformity in punishment may be intellectually coherent but, in the view of the drafters, do not incorporate the full range of desirable public policies for the use of criminal sanctions. The revised Code eschews any vision of sentence uniformity that would rule out full consideration of the utilitarian and proportionality objectives stated in § 1.02(2)(a).

j. Elimination of inequities in sentencing. Subsection (2)(b)(iii) states that it should be the goal of all official actors in the system to eliminate inequities in sentencing across population groups. The provision is worded broadly to extend to "population groups" of many different kinds. The language is intended to include racial and ethnic minorities, as well as groups defined by gender, religious belief, sexual orientation, national origin, or other personal characteristics. The open-ended wording allows for applica-

tion to vulnerable groups not recognized today as the subjects of discrimination. As conditions in the world change, so too may the dangers of inequities in the criminal-justice system.

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

The whole of § 1.02(2) is cross-referenced throughout the revised Code and is made the required basis for decisionmaking by trial courts, appellate courts, and the sentencing commission. See Comment *a*, supra. See also § 6A.05(2)(f) (requiring that, on an ongoing basis, the sentencing commission investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities); § 6A.07(3) (requiring sentencing commission to prepare demographic impact projections, including the race, ethnicity, and gender of persons projected to be sentenced, whenever new sentencing laws or guidelines are formally proposed); § 6B.06(2)(a) (forbidding sentencing commission, when formulating guidelines, from giving weight to an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, and political affiliation or belief); § 6B.07(4) (imposing special duty on sentencing commission to monitor the effects of the use of criminal history in sentencing guidelines upon punishment disparities among racial and ethnic minorities, and other disadvantaged groups).

k. Encouragement of intermediate sanctions. The term "intermediate" sanctions, as used in subsection (2)(b)(iv), denotes those sanctions that are more intensive than traditional probation or parole yet less intrusive than incarceration.

There has long been agreement across the political spectrum that it is desirable to encourage the use of intermediate sanctions in appropriate circumstances. Major difficulties have been encountered in successful implementation, however. Subsection (2)(b)(iv) states an objective that is linked to provisions elsewhere in the Code, see §§ 6A.06 (Community Corrections Strategy); 6B.02(6) (sentencing guidelines to address the full menu of criminal sanctions); 6B.05 (Selection Among and Use of Sanctions) (to be drafted); Parts III and IV (provisions to be drafted on the organization and administration of corrections, including community corrections).

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

A small number of commissions have deployed the resource-management capability toward planned increases in sentence severity—usually at the direction of the legislature in their jurisdiction. The United States Sentencing Commission provides the best-known example of this deliberate policy choice. Among state commissions, the Pennsylvania Commission on Sentencing, in the initial years after

its inception in 1982, likewise pursued the legislature's declared policy of prison growth.

Most state sentencing commissions, however, have not followed high-prison-growth policies over their institutional lives. Sentencing commissions in Minnesota (since 1980), Washington (since 1984), Delaware (since 1987), Oregon (since 1989), North Carolina (since 1995), Virginia (since 1995), and Ohio (since 1997), have all produced multi-year rates of prison growth slower than average rates of change for state prison populations nationwide. An important tool used by the commissions in these states has been the correctional-population forecasting model recommended in § 6A.07. The revised Code, emulating legislation in some guideline states, and practice in others, instructs the commission to promulgate sentencing guidelines that may be accommodated by existing or funded correctional resources of state and local governments, see § 6B.02(9), Comment *i*.

Subsection (2)(b)(v) addresses not only the question of the aggregate use of correctional resources, but also the rational prioritization of their use. Most state sentencing commissions, for example, have implemented policies of longer prison terms for violent offenders that are offset by reduced terms for nonviolent offenders (as compared against sentencing patterns in the state's pre-guidelines era). In a number of jurisdictions, this reprioritization of the use of prison resources has been effected while slowing or even reversing preexisting trends of prison population growth.

m. Administration of sanctions. The purposes provision of the original Code did not address prison and jail conditions, or the subject of the humane administration of criminal sanctions in general, although provisions in Parts III and IV of the 1962 Code spoke to those topics. The first edition of the Code predated the wave of prison-conditions litiga-

tion in the 1970s. It was written at a time when incarcerated populations were roughly one-sixth of their current totals, and before the increased use of private prisons and the advent of "supermax" prisons. It is difficult to conceive of a purposes provision drafted in the 21st century that overlooks these subject matters, with U.S. incarcerated populations now standing at more than two million individuals. Subsection (2)(b)(vi) states the most important goals for the conditions of confinement and the administration of other sanctions.

n. Promotion of research. One priority of the revised Code is to promote adequate research and data-collection capabilities within the sentencing system of each jurisdiction, and through partnerships among responsible state agencies, federal agencies, and other organizations. Sentencing policies and practices are to be assessed for their effectiveness as measured against their purposes. The Code embraces the ideal of "evidence-based" criminal-justice interventions, where utilitarian sanctions are evaluated using high-quality research designs to test for successful implementation and results achieved. One focus of research must be upon "the effects of criminal sanctions upon families and communities."

o. Transparency, accountability, and legitimacy of the sentencing system. The revised Code works a substantial improvement upon traditional American sentencing systems by making the decisional processes of criminal punishment open for inspection. This goal is achieved by creating a structured environment for the exercise of sentencing discretion, which allows for reasoned explanation and review of outcomes in particular cases. The goal is also furthered through increased reflexivity: new institutional mechanisms for regular monitoring of the system as a whole. The public is entitled to information necessary to ap-

praise the workings of the system as a whole, as well as knowledge of the rationales for decisions in particular cases.

The goal of enhanced legitimacy of the sentencing and corrections system, "as perceived by all affected communities," goes to the moral authority of the criminal law. Even if a system of laws is built on morally sound precepts, and is well designed to further utilitarian goals, it fails if it cannot command the respect of those it governs. Subsection (2)(b)(viii) posits that the goal of moral legitimacy must respond not simply to majoritarian sentiment, but should be sought within all communities affected by the sentencing and corrections system.

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

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

important systemwide goals of principled decisionmaking, policy transmission, and resource management.

The Code will contain a running series of Comments addressed specifically to states that elect to adopt an advisory guidelines system, or states that merely desire to study a detailed roadmap of such a program in order to consider the alternatives of a presumptive versus an advisory system. Section 1.02(2), Comments *p* and *q*, are the first in this series. Others in the series are §§ 6B.01, Comment *b*, 6B.02, Comment *k*, 6B.03, Comment *g*, 6B.04, Comment *f*, 6B.07, Comment *g*, 6B.08, Comment *h*, 6B.10, Comment *e*, 7.XX, Comment *i*, and 7.ZZ, Comment *k*. Black-letter amendments to the proposed Code, necessary to institute an advisory guidelines approach, are collected in Appendix A at the end of this Tentative Draft.

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

> **(2) The general purposes of the provisions on sentencing are: . . .**
>
> **(b) in matters affecting the administration of the sentencing system:**
>
> **(i) to preserve judicial discretion to individualize sentences within a framework of ~~law~~ recommended penalties;**
>
> **(ii) to ~~produce~~ encourage sentences that are uniform in their reasoned pursuit of the purposes in subsection (a); . . . .**

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

REPORTER'S NOTE

Comment a. Scope. This subsection replaces subsection (2) of § 1.02 of the 1962 Model Code. Original subsections (1) and (3) are retained without change.

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

The drafters of the original Code hoped that rehabilitative successes would predominate in American sentencing and corrections, and that the nation's use of incarceration would decline through the late 20th century. Instead, punitive and incapacitative goals gained precedence during the 1970s, 1980s, and 1990s, and American incarceration rates expanded by a factor of nearly five. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2005 (2006), at 1; Margaret Werner Cahalan, Historical Corrections Statistics in the United States, 1850-1984 (1986), at 79 tbl. 4-4; Franklin E. Zimring and Gordon

Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime (1995), at 3. Indeterminate sentencing systems such as the one recommended in the original Code became more oriented toward long-term confinement, and less invested in offender change, than most criminal-justice professionals had anticipated in 1962. For the past quarter century, the legal systems most often and most dramatically associated with explosive growth in imprisonment rates have been those in states working with indeterminate sentencing regimes. See Kevin R. Reitz, Questioning the Conventional Wisdom of Parole Release Authority, in Michael Tonry ed., The Future of Imprisonment (2004), at 220-221, 224 tbl. 8.2.

Revised § 1.02(2), including its linkages to later provisions in the Code, has no close precedent in existing legislation. See Preliminary Draft No. 3 (May 28, 2004), Statutory Appendix to § 1.02(2), at 17-40. The drafters intend the provision to be a strong statement that contemporary criminal codes are deficient in their failure adequately to specify and integrate core legislative purposes within the law of criminal punishment.

b. Utilitarian purposes within limits. The utilitarian purposes in subsection (2)(a)(ii) include the known means of crime reduction that may be achieved through criminal sentencing, but also include "restorative" purposes that aim to repair harms done to victims, families, and communities. See generally John Braithwaite, Restorative Justice and Responsive Regulation (2002). Pursuit of these utilitarian goals is encouraged in the Code within, but not exceeding, the limits of proportionality in sentencing stated in subsection (2)(a)(i). For a statement of sentencing principles closely resembling subsection (2)(a), see The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), at 16.

The proviso in subsection (2)(a)(ii) (activating utilitarian goals "when reasonably feasible") borrows from Tenn. Code § 40-35-102(3)-(C) (2006).

(1) *Crime-reductive utilitarian purposes.* Most existing sentencing codes incorporate the utilitarian goals of offender rehabilitation, the incapacitation of dangerous offenders, and general deterrence. Sometimes these goals are collected under general headings such as "crime prevention," "public safety," or "protection of the public." See

N.Y. Penal Law § 1.05(6) (2006) (one purpose of criminal code is "[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection"). Similar provisions include Ala. Code § 13A-1-3(5) (2006); N.J. § 2C:1-2(a)(2) (2006); N.D. Century Code § 12.1-01-02 (2006); Oh. Rev. Code § 2929.11(A) (2006); Ore. Rev. Stat. § 161.025(1)(a) (2006).

Offender reintegration—or reentry to the community—is occasionally made an explicit statutory goal of American sentencing systems. When not enumerated, it is proper to view reintegration as a special case of offender rehabilitation. For express references, see California Penal Code § 1170(a)(2) (2006) ("the Legislature further finds and declares that programs should be available for inmates including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community"); Florida Statutes § 944.012(6)(d) (2006) (stating legislative intent "[t]o make available to those offenders who are capable of rehabilitation the job training and job placement assistance they need to build meaningful and productive lives when they return to the community"); Minn. Stat. § 364.01 (2006) ("The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship"); Mont. Code § 46-18-101(2)(d) (2006) (among other goals, the correctional and sentencing policy of the state is to "encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community").

The revised Code does not include "specific deterrence" as a separate form of crime avoidance. Specific deterrence is understood within the Code as one variant of offender rehabilitation.

(2) *Restorative utilitarian purposes.* Restorative-justice principles are mentioned in a growing number of contemporary sentencing codes.

See Alaska Stat. § 12.55.005(7) (2006) ("In imposing sentence, the court shall consider . . . the restoration of the victim and the community"); Arkansas Code § 16-90-801(a)(3), (4) (2006) ("primary purposes of sentencing" include "restitution or restoration to victims of crime to the extent possible and appropriate" and "[t]o assist the offender toward rehabilitation and restoration to the community as a lawful citizen"); Del. Code, Title 11, § 6580 (2006) (goals for sentencing commission to consider when developing sentencing guidelines include "[r]estoration of the victim as nearly as possible to the victim's preoffense status"); Kan. Stat. § 74-9101(b)(12) (2006) (sentencing commission shall "develop a program plan which includes involvement of business and industry in the public or other social or fraternal organizations for admitting back into the mainstream those offenders who demonstrate both the desire and ability to reconstruct their lives during their incarceration or during conditional release"); Mo. Rev. Stat. § 558.019(7) (2006) ("Courts shall retain discretion . . . to order restorative justice methods, when applicable") id. § 558.019(8) ("If the imposition or execution of a sentence is suspended, the court may order any or all of the following restorative justice methods," including victim restitution, offender treatment, mandatory community service, work release in local facilities and community-based residential and nonresidential programs); Mont. Code § 46-18-101(2)(c) (2006) (among other goals, the correctional and sentencing policy of the state is to "provide restitution, reparation, and restoration to the victim of the offense"); N.Y. Penal Law § 1.05(5) (2006) (one purpose of criminal code is "[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community"); Okla. Stat. tit. 22, § 1514 (2006) (purposes of criminal-justice system include "restitution and reparation"). See also Robin L. Lubitz and Thomas W. Ross, National Institute of Justice, Sentencing Guidelines: Reflections on the Future (2001), at 4-5 (suggesting that one part of sentencing-guidelines grid, at the low level of crime seriousness, could include presumption in favor of restorative-justice goals and processes).

(3) *Proportionality constraints.* The goal of proportionality in punishment is ubiquitous in legislative statements of the underlying purposes of criminal sentencing. Typically, however, proportionality is artic-

ulated as one important objective alongside a number or others, including one or more of the crime-reductive utilitarian purposes. See Ala. Code § 13A-1-3 (2006); Alaska Stat. § 12.55.005 (2006); Ariz. Rev. Stat. § 13-101 (2006); Colo. Rev. Stat. § 18-1-102.5 (2006); D.C. Code § 3-101(b)(2) (2006) (applicable to felony sentencing); Official Code of Ga. § 16-1-2 (2006); Ill. Compiled Stat., Ch. 720, § 5/1-2 (2006); Ind. Const., Art. 1, §§ 16 & 18 (2006); Mass. Laws, Ch. 211E, § 2 (2006); Nev. Rev. Stat. § 176.0125 (2006); N.J. Stat. § 2C:1-2(b) (2006); N.Y. Penal Law § 1.05 (2006); N.C. Gen. Stat. § 15A-1340.12 (2006); N.D. Century Code § 12.1-01-02 (2006); Ore. Rev. Stat. § 161.025(1) (2006); Tex. Penal Code § 1.02 (2006); 18 U.S.C. § 3553(a) (2006); Utah Code § 76-1-104 (2006); Va. Code § 17.1-801 (2006); Rev. Code of Wash. § 9.94A.010 (2006).

In the above formulations, it is unclear what result is intended when proportionality in punishment conflicts with another statutory goal of sentencing, such as the rehabilitation or incapacitation of an offender. That proportionality should impose a limit on the pursuit of utilitarian ends is perhaps implied in the above provisions. It is unlikely that a court in one of the jurisdictions above would declare that disproportionate penalties are countenanced, even some of the time.

Occasionally, the conception of proportionality as overarching constraint is signaled or made explicit in American sentencing codes. See Del. Code, Title 11, § 6580 (2006) (sentencing commission must develop guidelines consistent with "overall goals of ensuring certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost"; crime-reductive and restorative utilitarian purposes are denoted "additional goals"); Oh. Rev. Code § 2929.11(B) (2006) ("A sentence imposed for a felony shall be reasonably calculated to [to protect the public from future crime by the offender and others and to punish the offender], commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders"); Tenn. Code § 40-35-102(1) (2006) ("Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense"; no other purpose made applicable to "every" case); id. § 40-35-103(2) (2006) ("The sentence imposed should be no greater than that deserved for the offense committed"). See also Ark.

Code § 16-90-801 (2006) ("the purpose of establishing rational and consistent sentencing standards is to seek to ensure that sanctions imposed following conviction are proportional to the seriousness of the offense of conviction and the extent of the offender's criminal history"; no other purpose of the sentencing standards is given, although enumerated "purposes of sentencing" include crime-reductive and restorative utilitarian goals); Montana Code § 46-18-101(2)(a) (2006) (one goal of the correctional and sentencing policy of the state is to "punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable"; no other goal is made applicable to "each" offender).

It is rare that proportionality in punishment is not set out in sentencing codes as at least an implied—or potential—limit on sentence severity in pursuit of utilitarian objectives. But see Me. Rev. Stat., Tit. 17-A, § 1151 (2006) (although sentences in furtherance of utilitarian goals must not "diminish the gravity of offenses," there is no wording that can be construed as a proportionality ceiling on punishment severity).

For examples of courts struggling with the problem of upper or lower retributive limits, see State v. Chaney, 477 P.2d 441 (Alaska 1970) (Rabinowitz, J.) (trial court's sentence of concurrent one-year terms for two counts of forcible rape and one count of robbery "falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms"; court states that "a substantially longer term of imprisonment" would have been required to serve retributive and other goals); United States v. Jackson, 835 F.2d 1195 (7th Cir. 1987) (Posner, J., concurring) (trial court's sentence of life imprisonment without possibility of parole for repeat bank robber was unjustified on retributive grounds by the "sheer enormity of [the defendant's] conduct," especially when measured against the lighter sentences received by many murderers, traitors, or rapists); State v. Williams, Nos. L-00-1027, L-00-1028, 2000 WL 1752889, at *6 (Ohio Ct. App. Nov. 30, 2000) ("[A]ppellant was sentenced to six years in prison for causing the death of two people while committing the misdemeanor traffic offense of speeding. [and] cites to two cases in which drivers caused the deaths of others while speeding. The combined jail sentence for these defendants was eighteen months. Appellant also cites to cases in which people were killed as a result of drivers committing misdemeanor traffic offenses while intoxi-

cated. In one case, a defendant served less than a year for the death of one person. In two of the cases, the defendants each caused the death of one person. Each defendant received a two-year prison sentence. Two of the cases appellant cites to involved defendants who each caused the deaths of four people. One defendant was sentenced to a total of four years in prison. The other defendant received a total sentence of eight years, or, two years consecutive for each of the four deaths. Accordingly, we clearly and convincingly find that appellant's sentence is not supported by the record and is contrary to law as it fails to achieve one of the two overriding purposes of felony sentencing, that is, consistency with sentences imposed in similar crimes committed by similar offenders.").

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

Morris called his theory "limiting retributivism," because it drew from retributive—or deontological—considerations to impose limits on the intrusiveness of utilitarian sentences. The revised Model Penal Code avoids use of the term "retribution," however, and speaks instead of "proportionality" constraints on utilitarian sanctions. See Edward Rubin, Just Say No to Retribution, 7 Buff. Crim. L. Rev. 17, 49-55 (2003) (commenting on early draft of revised § 1.02(2)). Some have conflated "limiting retributivism" with just-deserts theory, or with other theories that posit the derivation of penalty severity from indices of retribution standing alone. See Michael H. Marcus, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1 (2002), 30 Am. J. Crim. L. 135, 136, 169 (2003) (claiming that an early draft of revised § 1.02(2) would

"reintroduc[e] just deserts as the primary purpose of sentencing" and would "virtually abandon public safety as a guiding principle"). The drafters wished to avoid any suggestion that utilitarian concerns should be of little or no importance to the Code's sentencing scheme. Also, the word "retribution" in recent years has become ideologically charged. Some argue that retribution theory propelled the upward spiral of American incarceration rates in the late 20th century. See James Q. Whitman, A Plea Against Retribution, Buffalo Crim. L. Rev. (2002).

The revised Code does not posit an authoritative source of moral judgments about the boundaries of proportionality in criminal punishment. Across a pluralistic nation, different people draw their moral instincts from a variety of separate yet (for them) irreducible first principles. Cf. Roger C. Cramton, Demystifying Legal Scholarship, 75 Geo. L.J. 1 (1989). What the Code does insist upon, however, is that there be collective input on ranges of proportionate sanctions through the informed, experienced, and diverse membership of a sentencing commission. When a sentencing court diverges from the commission's benchmarks in an individual case, it must provide an explanation of its moral-reasoning process that is open to inspection and review. See Michael Moore, Moral Reality, 1982 Wis. L. Rev. 1061.

(4) *Alternative theoretical frameworks.* Subsection (2)(a) rejects the "just deserts" model of sentence severity, which apportions degrees of punishment exclusively on retributive grounds. See Andrew von Hirsch, Doing Justice: The Choice of Punishments (1976); Richard Singer, Just Deserts: Sentencing Based on Equality and Desert (1979); Andrew von Hirsch, Censure and Sanctions (1993); Andrew Ashworth, Sentencing & Criminal Justice, Fourth Edition (2005), at 84-87. Paul H. Robinson, contrasts his preferred program, in which desert specifies the particular amount of punishment that should be imposed on offenders, with the approach of the revised Model Penal Code in: Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical (forthcoming 2007), ms. at 26-31.

The theory of retribution as the controlling principle for the distribution of criminal sanctions has not been widely adopted in American criminal codes. But see Cal. Penal Code § 1170(a)(1) (2006) ("The Legislature finds and declares that the purpose of imprisonment

for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances"; no other purpose is given for the setting of prison terms); Fla. Stat. § 921.002(1)(b) (2006) ("The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment").

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

Between the extremes of just-deserts theory and unconstrained, or weakly constrained, utilitarianism, subsection (2)(a) charts a middle course that allows for effectuation of utilitarian purposes within, but not exceeding, the boundaries of proportionate sanctions.

c. The sentencing commission and benchmarks of proportionality. For statutory sources requiring sentencing commissions to attend to

considerations of proportionality when formulating sentencing guidelines, see § 6B.03, Reporter's Note to Comment *b*. For scholarly discussions, see John Monahan, The Case for Prediction in the Modified Desert Model of Criminal Sentencing, 5 Internat'l J. Law & Psych. 103, 109-110 (1982); Richard S. Frase, Limiting Retributivism, in Michael Tonry ed., The Future of Imprisonment (2004).

d. Subconstitutional proportionality analysis in the courts. For examples of the toothlessness of proportionality review in noncapital cases under the Eighth Amendment's Cruel and Unusual Punishments Clause, see, e.g., Ewing v. California, 538 U.S. 11 (2003) (holding sentence of 25 years to life for current offense of theft of 3 golf clubs worth $1200 is not grossly disproportionate under Eighth Amendment); Lockyer v. Andrade, 538 U.S. 63 (2003) (finding no unreasonable application of clearly established Eighth Amendment law when state imposed mandatory prison term of 50 years to life for current offenses of 2 counts of petty larceny arising from shoplifting of videotapes worth approximately $150); Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding mandatory sentence of life without parole imposed on first offender convicted of possessing more than 650 grams of cocaine). At least two Justices have endorsed the view that the Eighth Amendment imposes no proportionality constraint on the length of prison terms. Ewing v. California, 538 U.S. at 31-32 (separate concurring opinions of Scalia, J. and Thomas, J.).

e. Assessment constraints on utilitarian purposes. On the shortfall in quality research on the effectiveness of criminal sanctions in reducing crime, see Gerald G. Gaes et al., Adult Correctional Treatment, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 26 (1999); Lawrence W. Sherman et al., National Institute of Justice, Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress (1997); Alfred Blumstein and Joan Petersilia, Investing in Criminal Justice Research, in James Q. Wilson and Joan Petersilia eds., Crime (1995).

A growing body of literature demonstrates that some offender rehabilitation programs realize desired effects for meaningful numbers of participants. See, e.g., Francis T. Cullen, Rehabilitation and Treatment Programs, in James Q. Wilson and Joan Petersilia eds., Crime: Public

Policies for Crime Control (2002); Mark W. Lipsey & Nana Landenberger, Cognitive Behavioral Interventions, in Brandon C. Welsh and David P. Farrington eds., Preventing Crime: What Works for Children, Offenders, Victims, and Places (2006). Empirical assessment is needed, however, in part because some interventions aimed at rehabilitation are ineffectual or criminogenic. See, e.g., Anthony Petrosino, Carolyn Turpin-Petrosino, and James O. Finckenauer, Well-Meaning Programs Can Have Harmful Effects!: Lessons From Experiments of Programs Such as Scared Straight, 46 Crime & Delinq. 354 (2000). Rigorous evaluation also contributes to the credibility and successful replication of programs that work. See Lawrence W. Sherman, Reducing Incarceration Rates: The Promise of Experimental Criminology, 46 Crime & Delinq. 299 (2000) (arguing that experimental testing of rehabilitative programs "would be the shortest path to reducing incarceration rates" in the United States; that policy makers and the public would invest enthusiastically in such programs if they can be proven to deliver results).

The feasibility of general deterrence through marginal increases in the severity of criminal punishments is in doubt, at least for many species of criminal behavior. See Anthony N. Doob & Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003) (surveying 10 years of deterrence research).

On the other hand, actuarial measures for predicting the risk of recidivism posed by individual offenders have become more powerful over time. See generally John Monahan, The Future of Violence Risk Management, in Michael Tonry ed., The Future of Imprisonment (2004). Actuarial tools have increasingly been put to use in the criminal-sentencing process—sometimes to identify high-risk offenders, and sometimes to identify low-risk offenders for whom an incapacitative sentence would likely be pointless. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). In the terminology of § 1.02(2)(a)(ii), it is not reasonably feasible to pursue the goal of incapacitation of dangerous offenders through the confinement of individuals who pose little or no risk of serious reoffending. At the same time, any attempt selectively to incapacitate high-risk offenders must acknowledge that there

will be substantial numbers of "false positives"—individuals who register as dangerous on even the most sophisticated risk-assessment instrument, but who in fact would not reoffend as predicted. See Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985), pp. 1-50. Sentencing decisionmakers in each jurisdiction should ponder not only what aggregate crime reduction is feasible through incapacitative strategy, but whether such programs are reasonable given their human costs.

The assessment literature suggests that restorative justice alternatives to traditional criminal punishments can reduce recidivism among some offenders, increase victims' satisfaction in the process afforded to them, reduce victims' fears of repeat victimization, and enhance perceptions in both victims and offenders that a just outcome has been achieved. See John Braithwaite, Restorative Justice: Assessing Optimistic and Pessimistic Accounts, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 25 (1999); Lawrence W. Sherman, Heather Strang, and Daniel J. Woods, Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE) (2000).

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

Statements against needless severity in criminal punishments are found in a number of American sentencing codes or sentencing guidelines. See Ala. Code § 12-25-2 (2006) ("purposes of sentencing" include "[i]mposing sanctions which are least restrictive while consistent with the protection of the public and the gravity of the crime"); Ark. Code § 16-90-801(c)(4) (2006) ("Restrictions on an offender's liberty should only be as restrictive as necessary to fulfill the purposes of sentencing contained in this policy"); Minnesota Sentencing Guidelines and Commentary 1 (2006) ("sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence"); Tenn. Code § 40-35-103(4) (2006) ("The sentence imposed should be the least severe measure necessary to achieve the purposes

for which the sentence is imposed"); 18 U.S.C. § 3553(a) (2006) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection"). See also ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-2.4 (1994) ("Sentencing authorized and imposed, taking into account the gravity of offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized"). For an interesting variation, see Oh. Rev. Code § 2929.13(A) (2006) ("The sentence shall not impose an unnecessary burden on state or local government resources").

h. Preservation of judicial discretion. For statutory sources, see § 6B.03, Reporter's Note to Comment *d*. One primary complaint with the federal guidelines system, instituted in 1987, is that it has been too restrictive of judicial sentencing discretion. See Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), ch. 4; Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity, 29 Amer. Crim. L. Rev. 833 (1992). The tight grip of the federal guidelines on judicial discretion may have loosened with the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005) (declaring the federal guidelines to be "advisory"). The drafters of the revised Code were in overwhelming agreement that it was undesirable to confine judicial sentencing discretion to the degree found in the pre-*Booker* federal system.

See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 37 ("The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored. But judicial discretion is necessary to assure that sentences reflect the totality of circumstances regarding an offender and offense").

i. Consistency of analysis. The record of many state sentencing-guidelines systems in bringing greater consistency to sentencing decisions is discussed in Michael Tonry, Sentencing Matters 40-49 (1996). There is evidence that the use of advisory guidelines can also enhance the consistency of judicial sentencing across cases, albeit less reliably

than when presumptive guidelines are used. John F. Pfaff, The Continued Vitality of Structured Sentencing Following *Blakely*: The Effectiveness of Voluntary Guidelines, 54 UCLA L. Rev. 235 (2006).

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

j. Elimination of inequities in sentencing. For a very long time, the most pressing issues of uniformity and disparity in American criminal law have been those of racial and ethnic disproportionalities in sentences imposed. See Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995). Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response 27-32 (2003) quantify the steadily worsening problems of racial and ethnic disparities in prison populations over the past 120 years. These subjects were not addressed explicitly in the original Model Penal Code.

Roughly 60 percent of state and federal prisoners in the United States are either black or Hispanic. See Bureau of Justice Statistics, Prisoners in 2005 (2006), p. 8 tbl. 10. Nationwide, Hispanics and American Indians are imprisoned at rates roughly 2.5 times the imprisonment rate for white Americans. Id., p. 8 tbl. 11; Bureau of Justice Statistics, American Indians and Crime (1999), p. 26 tbl. 33. For African Americans, the disparity ratio of their current imprisonment rate compared with the rate for white Americans is nearly 8:1 across the nation as a whole. High ratios of disproportionality have had increasing impact on minority communities as the total scale of American incarceration has grown over the past 35 years. Among black males born in 2001, the U.S. Justice Department estimated that 32.2 percent will serve a prison term during their lifetime. For white males of the same birth year, an estimated 5.9 percent would serve prison time; for Hispanic males, the probability was estimated as 17.2 percent. Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (2003). See also Alfred Blumstein and Allen J. Beck, Population Growth in U.S. Prisons, 1980-1996, in Michael Tonry and Joan Petersilia eds. Crime and Justice: A Review of Research, vol. 26 (1999), at 22-23 ("Between 1980

and 1996 . . . [t]he number of white [prison] inmates increased by 185 percent, the number of black inmates by 261 percent, and the number of Hispanic inmates by 554 percent").

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

Some observers take the view that criminal punishment in America has been driven or infected by pervasive racial discrimination. See Loïc Wacquant, Deadly Symbiosis: Race and the Rise of Neoliberal Penality (2007); William J. Chambliss, Power, Politics, and Crime (2001); Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics (1997); Jerome G. Miller, Search and Destroy: African-American Males in the Criminal Justice System (1996); American Friends Service Committee, Struggle for Justice: A Report on Crime and Punishment in America (1971). The issue is complex. Serious crime rates, and victimization rates, are highest in America's most disadvantaged communities, which overwhelmingly are minority communities. See Franklin E. Zimring and Gordon Hawkins, Crime Is Not the Problem: Lethal Violence in America (1998), at 76; Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743 (1993); Alfred Blumstein, On the Racial Disproportionality of United States' Prison Populations, 73 J. Crim. L. & Criminology 1259 (1983); Bureau of Justice Statistics, Homicide Trends in the U.S.: 1998 Update (2000), at 1-3; Bureau of Justice Statistics,

Violent Victimization and Race, 1993-1998 (2001), at 10 tbl. 14. Estimated differences in crime commission, however, do not account for the degree of racial and ethnic disparities in punishment. Research consistently suggests that "unexplained" disparities are largest for crimes at the low end of the seriousness scale—especially drug offenses. See Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, supra; Randall Kennedy, Race, Crime, and the Law (1997), ch. 10; Marc Mauer, Race to Incarcerate (1999), ch. 8; Tonry, Malign Neglect, chapter 3; David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999), at 141-146; Human Rights Watch, Punishment and Prejudice: Racial Disparities in the War on Drugs (2000).

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

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

> Given the history of race in America—e.g., slavery, Jim Crow laws, segregation, Japanese internment, urban ghettos—there is reason for concern when two-thirds of those incarcerated are African-American or Latino. Even though offenders of color may commit a disproportionate percentage of certain types of criminal acts as the result of socio-economic disadvantage and the many other complex causes

> of crime, there is also evidence of discriminatory treatment of defendants and victims of color at various stages of the criminal process. Every jurisdiction should examine whether conscious or unconscious bias or prejudice may affect investigatory, prosecution, or sentencing decisions and take steps to eliminate such bias. All participants in the criminal justice system, including legislators, should strive to eliminate the racial impact of their decisions.

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

k. Encouragement of intermediate sanctions. For a definition of "intermediate" punishments, and a discussion of the policy and research literature, see Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System (1990). See also Joan Petersilia ed., Community Corrections: Probation, Parole, and Intermediate Sanctions (1998); David C. Anderson, Sensible Justice: Alternatives to Prison (1998). On implementation difficulties, see Michael Tonry, Sentencing Matters 104-133 (1996).

l. Correctional resource management. Perhaps the leading impetus of sentencing reform at the state level beginning in the 1980s, and persisting through the 1990s and into the 2000s, has been the desire to exert deliberate policymaking control over the growth of prison populations and the use of other correctional resources. See generally Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 686-689 (1993). For recent state-specific illustrations, see State of California, Little Hoover Commission, Solving California's Corrections Crisis: Time is Running Out 133-148 (2007); Colorado Lawyers Committee, Task Force on Sentencing, Report on the Sentencing System in Colorado: A Serious Fiscal Problem on the Horizon (2006).

It is no accident that prison growth should be a leading policy issue for American criminal-justice policymakers in the late 20th and early 21st centuries. The past 35 years have seen an unprecedented explosion in the use of incarceration by state and federal governments.

The nation held an estimated total of 357,292 inmates in its prisons and jails in 1970, which rose to 2,320,359 in 2005. Corrected for population growth, this represented a near quintupling of the incarceration rate. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2005 (2006), at 1; Margaret Werner Cahalan, Historical Corrections Statistics in the United States, 1850-1984 (1986), at 79 tbl. 4-4. By the late 20th century, the U.S. incarceration rate was higher than that reported in any other nation worldwide. See The Sentencing Project, New Incarceration Figures: Growth in Population Continues (2004), at 4.

Although the rate of expansion of the total U.S. incarceration rate slowed at the turn of the century, there are few signs of a leveling off or reversal. When state-by-state projections for the nation as a whole are aggregated, it appears that significant growth in aggregate American prison populations will continue at least into the coming decade. See Pew Charitable Trusts, Public Safety, Public Spending: Forecasting America's Prison Population 2007-2011 (2007).

Sentencing reforms most similar to the approach of the revised Code have proven effective at giving policymakers the ability to predict and control future patterns of prison use. Most states have used the tools of a sentencing commission and guidelines to slow down or stop preexisting growth trends. Empirical studies using a variety of methodologies have found a correlation between states' use of sentencing guidelines and rates of prison growth lower than in non-guidelines states. See Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696 (1995) (finding that, wherever sentencing commissions had made conscious efforts to restrain prison expansion, sentencing guidelines were strongly associated with slower prison growth than in comparable nonguidelines jurisdictions); Don Stemen et al., Vera Institute of Justice, Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates (2005), at 143 (finding that "states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states. . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates"); Kevin R. Reitz, Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces, 84 U. Tex. L. Rev. 1787 (2006).

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

For a discussion of the recent history of resource management under state sentencing commissions, see Model Penal Code: Sentencing, Report (2003) at 72-85.

m. Administration of sanctions. Although the 1962 Model Penal Code contained extensive recommendations on the "Treatment and Correction" of offenders, and on the "Organization of Correction," see Model Penal Code, Complete Statutory Text, Parts III & IV (1985), no provision of the original Code spoke to the fundamental conditions that should be assured to those serving criminal sentences. The subject has arguably become more important by orders of magnitude since the 1960s, if for no reason other than the massive growth in confined populations. See Reporter's Note to Comment *l*, supra.

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

o. Transparency, accountability, and legitimacy of the sentencing system. Subsection (2)(b)(viii) gives voice to goals of transparency,

accountability, and legitimacy that were not explicit in original § 1.02(2). Indeed, values of transparency and accountability held low priority in the indeterminate sentencing systems of mid-20th-century America, including the indeterminate machinery of the 1962 Code. The most important sentencing decisions in such systems were made by judges, correctional officials, and parole boards, all subject to little regulation, burden of explanation, or review. Sentencing was a "black box" process of invisible acts of discretion and power. See generally Marvin E. Frankel, Criminal Sentences: Law Without Order (1973).

The moral legitimacy of the criminal-justice system is at issue particularly in some American communities of color, where the police and criminal courts are viewed by many as hostile institutions. See Gary LaFree, Losing Legitimacy: Street Crime and the Decline of Social Institutions in America (1998); William J. Stuntz, Race, Class, and Drugs, 98 Colum. L. Rev. 1795 (1998). This is a problem with deep historical roots. See Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century South (1984); Randall Kennedy, Race, Crime, and the Law (1997), chs. 2 & 3. Maintaining the moral legitimacy of any system of law is an intrinsic good, but one that also holds instrumental dimensions. Negative consequences of widespread distrust of the criminal-justice system include reduced inclinations to abide by the law, to cooperate with officials during a criminal investigation, and even to report serious criminal victimizations in the first instance. See, e.g., Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003); Beth E. Richie, Compelled to Crime: The Gender Entrapment of Battered Black Women (New York: Routledge, 1996), at 77, 95-97; Lawrence Sherman, Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction, 30 J. Rsrch. Crime & Delinq. 445 (1993); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Government Printing Office, 1967), at 49-55.

p. States choosing an advisory guidelines system. Ten states and the District of Columbia had adopted advisory sentencing-guidelines systems as of March 2007, and it is likely that experimentation with such structures will continue in the future. In some jurisdictions, the adoption of presumptive guidelines has proven politically infeasible, while advi-

sory guidelines have met with approval. Following the Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), and Cunningham v. California, 127 S. Ct. 856 (2007), additional states may gravitate toward advisory guidelines because Sixth Amendment requirements of jury factfinding at sentencing do not apply to advisory systems. See § 7.07B, Reporter's Note to Comment *a*.

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

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

In at least two states, advisory guidelines have been well-respected by sentencing judges, and have been used effectively as a tool to regulate the use of correctional resources, including the number of prison bed spaces and the demand for community sanctions. See Hunt & Connelly, supra. Surveying all states that have employed advisory guidelines, however, the record of success is mixed. Only about half of the advisory guidelines states have succeeded in imposing deliberate controls upon prison population growth. Nearly all of the state guidelines systems with pronounced rates of prison growth (far above national average rates of growth) are advisory guidelines systems. See Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1114-1116 (2005). A num-

ber of recently established advisory systems (e.g., in Alabama, the District of Columbia, and Wisconsin) are too new to permit comment on their effectiveness.

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

REPORTER'S INTRODUCTORY NOTE TO ARTICLE 6A

Article 6A contains the central institutional recommendation of the revised Model Penal Code: that every jurisdiction should charter a permanent sentencing commission, or equivalent agency, to perform the basic research and prescriptive functions outlined in the Article.

Although there have been many successful sentencing commissions in the U.S. since the late 1970s, and the broad elements of success are discernible from their histories, there is no definitive model at the level of detail. All states with sentencing commissions have designed those institutions to meet the particular needs and political circumstances of their jurisdictions. The revised Code expects and welcomes continuing state-specific experimentation with sentencing commissions' composition, obligations, powers, and discretionary responsibilities. In this spirit, Article 6A gives state legislatures a series of relatively complete illustrations of the necessary components of sentencing-commission enabling legislation. The Code does not recommend any single approach, but provides a useful starting point for legislative drafting.

ARTICLE 6A. AUTHORITY OF THE SENTENCING COMMISSION

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

(1) There is hereby established a permanent sentencing commission as an independent agency of state government.

(2) The sentencing commission shall:

(a) develop sentencing guidelines as provided in Article 6B;

(b) collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework;

(c) provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects;

(d) assemble and draw upon sources of knowledge, experience, and community values from all sectors of the criminal-justice system, from the public at large, and from other jurisdictions;

(e) perform its work and provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2); and

(f) ensure that all these efforts take place on a permanent and ongoing basis, with the expectation that the sentencing system

must strive continually to evaluate itself, evolve, and improve.

Comment:

a. Scope. Section 6A.01 recommends to all American jurisdictions that they establish a permanent sentencing commission, as described in Article 6A, as an essential agency of the criminal-justice system. Article 6A presents a flexible series of recommendations that individual states should carry out in ways best tailored to their governmental structures, available resources, and local needs. Article 6A is an exercise in "model" legislation in the sense that it sets forth workable *illustrations* of the architecture and detailed construction of a sentencing commission. The drafters envision creative adaptation of Article 6A by state legislatures.

The Article is built upon the experience of the roughly two dozen American jurisdictions that have chartered sentencing commissions, including some states with commissions that have enjoyed decades of operation, and some states with commissions that failed in their work or were discontinued after a short lifespan. Article 6A selects features of commission design that have been associated with successful operation over extended periods of time, and avoids features that have proven troublesome, self-defeating, or even fatal to some sentencing agencies.

Sentencing commissions—or equivalent agencies—may be constituted in many different forms. Their institutional trappings do not matter as much as their ability to perform the core functions outlined broadly in § 6A.01, and addressed in greater detail throughout Article 6A. It matters little, for example, whether the terminology "sentencing commission," or related terms such as "sentencing guidelines," are used in all jurisdictions. These word choices

appear throughout the black letter of the Code revision only because it is necessary to adopt a consistent lexicon for model statutory drafting. Some U.S. jurisdictions, and the American Bar Association in its Criminal Justice Standards for Sentencing, have employed alternative verbal formulas. More importantly, they have envisioned a host of institutional forms to discharge the functions of lawmaking, monitoring, research, consensus-building, and education assigned in this Article to a "sentencing commission."

b. A permanent commission. Subsection (1) begins with the premise that a sentencing commission or equivalent agency should be chartered in each jurisdiction as a permanent agency. Subsections (1) and (2)(f) endorse the view that sentencing policy should never be viewed as a "settled" matter, but should be allowed to evolve, and must continually be evaluated.

A number of states have elected to create temporary sentencing commissions, or have abolished standing commissions at some point after the commission's guidelines have taken effect. As a result, the monitoring, research, planning, consensus-building, and lawmaking functions normally entrusted to a commission are performed by no one on a continuing basis. Discontinuation guarantees that the commission's work product will become obsolete over time, and no institutional memory will inform ongoing changes to the sentencing structure. All longstanding commissions have found that the environment in which sentencing policy is made is constantly in flux. Crime rates change, as do the politics of punishment, the availability of resources, and the feedback from various sources on how well the sentencing system is working. Most permanent commissions have found it desirable to make substantial changes in their guidelines, or have over time reached into new areas of emerging concern, such as sentence-revocation practices or

offender risk assessments. If there is a need for the expertise of a sentencing agency in the first instance, that need does not dissipate once the agency has completed a single set of studies or guidelines.

c. Location in government. Subsection (1) provides that the commission should be "an independent agency of state government," but does not specify any particular location in government that the commission should occupy. A sentencing commission may reside in the judicial, legislative, or executive branch, or may be defined as an administrative agency without clear assignment to any one branch. Contemporary practices across American jurisdictions vary, and each state must consult its own constitutional structure in deciding how best to define the commission's identity. Regardless of formal designation in one branch or another, however, the commission's functional attributes should be preserved. Important concepts here are that the agency be independent, nonpartisan, broadly representative of the criminal-justice system and the public, and have a strong contingent of members from the state courts, see § 6A.02.

d. The need for a "purposes-of-commission" provision. Subsection (2) recommends that legislatures adopt a purposes-of-commission provision for three reasons.

First, one function of a criminal code is education, and many readers of the Penal Code will have patchy knowledge of sentencing commissions, particularly as they have existed across various states. Even persons newly appointed as commissioners, most of whom have had great experience in the criminal-justice system, may lack a firm sense of institutional mission.

Second, sentencing commissions nationwide have varied enormously in their powers, duties, and the roles they have assumed vis-à-vis other actors in the system. It does

not suffice for the revised Code to hold out generically that a sentencing commission should be chartered—any such policy recommendation must make clear *what kind* of commission the Institute has endorsed.

Finally, to the extent that the work product of a sentencing commission is or might be reviewable by other agencies of government, including the courts, a legislative declaration of purpose helps set parameters for the commission's authority.

e. Guidelines development. First among the commission's purposes is its responsibility to develop guidelines, as recognized in subsection (2)(a). This is perhaps the commission's primary function, although the quality of a commission's guidelines depends on how well it carries out its other basic functions. There is thus a close interaction between subsection (2)(a) and the remaining subsections (2)(b) through (2)(f).

The revised Code does not endorse any and all forms of sentencing guidelines, but only those that allow considerable latitude for judicial discretion and the development of a common law of sentencing through developing case law in the trial and appellate courts. Further, the content of the guidelines, and ongoing projections of their impacts, should be informed by high-quality data and research prepared by the commission in an objective, nonpartisan manner. Policy decisions reflected in the guidelines should be made with the input of knowledgeable persons with varied experience from across the criminal-justice system and the broader life of the community, and should be taken with awareness of any similar policy initiatives in other jurisdictions. The guidelines should rest explicitly upon the underlying goals of the sentencing and corrections system. They should always be considered a work-in-progress, to be amended

and improved over time as the commission oversees and evaluates the guidelines' performance in light of their purposes. Subsection (2)(a) cross-references Article 6B, in which the revised Code speaks in detail to the vision of sentencing guidelines endorsed by the Institute.

f. Collaboration with, not domination of, judicial branch. The revised Code takes pains to avoid the creation of a sentencing commission with authority to eliminate, override, or ignore the discretionary input of sentencing courts and the appellate bench. Ideally, the commission's guidelines will provide a framework, and starting points for analysis, from which the courts may develop a common law of sentencing sensitive to the variations of individual cases. The aspiration stated in this subsection is reinforced elsewhere in the revised Code, see §§ 1.02(2)(b)(i) (one general purpose of sentencing system is "to preserve judicial discretion to individualize sentences within a framework of law"); 6B.02(7) (limiting legal effect of commission-created guidelines to "presumptive force"); 7.XX ("Judicial Authority to Individualize Sentences").

g. Nonpartisan forum. Sentencing commissions' substantive achievements, and sometimes their very political survival, have depended in large degree on their reputation for nonpartisanship. The data, research, and projections assembled by a commission increase in value with the commission's credibility and track record of objective reporting. When translating policy into presumptive guidelines, a commission's work product is better respected, and meets less resistance in the field, if there are no suspicions that the commission has been captured by one political viewpoint. The reputational capital of a sentencing commission is an asset that increases over time if the commission consistently works to uphold the aspiration stated in subsection (2)(c). Conversely, a commission that acts, or is perceived to act, as

an ideological entity sacrifices its strongest claim to legitimacy. Ideally, a commission should be seen as an advocate only for one position: that systemwide choices about sentencing law and policy should be informed by the best available information.

A related provision is Alternative § 6A.02(5) ("Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system").

h. Roundtable function. Subsection (2)(d) highlights what might be called the "roundtable function," accomplished by the commission's bringing together of many knowledgeable and responsible stakeholders from throughout the criminal-justice system and from the public at large. In most states, there are few forums of any kind that regularly assemble judges, prosecutors, defense lawyers, corrections officials, crime victims, and other representatives of the public in the same room. Many of these stakeholders regularly "do battle," and opportunities are scarce for consensus-building on important policy issues. Anecdotally, the success of many sentencing commissions at the state level has been due in important part to the group dynamics among carefully selected commissioners who, although they come from different walks of life, find that they share many common goals in the quest to improve statewide policy.

Subsection (2)(d) directs attention to the experience of other jurisdictions as sources of knowledge, experience, and value determinations that may be relevant to the commission's work. See also §§ 6A.03(1)(c) (executive director's responsibilities include "maintenance of contacts with . . . sentencing commissions in other jurisdictions"); 6A.04-

(3)(b) (start-up commission should "study the experiences of other jurisdictions with sentencing commissions and guidelines"); 6A.05(3)(c) (commission should "remain informed of the experiences of sentencing commissions and guidelines in other jurisdictions").

i. Consistency with purposes of sentencing. The revised Code elevates the operational importance of § 1.02(2) (general purposes of the sentencing system) in comparison with the 1962 Code. See § 1.02(2), Comment *a*. Subsection (2)(e) admonishes the commission that the creation of guidelines, and indeed the performance of all of the commission's tasks, must be done in light of fundamental societal purposes identified by the legislature. The commission's explanations for its actions must be framed in terms of the same goals. See also § 6B.03.

j. Continual self-evaluation and improvement. Subsection (2)(f) interlocks with the injunction in subsection (1) that the commission should be a permanent agency. Subsection (2)(f) defines the functions that justify and make necessary the ongoing life of a commission. These include systemic assessment, critical self-evaluation, and periodic adjustment of the guidelines so that the sentencing system may adapt to changing conditions and improve itself over time. Subsection (2)(f) explicitly recognizes, and seeks to communicate to the members and staff of a commission, that the law and policy of criminal punishment are never closed subjects.

The revised Code does not lock into place any one structure of sentencing guidelines, or any one template for a commission's overall activities. Instead, the Code brings into existence an agency of qualified persons to help drive a process of ongoing knowledge development, consensus-building, innovation, self-awareness, and self-correction.

REPORTER'S NOTE

b. A permanent commission. The suggestion of a sentencing commission as a permanent agency of government was first made by Marvin Frankel in his influential book, Criminal Sentences: Law Without Order 118-124 (1973). In support of his recommendation that the commission be a permanent body, Frankel wrote, "There must be recognition that the subject [of appropriate criminal punishments] will never be definitively 'closed,' that the process is a continuous cycle of exploration and experimental change." Id. at 118-119. The recommendation that all American jurisdictions should adopt a permanent sentencing commission, or equivalent agency, has also been the centerpiece of national law reform initiatives. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a) (1994); ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 29-30; The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), at 23-25; U.S. Department of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing 127 (1996).

Over the past 30 years, the permanent sentencing commission has been the most popular institutional framework for reform among those states that have undertaken comprehensive changes in their sentencing laws. As of early 2007, 23 permanent sentencing commissions had been established in 21 states, the District of Columbia, and the federal system. Seventeen of these commissions were charged initially with the creation of sentencing guidelines and then, on a continuing basis, with oversight of their guidelines systems. See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (as of 2005, 16 American sentencing-guidelines systems with permanent sentencing commissions existed in Arkansas, Delaware, District of Columbia, Kansas, Maryland, Minnesota, Missouri, North Carolina, Ohio, Pennsylvania, Oregon, Utah, Virginia, Washington, Wisconsin, and the federal system); see also Alabama Code § 12-25-1 (2006 legislation making Alabama the 17th jurisdiction to charter a permanent sentencing commission charged with oversight of sentencing guidelines). An additional six permanent sentencing commissions existed in states with no formal sentencing guidelines. See Rachel Barkow & Kathleen M. O'Neill, Delegating

Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation, 84 Tex. L. Rev. 1973, 1994 table 1 (2006) (reporting existence of longstanding sentencing commissions in Louisiana, Massachusetts, Nevada, New Mexico, Oklahoma, and South Carolina). Finally, in three states—in addition to the 23 above—sentencing guidelines originally created by sentencing commissions were in operation in early 2007, although the legislature in each state had discontinued the commission following the promulgation of guidelines. See Frase, State Sentencing Guidelines, 105 Colum. L. Rev. at 1196 (sentencing guidelines in force, but sentencing commissions abolished, in Florida, Michigan, and Tennessee).

In early 2007, active discussions to create new permanent state sentencing commissions were underway in several additional states, including California, Colorado, Connecticut, and New Jersey. See State of California, Office of the Governor, Comprehensive Prison Reform: Sentencing Reform (2006); State of California, Little Hoover Commission, Solving California's Corrections Crisis: Time is Running Out 133-148 (2007); Colorado Lawyers Committee, Task Force on Sentencing, Report on the Sentencing System in Colorado: A Serious Fiscal Problem on the Horizon (2006); New Jersey Commission to Review Criminal Sentencing, Sentencing in the 21st Century and the Necessity of a Permanent Sentencing Commission in New Jersey (2006).

c. Location in government. With much variation across jurisdictions, American sentencing commissions have been chartered in the judicial branch, the legislative branch, or as agencies of no defined location within the branches of government. Assignment to one or another—or none—of the branches of government has made no obvious difference in commissions' effectiveness within their respective states. See Ala. Code § 12-25-1 (2006) (commission within judicial branch as agency of supreme court); Ark. Code § 16-90-802(a) (2006) (silent on location in government); Del. Code tit. 11, § 6580(a) (2006) (no specified location in government); D.C. Code § 3-101(a) (2006) (creating commission "as an independent agency"); Kan. Stat. § 74-9101(a) (2006) (no specified location within the branches); Mass. Gen. Laws ch. 211E, § 1(a) (2006) (independent commission in judicial branch); Minn. Stat. § 244.09, subd. 1 (2006) (no explicit assignment within branches of government); Rev. Stat. Mo.

§ 558.019(6)(1) (2006) (no reference to location within the branches); N.M. Stat. § 9-3-10(F) (2006) (commission "administratively attached to the office of the governor"); N.C. Gen. Stat. § 164-45 (2006) (commission managed by judicial branch, but holds independent authority to exercise its statutory powers); Oh. Rev. Code § 181.21(A) (2006) (commission created "within the supreme court"); 42 Pa. Cons. Stat. § 2151.2(a) (2006) (establishing commission as "an agency of the General Assembly"); 28 U.S.C. § 991(a) (2000) (commission is independent commission in the judicial branch); Va. Code § 17.1-800 (2006) (commission within judicial branch as agency of supreme court); Wash. Rev. Code § 9.94A.850(1) (2006) (commission is "agency of state government" with no assignment within the branches); Wis. Stat. § 15.105(27)(a) (2006) (commission "attached to the department of administration" in the executive branch). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-1.3, 18-4.2, 18-4.5, 18-4.6 (1994) (recommending creation of a permanent sentencing commission, or equivalent agency, as a "governmental agency," or as an agency of the legislative or judicial branch).

The constitutional law of particular jurisdictions may include structural concerns that must be addressed when a commission's institutional identity, powers, and membership are defined in authorizing legislation. Only a tiny case law exists on this subject. See Mistretta v. United States, 488 U.S. 361 (1989) (upholding United States Sentencing Guidelines against federal constitutional claims of impermissible delegation of legislative power and separation of powers violations in placement of the sentencing commission in the judicial branch); Commonwealth v. Sessoms, 532 A.2d 775, 780-781 (1987) (finding no constitutional impediment to legislature's establishment of Pennsylvania Commission on Sentencing as a "legislative agency," but holding the powers of such a "unique" agency are limited by the state constitution; also questioning in dictum the constitutionality of an "administrative agency" with members from both the legislature and judiciary). Given the large number of sentencing commissions that have been created across the nation since the late 1970s, it is notable that there have been virtually no successful challenges on structural constitutional grounds to the composition of the commissions, or their exercises of authority.

d. The need for a "purposes-of-commission" provision. Provisions on the basic purposes of a sentencing commission exist in a number of states, with varying content and degrees of specificity. See Ala. Code

§ 12-25-2 (2006); Ark. Code § 16-90-802 (2006); Del. Code tit. 11, § 6580(b) (2006); D.C. Code § 3-101.01(a) (2006); Md. Code, Crim. Proc. § 6-202 (2006); Mass. Gen. Laws ch. 211E, § 2 (2006); Or. Rev. Stat. § 137.656(1) (2006); 28 U.S.C. § 991(b) (2000); Utah Code Ann. § 63-25a-304 (2006); Va. Code § 17.1-801 (2006).

e. Guidelines development. A consensus has emerged in the law-reform community that a well-designed sentencing commission is better positioned to draft a comprehensive scheme of sentencing guidelines than are the legislature or courts. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-1.3(b), 18-4.1 (1994); American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates 37 (2004); The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report 22-25 (2006); U.S. Department of Justice, Bureau of Justice Assistance, National Assessment of Structured Sentencing 127 (1996). As of early 2007, 20 American jurisdictions had in operation sentencing guidelines drafted in the first instance by sentencing commissions, see Reporter's Note to Comment *b*, above.

f. Collaboration with, not domination of, judicial branch. The problem of a hegemonic sentencing commission has not arisen in any state guidelines jurisdiction, but has been a central area of difficulty over much of the life of the federal sentencing-guidelines system instituted in 1987. See, e.g., Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), ch. 4; Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity 29 Amer. Crim. L. Rev. 833 (1992).

g. Nonpartisan forum. Observers have noted that sentencing commissions produce their most credible work products when they aim toward consensus positions rather than the adversarial resolution of policy issues. See Richard S. Frase, Sentencing Guidelines in the States: Lessons for State and Federal Reformers, 6 Fed. Sent'g Rep. 123, 125 (1993).

h. Roundtable function. Subsection (2)(d) endorses the practice of numerous existing state sentencing commissions, which have made comprehensive study of sentencing reforms elsewhere in the nation when propounding or revising their own guidelines. See 2002 Annual Report of the District of Columbia Advisory Commission on Sentencing (2002), at 1-28; John Kramer & Cynthia Kempinen, The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines, 8 Fed. Sent'g Rep. 74 (1995). In 1994, numerous sentencing commissions formed a national association to facilitate interstate dialogue and cross-fertilization. See Robin L. Lubitz, The Formation of the National Association of Sentencing Commissions, 8 Fed. Sent'g Rep. 71 (1995). The revised Code discourages commissions from following the early practice of the United States Sentencing Commission, which has been much-criticized for its failure in its early years to borrow from the experiences of preexisting state commissions and, indeed, for its failure adequately to investigate those experiences. See Michael Tonry, Sentencing Matters (1996), at 86; Kay A. Knapp and Denis J. Hauptly, State and Federal Guidelines: Apples and Oranges, 25 U.C. Davis L. Rev. 679, 681 (1992).

i. Consistency with purposes of sentencing. See Ala. Code § 12-25-2 (2006); 11 Del. Code § 6580(c) (2006); Delaware Sentencing Accountability Commission Benchbook 2006 21; D.C. Code. § 3-101(b)(2) (2006); Minnesota Sentencing Guidelines and Commentary 1 (2006); N.C. Gen. Stat. §§ 164-41(b), (c), 164-42(b), (c) (2006); Rev. Code Wash. § 9.94A.850(2)(a) (2007). For an argument in favor of a requirement that a sentencing commission explain its actions with reference to statutory purposes, see Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1 (1991).

j. Continual self-evaluation and improvement. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a) & Cmt. at 152-153 (1994).

§ 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) [three] members from the state's judicial branch;

(b) [two] members from the state legislature;

(c) the director of correction;

(d) [one] prosecutor;

(e) [one] criminal defense attorney;

(f) [one] official responsible for the provision of probation or parole services;

(g) one academic with experience in criminal-justice research; and

(h) [one] member of the public.

(2) One of the [judicial] members of the commission shall serve as chair of the commission.

(3) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms.

Alternative § 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) the chief justice of the supreme court or another justice of the supreme court [designated by the chief justice];

[(b) one judge of the court of appeals appointed by the chief justice of the supreme court;]

(c) [three] trial-court judges [appointed by the chief justice of the supreme court];

(d) [four] members of the state legislature [, one of whom shall be appointed by the majority leader of the state senate, one of whom shall be appointed by the minority leader of the state senate, one of whom shall be appointed by the speaker of the house of representatives, and one of whom shall be appointed by the minority leader of the house of representatives];

(e) the director of correction or another representative of the department of correction [designated by the director];

(2) The sentencing commission shall also include the following members [, to be appointed by the governor]:

(a) [two] prosecutors;

(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.

Comment:

a. Scope. Alternative versions of § 6A.02 are presented to underscore that the revised Code does not seek to dictate what the precise membership of a sentencing commission should be, or how its members should be chosen. No one formula for a commission's composition has proven superior to all others in past decades of experience—and yet model legislation must give a useful starting point to the drafters of future sentencing codes. The alternative provisions here supply workable illustrations for state legislators. Individual jurisdictions are encouraged to adapt these templates to fit their own circumstances.

Two basic skeletons are given in black letter. The first version of § 6A.02 describes an agency loosely modeled on the Minnesota sentencing commission, which has operated with fewer than a dozen members. The alternative version takes inspiration from North Carolina and Ohio, which now have commissions of more than 30 members.

In addition, the first version of § 6A.02 is as streamlined as possible. It omits much of the detail presented in subsections (3) through (8) of the alternative version. The two iterations are not meant to present a stark choice, but bookends of possibility. Legislators are invited to pick and choose from the terms of both provisions.

Liberal use of bracketed language in both alternative versions of § 6A.02 signals that there is no strict formula for the specific composition of commission members, and the best methods for appointment of members may vary from state to state. It is generally desirable that the membership represent a full range of perspectives on criminal-justice issues, and that it not be politically or ideologically unbalanced. To this end, there should be multiple appointment authorities or mechanisms to avoid concentration of ap-

pointment power in one official or branch of government. The optimum calibration to meet these concerns is a matter each state must address for itself.

b. Roster of membership. The success of sentencing reforms in individual jurisdictions often turns on the leadership abilities of a handful of public officials. The ambitious project of systemwide change requires the energy, creativity, and commitment of persons who are widely respected, who have devoted the time required to master the comparative advantages of different sentencing-system designs, who are effective communicators, and who understand the priorities and concerns of the many actors working in the pre-reform system. Such leadership is perhaps most needed in the legislature and judiciary. It must also be fostered within the commission itself, through careful selection of the commissioners and executive director, see § 6A.03(1). Each commission member chosen under the alternative provisions of § 6A.02 should be seen as a potential statewide leader in the enterprise of sentencing reform, and as a spokesperson to important constituencies within the criminal-justice system and the general public.

It is desirable that a critical mass of experienced judges from the trial and appellate benches serve on the commission. One underlying philosophy of the revised Code is that sentencing is, at its core, a judicial function. Judges—particularly trial judges—bring essential experience to commission deliberations. Judges are also the most important officials in the administration of sentencing guidelines, and judicial resistance to the form or substance of guidelines can be disruptive to the operation of the system as a whole. Heavy judicial involvement in the promulgation of guidelines and guideline amendments can head off later problems.

In addition, § 6A.05(5)(d) instructs the commission over time to "study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law." The presence of an adequate number of judges on the commission will help ensure that this legislative directive is heeded.

Section 6A.02(1)(a) recommends that the commission include "[three] members from the state's judicial branch." The bracketed recommendation would make the judicial members the largest single contingent on the commission, and deliberately so—for the reasons stated above. But there is no reason why a state could not opt to have four or five judicial members, or somewhat more, in order to recruit depth of experience and wide representation from the trial and appellate courts. Alternative § 6A.02(1)(a) through (c), for instance, would result in five judicial members (again in bracketed recommendations).

With a similar attitude of flexibility, subsection (1)(a) of the first iteration of § 6A.02 suggests no method of selection of the commission's judicial members. A state that wishes to adopt the provision will be called upon to specify an appointment mechanism. In contrast, Alternative § 6A.02(1)(a) through (c) recommend that appointments of judicial members should rest with the chief justice of the supreme court. Even here, however, the appointment authority is suggested in bracketed language. Some jurisdictions might prefer an alternative selection process. State-specific judgments on this score may vary with the size of a court system, its number of levels, whether judges are elected or appointed, and other factors. The revised Code does not attempt to anticipate the best procedures for all systems.

Many sentencing commissions no legislative members, or include legislators only as nonvoting members. The desirability of § 6A.02(1)(b) (commission should include "[two] members from the state legislature") and Alternative § 6A.02(1)(d) ("[four]" voting members from the state house and senate) should be open for discussion in each state. Over the long haul, the success and even the survival of a sentencing commission can depend upon its good working relationship with the state legislature, and upon the degree of respect and understanding among state lawmakers of the work performed by the commission.

Aside from prudential concerns, some states may encounter constitutional difficulty in including legislators as voting members if the commission is located in the judicial branch of government. (This could be reason enough to avoid the placement of the commission in the judicial branch in such a state.) The current draft opts to include a group of legislators, balanced across party lines, on the theory that the commission needs to have close communications with lawmakers and a realistic view of how commission recommendations will fare in the legislative process. Commissioners from the state house and senate can also be influential advocates of the commission's proposals once they go forward. Even in states that opt not to include legislative members on the sentencing commission, these underlying issues need to be highlighted, and addressed through other means.

Section 6A.02(1)(b) sets forth no mechanism for selection of legislative members. Alternative § 6A.02(1)(d), in bracketed language, suggests an appointment process, borrowed from Kansas law, that achieves balanced representation from majority and minority parties. (The bracketed provision is of course not apposite to a state with a unicameral legislature.) One drafting alternative for this subsection

would be to specify that the chairs and ranking minority members of the judiciary committees in both state legislative chambers should automatically be designated as sentencing-commission members. If the judiciary committees are not formally linked to the sentencing commission, it nonetheless remains essential for the commission to forge and maintain regular ties with the leadership of these committees.

The remaining rosters of the commission's membership, as set out in both versions of § 6A.02, seek to achieve balanced representation from those sectors of the criminal-justice system most intimately concerned with sentencing law and policy, and from the public at large.

The Director of Corrections, or a qualified designee, contributes to a sentencing commission invaluable knowledge and experience about the conditions of imprisonment, the personal histories of inmates and ex-inmates, program availability and development, the process of release planning, the transitional difficulties of prisoner reentry and postrelease supervision, and the overarching problems of correctional management with limited resources and (often) expanding demand. Section 6A.02(1)(c) and Alternative § 6A.02(1)(e) both treat such input as requisite to the life of a commission. Representation from the Department of Corrections, and the full cooperation of that agency, will be especially important to the commission's performance of such tasks as the preparation of impact projections when new sentencing laws or guidelines are proposed, see § 6A.07, and the collection of periodic surveys of the correctional populations of the state, see § 6A.05(2)(d).

Both versions of § 6A.02 also provide for equally balanced representation from the ranks of prosecutors and defense counsel in the state. The streamlined commission

would include at least one member from each side of the adversarial aisle. The larger commission would include at least two. Of paramount importance is that neither side be given precedence over the other in the membership roster. Commissions that appear slanted toward either the government or defense viewpoint are likely to encounter strong political backlash. The ideal—not easily obtainable—of an agency that enjoys a solid reputation for nonpartisanship, see § 6A.01(2)(c), will be placed in imminent danger if this principle of equipoise is ignored.

As before, the short-form provisions of § 6A.02(1)(d) and (e) recommend no specific appointment process for government and defense attorneys, while Alternative § 6A.02(2)(a) and (b) come under a heading of gubernatorial appointments—but only as a bracketed suggestion. The best method of selection of members of the bar is anticipated to vary widely across jurisdictions, and so the revised Code offers no firm recommendation to all states. The goal of the selection process is to yield commission members with depth of experience, leadership status, and statewide credibility in their respective fields. They should also be persons who may be expected to adopt the "systemwide policymaking orientation" described in Alternative § 6A.02(5).

It will be important for prosecutorial members to serve as ambassadors to prosecutors throughout the state on behalf of the commission and its work. A state's selection process should be tailored to produce appointments that match these demanding criteria. The governor's office may be well positioned to discharge the task, as suggested in Alternative § 6A.02(2)(a), but individual states might explore other options. It may be desirable in some jurisdictions, for example, to empower the statewide district-attorneys association to elect or designate commission members. If more than one prosecutor is to serve on the commission,

legislation may require that selections be made from different geographic regions of the state.

Similar principles apply to appointments of defense lawyers to the commission. The qualities that matter most are experience, statewide recognition, credibility within the defense bar, and the ability to adopt a systemwide perspective on difficult policy issues. The selection mechanism enacted by a state legislature should be the one best calculated to produce commission members who answer that description. In some states, the approach of gubernatorial appointment suggested (only in brackets) in Alternative § 6A.02(2)(b) will work well. In other jurisdictions, a statewide defenders association or a public-defender agency might be ceded power to designate or elect one or more commission members. The organization and composition of defense bars across the states vary so widely that model legislation cannot at once speak to all circumstances.

Both versions of § 6A.02 suggest the inclusion of at least one official responsible for the provision of probation or parole services. The revised Code recommends that sentencing guidelines should address the full range of community sanctions, and may usefully extend to some aspects of prison-release decisions, the conditions of postrelease and reentry supervision, and the appropriate consequences of sentence violations. See Article 6B. In all of these tasks, the commission will benefit from input from persons with depth of experience in community-based programming. Among the many subjects comprehended in sentencing-reform initiatives, the encouragement of intermediate punishments and adequate postrelease services has developed the most unevenly across jurisdictions. Thorny issues of state and local governmental responsibilities exacerbate problems of overwhelming demand for programs sustained by inadequate resources. The problems of allocation of support

among many competing state and private providers, and adequate monitoring and evaluation to ensure that money is well spent, are as formidable as they are important. Successful innovations in community sanctions require considerable sophistication in design, but also widespread "buy-in" from officials in the service fields that must implement reforms. Commission members chosen from probation or parole offices, however they are selected, should be persons with depth of knowledge and personal prominence among their professional constituencies.

Both versions of § 6A.02 recommend that "one academic with experience in criminal-justice research" be included among the commission's members. Although the number of standing commissions with a dedicated academic member is small, those jurisdictions that have worked with such a requirement view it as a necessity. Prominent among the commission's start-up and ongoing responsibilities are the development of information systems about sentencing, the consumption and sometimes generation of original research about the effects of sentencing laws, the translation of research findings into sentencing guidelines and policy recommendations to the legislature, and the regular production of impact projections when new sentencing laws and guidelines come under consideration. See §§ 6A.04 and 6A.05. A qualified academic commissioner provides criminal-justice research expertise that otherwise might be missing entirely from the membership. The academic member can be expected to assist in the formulation of the staff's research agenda, and help guide the recruitment and hiring of a high-quality research director and staff.

Both versions of § 6A.02 suggest that at least one member of the public be included in the membership roster. Alternative § 6A.02(2)(h), for jurisdictions that prefer a large commission, suggests approximately three public

members, with bracketed recommendations that one should be a crime victim and one should be a rehabilitated ex-inmate of a prison within the state. Public members add appreciably to the breadth of perspective found on a commission's rolls, and can aid other members in the task of reflecting the values of the broader community in all of the commission's work.

Although all commission members have the duty to deliberate upon and reflect community values to the best of their ability, these efforts would not be complete without direct representation of the general public among the voting commissioners. Questions of justice in punishment, fairness in process, and proportionality among penalties cannot be resolved by data and research alone. When crafting guidelines, a commission is regularly called upon to make moral judgments as to the penalty framework for the system as a whole, and specific recommended penalties within that framework. The successful operation of the sentencing system requires that the guidelines earn and carry the weight of moral legitimacy. See § 1.02(2)(b)(viii). Public commission members are essential to realization of this goal.

The opportunities for public input into the shape and evolution of sentencing guidelines should not be limited to the contributions of formal commissioners. Alternative § 6A.02(8) invites commissions to form advisory committees, including members from outside the commission, to broaden the sources of information and insight available to the commission. Even without explicit authorization, a wise commission will make use of this device to reach out to important constituencies across the state, including individuals or groups who cannot feasibly be represented by one or several public-member commissioners.

Further, § 6B.02(10) directs the commission to comply with the state's administrative-procedure act (however denominated) when promulgating guidelines or amended guidelines. At a minimum, this will guarantee that public notice and opportunity for comment are routine features of the guideline-drafting cycle. It is in a commission's self-interest to ensure that these processes are observed in a meaningful fashion, and are not merely perfunctory. The best foundations for the success of a sentencing commission and a guidelines structure are public awareness and satisfaction.

For the most part, the expanded roster of commissioners in Alternative § 6A.02 is filled out through the inclusion of multiple members in each of the categories discussed above. The alternative provision also includes two categories of commissioners not found in the shorter-form provision of § 6A.02: one chief of police and one representative of local government. A law-enforcement perspective is otherwise missing on the commission. Although the police are not linked to the sentencing process as directly as other official members, they deal regularly with probationers and prison releasees, and collaborate in an increasing number of jurisdictions with community corrections officials. Reform initiatives such as community policing and community sentencing share philosophical underpinnings and encounter many of the same operational realities. The pragmatic viewpoint of a police chief can add meaningfully to the perspectives supplied by probation or parole officials on problem-solving in the field.

The addition of a representative of local government to the sentencing commission furthers the policy goal that the use of effective intermediate punishments at the community level should be increased and encouraged, see § 1.02(2)(b)(iv). In nearly every state, the Department of

Corrections subsists on appropriations from the state treasury, while most intermediate punishments are organized and funded by local governments. Thus, apparently straightforward efforts to divert prison-bound offenders to community programs can encounter compound problems of intergovernmental authorities, incentives, shortfalls in resources, and barriers to the equitable distribution of costs. A sentencing commission with realistic ambitions to untangle these difficulties must be cognizant of the concerns of local government officials. This may be achieved through local-government representation on the commission's standing membership as recommended in Alternative§ 6A.02(2)(f), through the use of advisory committees that include local government officials, as recommended in Alternative § 6A.02(8), or both.

c. Selection of chair. Section 6A.02(2) and Alternative § 6A.02(3) both incorporate a bracketed recommendation that the chair of the sentencing commission be selected from among the judicial members, without insisting that all jurisdictions adopt this as a strict requirement. A judicial chairperson helps effectuate the revised Code's philosophy that the judicial branch should occupy the centermost position in a well-designed sentencing structure. The chair may also serve as a uniquely effective emissary to judges statewide, to help increase judicial understanding and acceptance of the guidelines, and to assure judges that the commission is alert to their feedback and concerns.

The past decades of sentencing-commission history in a variety of states have yielded several examples of outstanding chairpersons who have come from walks of professional life other than the judiciary. As a result, both versions of § 6A.02 invite the separate states to reach their own best judgment concerning the mandate of a judicial chairperson.

The chair is appointed by the executive in a plurality of jurisdictions with sentencing commissions, and this method of designation is suggested in bracketed language in Alternative § 6A.02(3). No specific recommendation is given in the short-form provision. If not a gubernatorial appointment, a chairperson may be appointed by the chief justice of the supreme court, selected by the commission membership, or designated through other appropriate means.

d. Terms of service. Both versions of § 6A.02 provide for staggered terms of service by commission members. Among the founding members, half should be appointed for abbreviated terms, so that in the future the membership will never turn over completely in a single season. The black letter in both versions of the provision suggests, in brackets, that the full term of service should be four years. A somewhat longer or somewhat shorter term could serve equally well. The goal of the provision is to define a period of service that is long enough for members to become immersed in the relevant issues, and to facilitate continuity and institutional memory, but not so long as to make the assignment overly burdensome to the average member. For the occasional commissioner whose level of personal commitment extends for a longer period, Alternative § 6A.02(4) states that "[m]embers may serve successive terms without limitation."

e. Members' systemwide orientation. Alternative § 6A.02(5) articulates criteria for the selection of commission members that may be commended to appointment authorities, whether or not these criteria are formally codified. Perhaps the most important ideal is that the commission function as a nonpartisan and collegial body, in which members leave behind their job descriptions and role biases to take a common interest in the operation of the pun-

ishment system as a whole. There is no way to guarantee that a commission's group personality will coalesce in this way or that all members will leave their advocacy hats at the commission's door. Alternative § 6A.02(5) promotes realization of the ideal by stating it both as a guide to appointing authorities, and as an aspiration addressed to those chosen to serve as sentencing commissioners.

f. Compensation and reimbursement. Alternative § 6A.02(6) states a preference that commission members should receive no salary for their service, but may be reimbursed for out-of-pocket expenses incurred in their work for the commission. The experience in most states has been that commission members give high-quality public service without compensation, and a commission's reputation for neutrality is enhanced when commission members are not perceived to have vested interests in their offices. Given also that state sentencing-commission budgets are typically strained to support necessary operations, it is wise to preserve available resources.

As with most of § 6A.02 (both versions), the recommendation in Alternative 6A.02(6) is not intended to be written in stone. It adopts the successful practice of a number of state sentencing commissions, but is not meant to foreclose experimentation. If a state legislature were to conclude, for example, that better or longer service might be had from commissioners who received a stipend or salary, this arrangement would not offend the spirit of adaptability that permeates all of § 6A.02.

g. Diversity of commission's membership. Part of the mission of a sentencing commission is to enhance the legitimacy of the punishment system as perceived by all affected communities in the jurisdiction, see § 1.02(2)(b)(viii). This aspiration is especially important with respect to

minority groups who often suffer disproportionately from crime victimization and the human costs of legal punishments. In many states, regional differences in crime and levels of punishment are also substantial concerns. Wherever reasonably possible, the composition of the commission should reflect the diversity of communities throughout the state.

h. Advisory committees. Existing commissions have sometimes found it advantageous to form advisory committees to forge lines of communications with identified groups or constituencies, or to address specialized projects undertaken by the commission. An initiative to increase the use of and funding for intermediate punishments, for example, may benefit from the expanded input of persons working in the community corrections field, local government officials, academics or consultants with specialized expertise, and others not otherwise associated with the commission. Alternative § 6A.02(8) explicitly grants authority to the commission to constitute advisory committees. The commission's general powers should allow it to do so, however, even in the absence of statutory invitation.

REPORTER'S NOTE

a. Scope. As examples of legislation creating small and large commissions, Minn. Stat. § 244.09, subd. 1 (2006), and N.C. Gen. Stat. § 164-37 (2006) are set out in the Statutory Appendix to this Section.

b. Roster of membership. Existing sentencing commissions range in size from seven to thirty-one members. See Ala. Code § 12-25-3(a) (2006) (16 members); Ark. Code § 16-90-802 (2006) (9 voting and 2 nonvoting members); Del Code tit. 11, § 6580(a) (2006) (11 members); D.C. Code § 3-102(a)(1), (2) (2006) (15 voting members and 5 nonvoting members); Mass. Gen. Laws § 211E, § 1(a) (2006) (9 voting and 6 nonvoting members); Minn. Stat. § 244.09, subd. 1 (2006) (11 members); Rev. Stat. Mo. § 558.019(6)(1) (2006) (11 members); N.C. Gen.

Stat. § 164-37 (2006) (30 members); 2003 N.J. Sess. Law Serv. 265 (15 members); N.M. Stat. § 9-3-10(B) (2006) (23 members); Oh. Rev. Code § 181.21(A) (2006) (31 members); Okla. Stat. tit. 22, § 1502 (2006) (15 members); Or. Rev. Stat. § 137.654(1) (2006) (9 members); 42 Pa. Cons. Stat. § 2151.2(a) (2006) (11 members); S.C. Code § 24-26-10(A), (B) (2006) (13 voting and 4 nonvoting members); 28 U.S.C. § 991(a) (2000) (7 voting members and 1 nonvoting member); Utah Code Ann. § 63-25a-301 (2006) (27 members); Va. Code § 17.1-802 (2006) (17 members); Wash. Rev. Code § 9.94A.860 (2006) (24 members); Wis. Stat. § 15.105(27)(a), (b) (2006) (16 voting members and 3 nonvoting members).

The various professional or public qualifications for membership in both versions of § 6A.02 are drawn from the above sources. Commissions in a handful of jurisdictions include members with professional or public backgrounds not specified in the alternative versions of § 6A.02. See Ala. Code § 12-25-3(a) (2006) (the governor or the governor's designee); D.C. Code § 3-102(a)(1), (2) (2006) ("Corporation Counsel for the District of Columbia or his or her designee"; one member of the bar who does not specialize in the practice of criminal law; "[a] professional from an established organization devoted to research and analysis of sentencing issues and policies, appointed by the Chief Judge of the Superior Court of the District of Columbia"); N.C. Gen. Stat. § 164-37 (2006) (The President of the Association of Clerks of Superior Court of North Carolina, or his designee; A representative of the Department of Juvenile Justice and Delinquency Prevention); Wash. Rev. Code § 9.94A.860 (2006) (an administrator of juvenile-court services).

On the unique and essential role of judges as sentencing commissioners, see Michael Tonry, Sentencing Matters (1996), ch. 6. One criticism of the composition of the original U.S. Sentencing Commission was the small role given to federal judges. See Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), at 44 (arguing that judges were seen by Congress as "the *problem* and as such could hardly be part of the *solution*") (emphasis in original). It may be especially important, in a system of advisory sentencing guidelines, that judges be well represented on the sentencing commission. The effectiveness of advisory guidelines depends in important part on their perceived value and legitimacy

among judges. See Kim S. Hunt & Michael Connelly, Advisory Guidelines in the Post-*Blakely* Era, 17 Fed. Sent'g Rep. 233 (2005).

On the advantages of legislators as sentencing members, or other close ties between the commission and legislature, see Rachel F. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 800-804 (2005). Much lore of the pros and cons of legislative membership exists only in the oral histories of sentencing commissions, but a good discussion of the (mostly positive) experience in North Carolina can be found in Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002).

The method of appointment of sentencing commissioners varies across jurisdictions. Nearly all state codes designate multiple appointing authorities spread across the branches of government. See, e.g., Kan. Stat. § 74-9102 (2005) (some members designated by statute; others appointed by the chief justice, governor, the senate president, the senate minority leader, the speaker of the house of representatives, and the minority leader of the house of representatives.); Va. Code § 17.1-802 (2006) (some members designated by statute; others appointed by the chief justice, the governor, the speaker of the house, and the senate committee on rules). See also Ala. Code § 12-25-3(a) (2006); Del. Code tit. 11, § 6580(a) (2006); D.C. Code § 3-102(a)(1), (2) (2006); Md. Code, Crim. Proc. § 6-204(a)(1) (2006); Minn. Stat. § 244.09, subd. 2 (2006); N.C. Gen. Stat. § 164-37 (2006); 2003 N.J. Sess. Law Serv. 265; Oh. Rev. Code § 181.21(A) (2006); 42 Pa. Cons. Stat. § 2151.2(a) (2006); Utah Code § 63-25a-301 (2006); Va. Code § 17.1-802 (2006); Wash. Rev. Code § 9.94A.860 (2006); Wis. Stat. § 15.105(27)(a) (2006). But see Ark. Code § 16-90-802 (2006) (governor appoints voting members); Mass. Gen. Laws § 211E, § 1(a) (2006) (same); Or. Rev. Stat. § 137.654(1) (2006) (same).

Federal law differs from the multiple-appointment-authority model used by most states. The President alone appoints all seven voting members of the U.S. Sentencing Commission. See 28 U.S.C. § 991(a) (2006).

c. Selection of chair. Provisions for the selection of the commission's chair are varied. Almost universally, the chair must be selected from the commission membership. Across jurisdictions, there is some

preference for a judicial member to serve as chair. See Ark. Code § 16-90-802(c)(2) (2006) (governor selects chair); Del. Code tit. 11, § 6580(a) (2006) (chief justice selects chair from judicial members); D.C. Code § 3-102(c) (2006) (commission elects chair); Kan. Stat. § 74-9102(c) (2005) (governor to selects chair from judicial members); Md. Code, Crim. Proc. § 6-204(a)(1) (2006) (governor appoints chair); Mass. Gen. Laws § 211E, § 1(a) (2006) (governor appoints chair); Minn. Stat. § 244.09, subd. 2 (2006) (governor selects chair); Rev. Stat. Mo. § 558.019(6)(6) (2006) (same); N.C. Gen. Stat. § 164-37(1) (2006) (chief justice selects sitting or former judge as chair); 2003 N.J. Sess. Law Serv. 265 (commission elects chair); Oh. Rev. Code § 181.21(A) (2006) (chief justice to serve as chair); Okla. Stat. tit. 22, § 1504 (2006) (chair appointed by legislative leaders); Or. Rev. Stat. § 137.654(3) (2006) (governor selects chair); 42 Pa. Cons. Stat. § 2152(c) (2006) (commission selects chair); S.C. Code § 24-26-10 (2006) (commission elects chair); 28 U.S.C. § 991(a) (2000) (President appoints chair); Utah Code § 63-25a-301(1) (2006) (commission elects own officers); Va. Code § 17.1-802 (2006) (chief justice to appoint chair who is not active member of the judiciary); Wash. Rev. Code § 9.94A.860(1) (2006) (governor appoints chair); Wis. Stat. § 15.105(27)(d) (2006) (governor designates chair).

d. Terms of service. Sentencing commissioners' terms of service range from two to six years across the states, with additional terms usually permitted. Four years is the term of service found most frequently in state legislation. See Ala. Code § 12-25-3(b)(1) (2006); Ark. Code § 16-90-802(c)(1)(B) (2006); Del. Code tit. 11, § 6580(a)(1) (2006); D.C. Code § 3-102(b) (2006); Kan. Stat. § 74-9102(e) (2005); Md. Code, Crim. Proc. § 6-204(b) (2006); Mass. Gen. Laws § 211E, § 1(b) (2006); Minn. Stat. § 244.09, subd. 3 (2006); Rev. Stat. Mo. § 558.019(6)(1) (2006); N.C. Gen. Stat. § 164-38 (2006); Okla. Stat. tit. 22, §§ 1502, 1503 (2006); Or. Rev. Stat. § 137.654(2)(a) (2006); 42 Pa. Cons. Stat. § 2152(b) (2006); S.C. Code § 24-26-10 (2006); Utah Code Ann. § 63-25a-602 (West 2006); Va. Code § 17.1-802 (2006); Wash. Rev. Code § 9.94A.860(3) (2006); Wis. Stat. § 15.105(27)(c) (2006). Members of the U.S. Sentencing Commission serve six-year terms, longer than in any state. 28 U.S.C. § 992(a) (2000).

Alternative § 6.A2(4), intended to ensure that the full membership of a commission does not expire at the same time, is inspired by Del. Code tit. 11, § 6580(a)(1) (2006).

e. Members' systemwide orientation. See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(a)(ii) (1994) ("Members of the commission should be selected for their knowledge and experience and their ability to adopt a systemic, policy-making orientation. Members should not function as advocates of discrete segments of the criminal justice system.").

f. Compensation and reimbursement. State sentencing commissioners receive no or token compensation for their service, but are reimbursed for expenses. The following provisions require volunteer service unless otherwise indicated. See Ark. Code § 16-90-802(c)(3) (2006); D.C. Code § 3-102(d) (2006); Kan. Stat. § 74-9102(f) (2005); Md. Code, Crim. Proc. § 6-205(c) (2006); Mass. Gen. Laws § 211E, § 1(b) (2006); Minn. Stat. § 244.09, subd. 4 (2006) (public members compensated $50 per day); Rev. Stat. Mo. § 558.019(6)(7) (2006); N.C. Gen. Stat. § 164-38 (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(E) (2006); Oh. Rev. Code § 181.21(B) (2006); Okla. Stat. tit. 22, § 1503 (2006); Or. Rev. Stat. § 137.654(8) (2006); 42 Pa. Cons. Stat. § 2152(f) (2006); Utah Code § 63-25a-305(1) (2006); Va. Code § 2.2-2813, 17.1-802, and 30-19.12 (2006) (members compensated $50 per day); Wash. Rev. Code § 9.94A.860(5) (2006); Wis. Stat. § 15.105(27)(e) (2006) (members not full-time state employees receive $25 per day).

Compare 28 U.S.C. § 992(c) (2006) (members of U.S. Sentencing Commission are compensated for full-time or part-time service by formula based on salaries of U.S. Court of Appeals Judges). There may be dangers of micromanagement in a structure where commissioners are salaried. See U.S. General Accounting Office, U.S. Sentencing Commission: Changes Needed to Improve Effectiveness (1990), at 12 (finding that "the extensive involvement of individual commissioners in what would normally be staff activities … contributes to the organizational disarray we found at the Commission. … Most troublesome is the direct control by individual commissioners over major research projects.").

g. Diversity of commission's membership. See Ala. Code § 12-25-3(b)(3) (2006) ("membership of the commission shall be inclusive and reflect the racial, gender, geographic, urban/rural, and economic diversity of this state"); Kan. Stat. § 74-9102(a)(9) (2005) (of the 2 members

from the general public, at least 1 must be a racial minority); Minn. Stat. § 244.09, subd. 2 (2006) ("[w]hen an appointing authority selects individuals for membership on the commission, the authority shall make reasonable efforts to appoint qualified members of protected groups"); N.M. Stat. § 9-3-10(B) (2006) ("The commission shall reflect reasonable geographical and urban-rural balances and regard for the incidence of crime and the distribution and concentration of law enforcement services in the state"); Oh. Rev. Code § 181.21(A) (2006) (requiring the Chief Justice and the Governor to consider adequate representation by race and gender when making their appointments); Or. Rev. Stat. § 137.654(1) (2006) (requiring Governor to consider different geographic regions of the state when appointing members); Utah Code § 63-25a-301(2)(t) (2006) (governor to appoint 2 public members "who exhibit sensitivity to the concerns of victims of crime and the ethnic composition of the population").

h. Advisory committees. Some codes grant explicit permission to the sentencing commission to form subcommittees and advisory committees. Where not express, these powers are likely assumed. See Md. Code, Crim. Proc. § 6-206(a)(1) (2006); N.C. Gen Stat. § 164-43(a) (2006); Okla. Stat. tit. 22, § 1508(B) (2006).

STATUTORY NOTE

Minnesota Statutes § 244.09 (2006)

Subdivision 1. Commission; establishment. There is hereby established the Minnesota sentencing guidelines commission which shall be comprised of 11 members.

Subdivision 2. The sentencing guidelines commission shall consist of the following:

(1) the chief justice of the supreme court or a designee;

(2) one judge of the court of appeals, appointed by the chief justice of the supreme court;

(3) one district court judge appointed by the chief justice of the supreme court;

(4) one public defender appointed by the governor upon recommendation of the state public defender;

(5) one county attorney appointed by the governor upon recommendation of the board of directors of the Minnesota county attorneys association;

(6) the commissioner of corrections or a designee;

(7) one peace officer as defined in section 626.84 appointed by the governor;

(8) one probation officer or parole officer appointed by the governor; and

(9) three public members appointed by the governor, one of whom shall be a victim of a crime defined as a felony.

When an appointing authority selects individuals for membership on the commission, the authority shall make reasonable efforts to appoint qualified members of protected groups, as defined in section 43A.02, subdivision 33.

One of the members shall be designated by the governor as chair of the commission.

Subdivision 3. Each appointed member shall be appointed for four years and shall continue to serve during that time as long as the member occupies the position which made the member eligible for the appointment. Each member shall continue in office until a successor is duly appointed. Members shall be eligible for reappointment, and appointment may be made to fill an unexpired term. The term of any member appointed or reappointed by the governor before the first Monday in January 1991 expires on that date. The term of any member appointed or reappointed by the governor after the first Monday in January 1991 is coterminous with the governor. The members of the commission shall elect any additional officers necessary for the efficient discharge of their duties.

Subdivision 4. Each member of the commission shall be reimbursed for all reasonable expenses actually paid or incurred by that member in the performance of official duties in the same manner as other employees of the state. The public members of the commission shall be compen-

sated at the rate of $50 for each day or part thereof spent on commission activities. . . .

[*Subdivisions 5 through 14 are omitted*.]

North Carolina General Statutes § 164-37 (2006)

§ 164-37. Membership; chairman; meetings; quorum

The [North Carolina Sentencing and Advisory] Commission shall consist of 30 members as follows:

(1) The Chief Justice of the North Carolina Supreme Court shall appoint a sitting or former Justice or judge of the General Court of Justice, who shall serve as Chairman of the Commission;

(2) The Chief Judge of the North Carolina Court of Appeals, or another judge on the Court of Appeals, serving as his designee;

(3) The Secretary of Correction or his designee;

(4) The Secretary of Crime Control and Public Safety or his designee;

(5) The Chairman of the Parole Commission, or his designee;

(6) The President of the Conference of Superior Court Judges or his designee;

(7) The President of the District Court Judges Association or his designee;

(8) The President of the North Carolina Sheriff's Association or his designee;

(9) The President of the North Carolina Association of Chiefs of Police or his designee;

(10) One member of the public at large, who is not currently licensed to practice law in North Carolina, to be appointed by the Governor;

(11) One member to be appointed by the Lieutenant Governor;

(12) Three members of the House of Representatives, to be appointed by the Speaker of the House;

(13) Three members of the Senate, to be appointed by the President Pro Tempore of the Senate;

(14) The President Pro Tempore of the Senate shall appoint the representative of the North Carolina Community Sentencing Association that is recommended by the President of that organization;

(15) The Speaker of the House of Representatives shall appoint the member of the business community that is recommended by the President of the North Carolina Retail Merchants Association;

(16) The Chief Justice of the North Carolina Supreme Court shall appoint the criminal defense attorney that is recommended by the President of the North Carolina Academy of Trial Lawyers;

(17) The President of the Conference of District Attorneys or his designee;

(18) The Lieutenant Governor shall appoint the member of the North Carolina Victim Assistance Network that is recommended by the President of that organization;

(19) A rehabilitated former prison inmate, to be appointed by the Chairman of the Commission;

(20) The President of the North Carolina Association of County Commissioners or his designee;

(21) The Governor shall appoint the member of the academic community, with a background in criminal justice or corrections policy, that is recommended by the President of The University of North Carolina;

(22) The Attorney General, or a member of his staff, to be appointed by the Attorney General;

(23) The Governor shall appoint the member of the North Carolina Bar Association that is recommended by the President of that organization.

(24) A member of the Justice Fellowship Task Force, who is a resident of North Carolina, to be appointed by the Chairman of the Commission.

(25) The President of the Association of Clerks of Superior Court of North Carolina, or his designee.

(26) A representative of the Department of Juvenile Justice and Delinquency Prevention.

The Commission shall have its initial meeting no later than September 1, 1990, at the call of the Chairman. The Commission shall meet a minimum of four regular meetings each year. The Commission may also hold special meetings at the call of the Chairman, or by any four members of the Commission, upon such notice and in such manner as may be fixed by the rules of the Commission. A majority of the members of the Commission shall constitute a quorum.

§ 6A.03. Staff of Sentencing Commission.

(1) The commission shall employ an executive director to serve at the pleasure of the commission. The executive director's responsibilities shall include:

(a) supervision of the activities of all persons employed by the commission;

(b) ultimate responsibility for the performance of all tasks assigned to the commission;

(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.

Comment:

a. Scope. This provision speaks to the composition of the staff of the sentencing commission. The foundational principle of § 6A.03 is that a commission requires adequate personnel to perform its central functions. Sentencing commissions participate in statewide policymaking that will visit dramatic effects upon large numbers of human lives, including offenders, crime victims (past and prospective), their respective families, and their communities. The commission's work also carries enormous budgetary implications for state and local governments. A well-functioning commission can do much to ensure that public resources are deployed in an effective and cost-efficient manner. Given the magnitude of the human and financial stakes involved, a responsible state legislature should recognize that the costs expended to build a qualified professional staff are a necessary investment.

b. Executive director. It is desirable to have a single staff member with ultimate responsibility to see that the commission's work gets done, that deadlines are met, that budgets are prepared and maintained, and so on. Section 6A.03 as a whole defines a chain of organizational authority from the commission membership to the executive director to the remainder of the staff. A clear chain of command helps ensure that the commission's staff are given clear direction and cannot be pulled in multiple, conflicting directions.

The executive director's duties are outlined in subsections (1)(a) through (1)(d). These include supervision of the activities of all persons employed by the commission, ultimate responsibility for the performance of all tasks assigned to the commission, and other duties as determined by the commission membership.

Subsection (1)(c) provides that an executive director's duties are outward-looking as well as internal. The director is charged with maintaining contacts with other state agencies involved in sentencing and corrections processes. Such lines of communication are needed so that the commission may interact with other government agencies as required in § 6A.08. The director should also forge contacts with sentencing commissions in other jurisdictions. This enables the commission to take advantage of the experiences of other, similar sentencing structures. See § 6A.01(2)(d).

c. Research staff. Subsection (2) gives emphasis to the commission's research capabilities and underscores the need to build a commission staff that is well supported by qualified research associates as well as a research director. The quality of the commission's work in all essential areas—including guideline drafting, monitoring and assessment of the sentencing system's operation, and the preparation of projections of the future impact of sentencing laws—depends on the recruitment of a research staff capable of gathering, organizing, and interpreting the necessary data.

d. Education and training staff. Subsection (3) underscores the importance of adequate personnel to discharge functions of education, training, and guideline implementation. No matter how workable a commission's sentencing guidelines may be, the commission plays an essential role in making explanatory resources available to other actors

throughout the sentencing system. These may include the preparation of user's guides or benchbooks, the development of user-friendly software, the collection of summaries of relevant case law, the maintenance of an official website, the offering of training seminars or materials, and the establishment of a "hot line" to accept telephone queries, see § 6A.05(6). Although no one doubts the ongoing necessity of educating judges, lawyers, and probation officers, and ensuring that procedures are followed and that proper records are maintained throughout the system, these unglamorous tasks are typically overlooked in authorizing legislation.

e. Additional staff. Subsection (4) is a catch-all provision authorizing the executive director to employ additional staff as necessary to fulfill the commission's responsibilities. The range of possibilities cover a broad spectrum including clerical workers and maintenance staff, on the one hand, and, if found necessary by a commission, additional professional staff such as in-house counsel or specialized consultants.

REPORTER'S NOTE

a. Scope. Most jurisdictions equip sentencing commissions with their own executive director and staff, see Ala. Code § 12-25-12 (2006); Ark. Code § 16-90-802(f) & (g) (2006); D.C. Code § 3-107 (2006); Kan. Stat. § 74-9103 (2005); Md. Code, Crim. Proc. § 6-205(d) (2006); Mass. Gen. Laws § 211E, § 1(c),(g) (2006); Minn. Stat. § 244.09 (West 2006); N.C. Gen. Stat. § 164-39 (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(D)(2) (2006); Oh. Rev. Code § 181.21(C) (2006); Or. Rev. Stat. § 137.654(7) (2006); S.C. Code § 24-26-30 (2006); 28 U.S.C. § 996 (2000); Va. Code § 17.1-804 (2006); Wash. Rev. Code § 9.94A.855 (2006); Wis. Stat. § 973.30(2) (2006). See also See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(c) (1994) ("Adequate staff assistance for the commission is essential and should include persons familiar with recent developments in empirical criminology").

A handful of states have provided no staff to the sentencing commission, but allow the commission to draw on staff from other agencies or departments. See Del. Code tit. 11, § 6581(i) (2006); Rev. Stat. of Mo. § 558.019(8) (2006).

The sizes of sentencing commissions' staffs, and levels of state funding, vary considerably across jurisdictions. The following table displays legislative appropriations for 17 American sentencing commissions charged with ongoing oversight of sentencing-guidelines systems. The information was compiled in an Internet search of the most recent available budget information in each jurisdiction.

Legislative Appropriations for Seventeen Sentencing Commissions

Alabama Sentencing Commission	$495,306 for FY 2007
Arkansas Sentencing Commission	$346,571 for 2007-2008
Delaware Sentencing Accountability Commission	$20,000 annual appropriation each year since 1987; Delaware Criminal Justice Council provides administrative support and Delaware Statistical Analysis Center provides research support
District of Columbia Sentencing Commission	$699,567 for FY 2007
Kansas Sentencing Commission	$703,220 for FY 2007
Maryland State Commission on Criminal Sentencing Policy	$338,901 for FY 2007
Minnesota Sentencing Guidelines Commission	$926,000 for 2006-2007 biennium

Missouri Sentencing Advisory Commission	Subsumed within Missouri Supreme Court budget for FY 2006
North Carolina Sentencing and Policy Advisory Commission	$746,701 for 2006-2007
Ohio Criminal Sentencing Commission	$343,730 for FY 2007
Oregon Criminal Justice Commission	$1,126,359 for 2005-2007 biennium
Pennsylvania Commission on Sentencing	$1,120,000 for 2006-2007
United States Sentencing Commission	$13,126,000 for FY 2005
Utah Sentencing Commission	$147,800 for 2006-2007
Virginia Criminal Sentencing Commission	$886,171 for FY 2006
Washington State Sentencing Guidelines Commission	$863,000 for FY 2007
Wisconsin Sentencing Commission	$308,700 for FY 2006-2007

Sources: Alabama Legislative Fiscal Office, State General Fund Comparison Sheets, FY 2007 as Enacted; Arkansas 86th General Assembly, Agency Budget Information, Arkansas Sentencing Commission (Agency 0328) 2007-2009 Biennium; Personal communication from John O'Connell, Director, Delaware Statistical Analysis Center, January 24, 2007; Personal communication from Kim Hunt, Director, District of Columbia Sentencing Commission, January 23, 2007; Appropriations Report for Kansas Sentencing Commission (Fiscal Year 2007); Maryland Department of Budget and Management, Summary of Operating Budget Appropriations for the Fiscal Year Ending June 30, 2007 at C.3; Minnesota Department of Finance, State Agency Profiles, Sentencing Guidelines Comm. 2 (2006) The Missouri Budget–Fiscal Year 2007, Judiciary at 12-13;; North Carolina 2006-2007 Revised Certified Budget Volume 4 at 10; Ohio H.B. 66, 126th Leg. (2005); State

of Oregon, Legislative Fiscal Office, Analysis of the 2005-2007 Legislatively Adopted Budget 144 (2005); Commonwealth of Pennsylvania, Governor's Office of the Budget, 2006-2007 Enacted Budget 166 (2006); U.S. Sentencing Commission 2005 Annual Report, c. 1 at 5; 2006 Utah Laws Ch. 1 (S.B. 1); Virginia Acts of Assembly c. 951 (2005 Sess.); 2006 Wash. Legis. Serv. c. 372, § 224 (S.S.B. 6386) (2006); 2005 Assemb. B. 100, Wisconsin Executive Budget Bill FY 2006-2007, at 253.

c. Research staff. See ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(d) (1994) ("The commission's empirical research capacity should be given highest priority and should be adequately funded by the legislature"); Minn. Stat. § 244.09, subd. 10 (2006) (mandating that commission hire a research director). The secondary literature has recognized the critical importance of adequate research expertise and research staffing in order for a sentencing commission to perform its basic functions. See Kay A. Knapp, Organization and Staffing, in Andrew von Hirsch et al., The Sentencing Commission and Its Guidelines (1987).

§ 6A.04. Initial Responsibilities of Sentencing Commission.

(1) In the first [two years] of its existence, the sentencing commission shall promulgate and present to the legislature one or more proposed sets of sentencing guidelines as provided in Article 6B, and shall develop a correctional-population forecasting model as provided in § 6A.07.

(2) In discharging its responsibilities under subsection (1), the commission shall:

(a) collect information on all correctional populations in the state;

(b) survey the correctional resources across state and local governments; and

(c) conduct research into crime rates, criminal cases entering the court system, sentences imposed and served for particular

offenses, and sentencing patterns for the state as a whole and for geographic regions within the state.

(3) In discharging its responsibilities under subsection (1), the sentencing commission should:

(a) consult available research and data on the current effectiveness of sentences imposed and served in the jurisdiction as measured against the purposes in § 1.02(2); and

(b) study the experiences of other jurisdictions with sentencing commissions and guidelines.

(4) In conjunction with its activities under this Section, the sentencing commission may:

(a) advise the legislature of any needed reallocations or additions in correctional resources;

(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.

Comment:

a. Scope. This provision defines the essential mission of a sentencing commission during the startup phase of its existence. The required initial period is expected to be roughly 24 months, as indicated in bracketed language in § 6A.04(1). Following the start-up phase, a commission's continuing responsibilities are defined in § 6A.05.

b. Time period. The time frame in subsection (1) is a crucial element of the provision. It is important that legislators and other policymakers plan sensibly for the manifold difficulties of a commission's early duties. The revised Code seeks to dispel any notion that a new commission can discharge its role in wholesale sentencing reform over a short period. Startup commissions in some jurisdictions have been hampered by unrealistic deadlines. Although these may be extended, and often are in the face of necessity, the thoughtful and efficient promulgation of statewide sentencing policies is best achieved within a workable timeline established from the outset.

The suggested two-year period is close to the minimum necessary for a new commission to do its work carefully and with proper staging. The appropriate timeline for each jurisdiction will vary somewhat depending on a host of factors, including the size, population, and regional diversity of the state, the resources given the commission, the complexity of the pre-reform sentencing structure, the quality of preexisting criminal-justice information systems, the political climate of the state, and the clarity of instructions conveyed to the commission in authorizing legislation. Depending on

such circumstances, the startup phase could be pared to as little as 18 months or extended to as much as three years.

c. Guidelines and forecasting model. The commission's primary tasks in its early life are the promulgation of sentencing guidelines and the development of a correctional-population forecasting model, as highlighted in subsection (1). These are, respectively, the commission's most significant prescriptive work product and its most useful research tool. All other responsibilities in § 6A.04 are calculated to facilitate the commission in performance of its primary tasks.

Section 6A.04 itself provides no instruction on the shape and legal effect of the guidelines the commission is asked to prepare. These subjects are treated in Article 6B, which is cross-referenced in § 6A.04(1). Similarly, this provision does not lay out the details of the correctional forecasting model to be developed by the commission, a subject dealt with in the cross-referenced § 6A.07.

d. Required research agenda. Subsection (2) describes research activities that a commission must undertake in order to assemble foundational knowledge of the existing sentencing and corrections system in the state. Any sentencing guidelines authored by the commission must be sensitive to standing correctional populations, available correctional resources, crime rates, past case-processing patterns, and past sentencing patterns. Any correctional-population forecasting model developed by the commission will require at least this much information if it is to generate reliable projections. Subsection (2) does not grant a commission discretion to deviate from its stated research agenda.

e. Encouraged research agenda. Subsection (3) encourages the commission to consult available research about the

effectiveness of sentences imposed and served in the jurisdiction in light of their underlying purposes, and to study the experiences of other jurisdictions with sentencing commissions and guidelines. The first task is meant to comprehend a survey of evaluation research of criminal sanctions. This includes such things as a survey of research into the crime-reductive benefits of incarceration for specific offense types and offenders, the effectiveness of in-prison and outpatient drug-treatment programs depending on the characteristics of their clientele, the costs and benefits of restorative justice sanctions for certain offense types, and so on.

The research tasks in subsection (3) are discretionary with the commission. Relevant evaluation research may not always be available, may describe out-of-state programs not replicated in the commission's home jurisdiction, and may not be of high quality. The injunction to study the experiences of other commission-guideline states will be more important to some commissions than others, and its application may be topic specific. A commission working in a sentencing system that is closely modeled on one or more outside jurisdictions may have greater reason to consult outside experience than a commission in a state that has created a wholly unique sentencing structure.

Nothing in subsections (2) and (3) is intended to preclude a commission from identifying and performing research tasks in addition to those enumerated in the statute.

f. Recommendations for change elsewhere in the sentencing system. In both its early and later periods of existence, a sentencing commission may find that its observations of the guidelines in action, its proposals to amend the guidelines, the findings of its impact projections, or some other aspect of its work counsel in favor of legislative or rulemaking changes outside the commission's authority.

Subsection (4) creates official lines of communication between the commission, the legislature, and the rulemaking authority of the state, so that the commission's recommendations on such matters will receive an official hearing.

Subsection (4)(a) authorizes the commission to advise the legislature of needed reallocations or additions in correctional resources within the state. It is meant to be read broadly so that the words "correctional resources" are understood to include not only prisons and jails, but the full range of community-based punishments. Some commissions have persuaded their legislatures to allocate substantially increased appropriations to intermediate punishments, in conjunction with sentencing guidelines designed to divert offenders away from confinement sanctions. Other commissions have accurately projected state-prison population growth in time for new prison construction to get underway. All such functions are embraced in this subsection.

Subsection (4)(a) is also intended to direct the commission's attention to problems of intergovernmental funding. If statewide planning suggests that substantial numbers of offenders who would formerly have been sent to the state penitentiary (funded by the state treasury) should now be punished in the community (at the expense of local governments), appropriate mechanisms must be devised to shift costs and cost savings across levels of government.

Subsection (4)(c) carves out a special area of concern. A commission often will have need of data and research that it itself is not equipped to generate. For example, the information on correctional populations that the commission is required to "collect" in § 6A.04(2)(a) will typically be prepared by the Department of Corrections and the department of probation or community of corrections, however

denominated. Evaluation research concerning the effectiveness of sanctions, which the commission is encouraged to "consult" in § 6A.04(3)(a) must for the most part be conducted by public or private entities other than the commission. Many other examples could be given. In most jurisdictions, however, the sources of data and research about the criminal-justice system are badly lacking. All sentencing commissions for the foreseeable future will be forced to do their work in the face of serious knowledge gaps. Subsection (4)(c) provides the startup commission with formal opportunity to "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." The provision ensures that the commission's informed voice may be added to the crucial project of improving the knowledge base for criminal-justice decisionmaking. This responsibility remains with the commission after its startup phase, as part of its periodic omnibus review of the sentencing system, see § 6A.09(c).

g. Final report. All of the commission's work pursuant to this provision is to be memorialized in a published final report made available to the legislature and the public. All reports prepared by a commission under this Section and § 6A.05 are subject to the requirement in § 6A.01(2)(e) that the "commission shall . . . provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2)." While § 6A.04(5) requires a "final" report, nothing in the provision precludes the commission from preparing interim reports as needed.

The commission's ongoing duties to report to the legislature and the public following the startup period are set out in § 6A.05(7) and § 6A.09.

REPORTER'S NOTE

a. Scope. Most American sentencing-commission legislation draws no clear distinction between the initial duties of a sentencing commission and its ongoing responsibilities following completion of a startup phase. Most existing provisions address both initial and continuing duties. See Del. Code tit. 11, § 6581 (2006); Kan. Stat. § 74-9101 (2006); Mass. Gen. Laws ch. 211E, § 2 (2006); Minn. Stat. § 244.09 (2006); Rev. Stat. Mo. § 558.019(6) (2006); 2003 N.J. Sess. Law Serv. 265; N.M. Stat. § 9-3-10(D) (2006); N.C. Gen. Stat. §§ 164-42.1 & 164-43 (2006); Okla. Stat. tit. 22, § 1508 (2006); Or. Rev. Stat. § 137.656(2), (3) (2006); 42 Pa. Cons. Stat. §§ 2153-2155 (2006); S.C. Code § 24-26-20 (2006); Va. Code § 17.1-803 (2006); Wis. Stat. § 973.30(1) (2006). The revised Code endorses the practice of the minority of sentencing commission jurisdictions, which have made a clear statutory delineation between a commission's startup and ongoing responsibilities. See Ala. Code §§ 12-25-9, 12-25-33, 12-25-34 (2006); Ark. Code § 16-90-802(d)(1) (2006); D.C. Code §§ 3-101(b) & 3-101.01(a) (2006); Oh. Rev. Code §§ 181.23 and 181.24 (2006).

Different routes have been taken by American jurisdictions that have accomplished comprehensive sentencing reform in the past 30 years. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002); David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 27 (2001); Rick Kern, Sentencing Reform in Virginia, 8 Fed. Sent'g Rep. 84 (1995). One approach has been the creation of a temporary sentencing commission, or a study group, to formulate recommendations for permanent changes in a jurisdiction's sentencing laws and institutions. Frequently, the "start-up" group has eventually recommended the chartering of a permanent sentencing commission. See William H. Pryor, Jr., Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943 (2005); Report of the District of Columbia Advisory Commission on Sentencing 1-3 (2000); 2003 Report of the District of Columbia Advisory

Commission on Sentencing 69-72 (2003); D.C. Code § 3-101(a) (2006) (District of Columbia Council created a Truth in Sentencing Commission in 1997, an Advisory Commission on Sentencing in 1998, and a permanent sentencing commission—following the recommendation of the Advisory Commission—in 2004). The revised Code bypasses any preliminary step of a study group to decide whether the creation of a permanent sentencing commission is a desirable reform. It is the Institute's firm recommendation that a permanent sentencing commission, or equivalent agency, should be chartered in every jurisdiction. See § 6A.01(1) and Comments *a*, *b*.

b. Time period. Rough, workable timelines between the enactment of sentencing commission enabling legislation and the commission's first set of comprehensive recommendations are suggested in state-specific histories of sentencing reform. See William H. Pryor Jr., Keynote Address, Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943, 951-954 (2005) (3 years from the passage of legislation establishing Alabama Sentencing Commission until commission's first set of recommendations were passed in Alabama Sentencing Reform Act of 2003); Richard S. Frase, Sentencing Guidelines in Minnesota, 1978–2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005), at 131-132 (2 years between sentencing commission enabling legislation and effective date of sentencing guidelines in 1980); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980–2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 39 (2002), at 72-76 (legislation created new commission in 1990 that was given until the summer of 1992 to promulgate guidelines recommendations, which were not finished until 1993); David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 28 (2001), at 82-83, 92 (commission's enabling legislation passed in 1981; commission presented recommendations that legislature enacted in 1983).

c. Guidelines and forecasting model. Many jurisdictions have directed new sentencing commissions to promulgate or propose sentencing guidelines, usually in conjunction with a projections tool to estimate the future impact of the guidelines on correctional resources. See Ala. Code §§ 12-25-33(1),(5); 12-25-34 (2006); Ark. Code § 16-90-802(d)(1)(A) (2006); Del. Code tit. 11, § 6581(a) (2006); Kan. Stat. § 74-9101(b)(1)

(2006); Minn. Stat. § 244.09, subds. 5, 12 (2006); Rev. Stat. Mo. § 558.019-(6)(3) (2006); N.C. Gen. Stat. § 164-43(a)(1) (2006); Oh. Rev. Code § 181.23(A) (2006); 42 Pa. Cons. Stat. § 2154(a) (2006); Va. Code § 17.1-803(1) (2006); Wis. Stat. § 973.30(1)(c),(d) (2006).

d. Required research agenda. See Ala. Code § 12-25-34(a)(1) (2006); D.C. Code § 3-101(b)(1) (2006); Rev. Stat. Mo. § 558.019(6)(2) (2006); Ohio Rev. Code §181.23 (2006); Wis. Stat. § 973.30(1)(b) (2006). Some sentencing commissions have used research into past sentencing practices to provide benchmarks for penalties in the commission's initial guidelines. See Ala. Code § 12-25-34(b) (2006); D.C. Sentencing Comm'n, 2006 Practice Manual, § 1.1; Va. Code § 17.1-805(A) (2006).

f. Recommendations for change elsewhere in the sentencing system. See Ala. Code §§ 12-25-10, 12-25-33(8) (2006); Ark. Code § 16-90-802(a) (2006); Del. Code tit. 11, § 6581(b), (d) (2006); D.C. Code § 3-101(b)(1) (2006); Minn. Stat. § 244.09, subd. 6 (2006); N.C. Gen. Stat. § 164-42.1(a)(2) (2006); Oh. Rev. Code § 181.23(A)(6), (7) (2006); 42 Pa. Cons. Stat. § 2153(a)(12) (2006).

§ 6A.05. Ongoing Responsibilities of Sentencing Commission.

(1) This Section sets forth the continuing responsibilities of the sentencing commission following completion of its initial responsibilities under § 6A.04.

(2) The commission shall:

(a) promulgate and periodically revise sentencing guidelines as needed, subject to the provisions of Article 6B;

(b) prepare correctional-population projections for the sentencing system at least once each year, and whenever new guidelines or laws affecting sentences are proposed, as described in § 6A.07;

(c) develop computerized information systems to track criminal cases entering the court system; the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served; sentencing patterns for the state as a whole and for geographic regions within the state; data on the incidence of and reasons for sentence revocations; and other matters found by the commission to have important bearing on the operation of the sentencing and corrections system;

(d) collect and, where necessary, conduct periodic surveys of the correctional populations and resources of the state;

(e) assemble information on the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

(f) investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities.

(3) The commission should:

(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.

Comment:

a. Scope. The ongoing responsibilities of a permanent sentencing commission, following completion of the startup tasks in § 6A.04, are addressed in this provision. Although no longer concerned with the creation of an initial set of sentencing guidelines, the commission acquires duties of monitoring and assessing the performance of the guidelines in action, and amending the guidelines as needed in light of

accumulating experience or changes of circumstance. In addition, the commission's role as the information center of the sentencing system matures following the startup period. Over time, the legislature and other policymakers should come to rely upon the data and projections regularly produced by the commission's research staff. The commission's duties of reporting, education, training, and guideline implementation also begin in earnest following the startup phase.

Section 6A.05 prioritizes the commission's responsibilities through designation of various tasks as mandatory, encouraged, or discretionary. Subsections (2) through (4), in a descending hierarchy, address the commission's obligations to amend the guidelines and recommend other changes in laws or procedural rules as needed, and to generate data and research concerning the operation of the sentencing system as a whole. Subsections (5), (6), and (7) speak respectively to the commission's specialized duties to monitor the guidelines and other laws affecting sentencing, facilitate proper implementation of the guidelines, and report on its own activities. Subsection (8) grants residual power to the commission to perform other tasks required by law or when necessary to carry out its operations as defined in Article 6A.

b. Mandatory continuing duties. Subsection (2) enumerates an ambitious but realistic program of general activities that must be performed by a sentencing commission.

Subsections (2)(a) and (2)(b) give prominence to the commission's most visible responsibilities: the promulgation of new and amended guidelines, as needed in light of the best available information; and the regular preparation of correctional-population impact projections. Neither responsibility is described fully in this provision. Instead, cross-references are given to the more detailed statutory instructions

in Article 6B (Sentencing Guidelines) and § 6A.07 (Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts).

Subsection (2)(c) calls upon the commission to develop computerized information systems to track the flow of cases through the sentencing system. Most of the relevant data will be assembled through sentencing reports completed by trial courts, using forms designed by the commission, see subsection (5)(a) (requiring the commission to design the relevant forms) and § 6A.08(4) (requiring courts to complete a sentencing report in every case and transmit the report to the commission). Some of the required data must be collected from other agencies, such as court administrators, probation offices charged with the preparation of presentence reports, and parole boards or other officials with authority over sentence revocations, see § 6A.08(1), (2).

The data incorporated into the commission's information systems should be sensitive enough to inform ongoing policy scrutiny of sentencing practices in the jurisdiction. The optimum level of sensitivity, however, cannot easily be defined in statute. With improvements in knowledge, research methods will not remain static. Only a competent research staff, working with an awareness of what other sentencing commissions are doing, and refining their work over time, can give definition to the mandate in subsection (2)(c). One or two illustrative points bear mention, however.

First, subsection (2)(c)'s injunction that the commission track "the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served" is meant to inspire the search for important and measurable variables. The offender characteristics tracked by the information system should include at a minimum the race, ethnicity, gender, age, class, educational attainment,

marital status, employment status, prior record, and substance-abuse history. Characteristics of crime victims should be tracked by the system, as well, together with basic facts about the relationship between the victim and offender. The gathering and reporting of victim-related data is especially important, even though it is typically neglected, because of the robust correlations between victim characteristics and penalty consequences shown repeatedly in death-penalty research.

Second, the commission should seek information about offense types, and their effects on sentences, that go beyond the bare statutory definitions of discrete crimes. In all criminal codes, some offenses cover a wide range of behavior. Some assaultive crimes in some jurisdictions, for example, may be committed without victim injury, with relatively slight injury, or with life-threatening injury—and yet be named and graded as the same substantive offense. If all "aggravated assaults" are coded in the information system as identical events, the system will lack crucial sensitivity concerning the diversity of harms in different cases. Worse yet, if offense types are bunched into heterogeneous sets such as "violent" and "property" crimes, the ability of the information system to help explain punishment consequences will approach zero. Accordingly, the sentencing commission should design tracking systems that search for the significant and measurable offense variables that affect penalty outcomes. These will often include offense-related factors that go beyond formal legal categories.

Subsection (2)(d) requires the commission periodically to "collect" or "conduct" surveys of the state's correctional populations and resources. An accurate cross-sectional portrait of standing correctional capacities is a prerequisite to the commission's correctional forecasting duties, see § 6A.07, and its responsibilities to help the legislature ad-

dress shortfalls in available resources, see § 6A.09(b). Correctional surveys are also required if the sentencing guidelines are to comprehend the full array of sentencing alternatives available to the courts, see § 6B.05 (to be drafted). A full-scale program for the use of intermediate punishments cannot be designed or implemented without knowledge of program availability.

Other state agencies should be able to supply most of the information denoted in subsection (2)(d). Ideally, a commission will be in a position to "collect" rather than expend resources to "conduct" correctional surveys. Existing commissions have not uniformly enjoyed such advantages, however. Particularly in the domain of intermediate punishments, whose availability tends to vary from local government to local government, sentencing commissions have sometimes been called upon to assemble statewide information concerning what programs are available, and where.

Subsection (2)(e) requires the commission to "assemble" information on the effectiveness of sentences of various kinds in meeting the goals of the sentencing and corrections system. This amounts to a command that the commission become a consumer of otherwise available research. Subsection (4)(b), setting forth only a discretionary responsibility, states that the commission "may" choose to "conduct or participate in original research" of this kind. The two subsections, read together, envision a commission that may engage in evaluation research on a selective basis, but is not weighted down with the burden of conducting expensive and time-consuming studies as a comprehensive duty. The revised Code places a high priority on the generation of evaluation research, see § 1.02(2)(b)(viii), but § 6A.05 reflects the view that the sentencing commission is

not the proper agency to do the bulk of this work. The research and development capabilities of the sentencing system will be a subject taken up in Part IV of the revised Code.

Subsection (2)(f) assigns to the commission the ongoing task of investigating the existence of discrimination or inequities in the sentencing system across population groups, and searching for the means to eliminate those problems wherever they are found. This provision helps give effect to the general purpose of the sentencing system in § 1.02(2)(b)(iii) ("to eliminate inequities in sentencing across population groups"). Subsection (2)(f) supplements the commission's related duty, in subsection (2)(b) and § 6A.07, to routinely make projections of demographic patterns in sentencing expected to result from proposed legislation or guidelines. Correctional projections alert policymakers to expected demographic effects before they occur, so the consequences of new provisions may be visualized and debated in advance. In contrast to demographic projections, subsection (2)(f) creates a demographic audit function applied to the sentencing system already in place.

c. Encouraged general responsibilities. Subsection (3) identifies tasks that most sentencing commissions will find necessary, or should choose to perform, as their experience deepens. Subsection (3)(a) recognizes that the commission may need to consult and make use of data and research generated by other state agencies, see, e.g., Comment *b* above. In return, the subsection contemplates that the commission should cooperate with other agencies in the development of improved information systems. A related provision is § 6A.09(1)(c) (commission required periodically to make recommendations to the legislature concerning data and research needs within the system).

Subsection (3)(b) explicitly acknowledges that the prescriptive agenda of a commission might usefully expand as it accumulates knowledge of systemwide issues. The provision invites the commission to study the desirability of introducing new regulation into stages of decisionmaking that occur both before and after the operation of traditional sentencing guidelines. Subsection (3)(b) neither requires nor authorizes the commission to stride into such areas of potential regulation on its own. Rather, it instructs the commission to "study." If this process leads the commission to recommend changes in law, subsection (4)(a) provides means to address the relevant lawmakers.

Data to support the ongoing study responsibilities referenced in subsection (3)(b) should be gathered pursuant to subsection (2)(c).

Among the subjects embraced by subsection (3)(b), the charging discretion of prosecutors and the plea-bargaining discretion of the parties, have undoubted effects upon the punishment consequences of many cases. No current model exists, however, for the direct regulation of charging and bargaining decisions. Most guideline systems, like the revised Code, contain a number of targeted provisions that limit the legal effects of charging decisions or plea agreements, see, e.g., § 6B.06(5) (limits upon the use of sentence agreements as grounds for departure) and § 6B.08 (limits upon the sentencing consequences of charges of multiple counts). Subsection (3)(b) encourages the commission to explore additional possibilities.

The remainder of subsection (3)(b) recognizes that "sentencing," as a subject matter, does not end with the pronouncement of penalties in the courtroom. The final sentencing outcome of a given case typically remains unknown for some time, which may extend over months or years. In

prison cases, sentencing courts lack sole authority to determine lengths of stay even in jurisdictions where parole-release authority has been abolished. Some important part of each jurisdiction's sentencing policy is thus made and implemented by officials—usually corrections officials—who hold authority to pass on prison-release dates. These authorities may include prison officials with discretion to grant or withhold good-time or earned-time credit, officials with power to adjust lengths of stay for inmates' disciplinary violations, traditional parole boards (where they exist), and, in some jurisdictions, sentencing courts granted discretion to revisit penalties after their original pronouncement. A comprehensive regulatory approach to sentencing policy and outcomes would include the full chronology of important decision points.

The same may be said of the commission's responsibility to study possible regulation of officials with authority to impose sanctions for the violation of sentence conditions, including the revocation of sentences. These low-visibility decisions, when cumulated, have massive repercussions for the sentencing system as a whole. Nationwide in the early 2000s, for example, roughly 40 percent of all admissions to state prisons were parole revocations rather than new court commitments. In some states, a majority of prison admissions each year flow from sentence revocations. A few existing sentencing commissions have concluded that their oversight of the sentencing system must be extended to the sanctioning of sentence violators. Individual commissions have made progress in this domain, but no single best approach to the systemwide regulation of sentence revocations has yet emerged. Subsection (3)(b) thus places the topic on the commission's plate of concerns, but does not command when or how the commission should act.

Subsection (3)(c) encourages reciprocal channels of assistance from and to sentencing commissions in other jurisdictions. The majority of existing commissions have at some point in their life undertaken surveys of commission-guideline structures in other states, either as part of their initial guideline-development process, or to inform the ongoing evaluation and amendment of their guidelines or research practices. Because commission-guideline systems are designed to innovate and remake themselves over time, through collaborative input from the commission and the courts, a commission's curiosity about best practices in other jurisdictions should never expire. Nor should such inquiries be relegated to the "spare time" of staff or commissioners. Subsection (3)(c) legitimizes commission activities that supply assistance to sentencing agencies in other jurisdictions, as well as those that solicit assistance.

d. Discretionary general responsibilities. Three areas of activity, all desirable in some circumstances, are included as discretionary responsibilities in subsection (4). Subsection (4)(a) invites the commission to remain alert to any changes in the criminal code or rules of criminal procedure that would be helpful to the operation of the sentencing guidelines or the commission itself. The subsection provides a formal avenue for transmitting recommendations on these topics to the state's legislature or rulemaking authorities.

Subsection (4)(b) adds to the commission's agenda the possibility of original evaluation research into the effectiveness of criminal sentences, see Comment *b*. Many commissions have performed or participated in such research on an occasional basis, sometimes with the assistance of special appropriations from the legislature, or with funding from other sources, see § 6A.08(5), (6). Good-quality evaluation research is an urgent need of all sentencing systems, but it is

typically expensive and can take years to perform. Subsection (4)(b) makes clear that an ambitious commission need not step back from the task on the theory that it is beyond its charter. The drafters of the revised Code, however, concluded that it was unrealistic to require or even encourage a state commission routinely to divert its finite energies to ambitious assessment studies.

Subsection (4)(c) responds to concerns similar to those underlying subsection (4)(b). Some sentencing commissions have mounted the effort of gathering longitudinal recidivism data on offenders who have passed through the sentencing system, usually in a one-time study. No commission has itself sought to gauge the indirect impact of sentences on families and communities, although this is a growing area of research elsewhere, and is an explicit priority within the revised Code's vision of a sentencing and corrections system, see § 1.02(2)(b)(viii). As with subsection (4)(b), subsection (4)(c) gives full authority to a commission to pursue such investigations at its own choosing, but draws short of overwhelming the commission with an ongoing obligation to do so. The research areas defined in subsections (4)(b) and (4)(c), which the commission itself cannot fully address, will be subject matters of first importance in Part IV of the revised Code.

e. Duty to monitor the operation of guidelines. Subsection (5) defines a critical subset of the commission's responsibilities to gather information about the sentencing system. It highlights a continuous duty to monitor the operation of sentencing guidelines, relevant procedural rules, and other laws, rules, or discretionary processes affecting sentencing decisions. Subsection (5) does not set the exact parameters of these tasks, which are intended to evolve over time, except to identify several essential duties in subsections (5)(a) through (5)(e).

Subsection (5)(a) requires the commission to design appropriate forms for "sentence reports" to be completed by trial courts in every case that reaches sentencing. The reports are the central mechanism through which the commission will be apprised of actions taken by the courts in light of case characteristics, and the reasons given by courts for departures from guideline presumptions. Section 6A.08(4) requires the trial courts to transmit a copy of the sentencing report to the commission in every sentenced case.

A commission should expect to devote substantial care and attention to the design of the sentence report forms. The forms should not be so cumbersome as to overwhelm busy sentencing courts, yet must be sufficiently sensitive to track the most salient case characteristics affecting sentencing decisions, see Comment *b*, supra. The commission should recognize when preparing sentence report forms that they will define the data stream available to policymakers for years to come, and future revisions to the form cannot capture retrospective information. The commission should design the forms with its research obligations under subsection (2)(c), (2)(f), and (4) in mind, and in anticipation of its needs when conducting periodic omnibus reviews of the sentencing system under § 6A.09.

Subsections (5)(b), (5)(c), and (5)(d) require the commission to study the operation of its guidelines as actually used by courts and other officials. All three subsections omit much detail that might have been included to define how these tasks are to be performed. The most successful and most practical approaches to the monitoring responsibilities under subsections (5)(b) through (5)(d) will undoubtedly change over the years. Particularized strategies should be determined by each commission, aided by its professional research staff, in light of available resources and the best

practices followed in other jurisdictions. Ideally, sentencing commissions nationwide could someday develop compatible methodologies for the collection and recording of monitoring information, so that interjurisdictional comparisons may be made with greater ease than is possible today.

Subsection (5)(b) states the commission's core responsibility to study the use of its sentencing guidelines by courts and other officials. This ongoing work will supply the basis for a large portion of the commission's annual report, see subsection (7).

Subsection (5)(c) directs the commission's attention to the subject of appellate sentence review, and imparts the responsibility to monitor the substantive decisions of the appellate courts in guidelines cases. It also includes a duty to monitor the impact of sentence appeals on the workloads of the courts. While most state guidelines systems that have authorized sentence appeals have not witnessed an unmanageable surge of appellate activity, at least one system (the federal system) experienced dramatic increases in the workloads of the Courts of Appeals following the implementation of sentencing guidelines. The revised Code seeks to enable and encourage appellate sentence review as a law-generative component of the sentencing system, but to do so in a way that emulates the state, and not the federal, experience. See § 7.ZZ, Comments *d*, *e*, and *f*. Subsection (5)(c) is intended to produce a red flag if demands upon the appellate bench become overly burdensome. Such dysfunction should cause the commission to consider guideline amendments to address the problem. If necessary, the commission may also recommend legislative change, see subsection (4)(a).

Subsection (5)(d) creates a mechanism to help ensure that the balance of institutional authority in the sentencing

system will not become distorted over time. The provision safeguards the intended structural relationship between the commission and the courts, in which the two institutions "collaborate" in the development of a common law of sentencing, but the commission does not hold power to dominate the courts, see §§ 6A.01(2)(b), 6B.02(5). On a continuing basis, the commission is enjoined to study the need for amendments to the guidelines so they can "better comport with judicial sentencing practices and appellate case law."

Subsection (5)(d) codifies the historic behaviors of most state sentencing commissions, but runs contrary to many years of practice of the United States Sentencing Commission, which often amended its guidelines to overrule judicially developed sentencing doctrines. Congress continued the federal practice of unduly marginalizing trial-court authority in 2003 when it tightened preexisting limitations on judicial discretion to depart downward from the federal guidelines. In the aftermath of United States v. Booker, there are new rumblings in the federal system that Congress may act once again to tightly rein in judicial sentencing discretion and lawmaking authority.

In contrast to the federal history, most state sentencing commissions have found it desirable, and in their own self-interest, to modify guidelines periodically to better reflect judicial sensibilities and to enhance the courts' acceptance of guideline presumptions. For example, state commissions that have observed high rates of departure from particular presumptive guidelines have often treated this finding as a basis to revise the relevant guidelines so that they fall more closely in sync with judicial decisions. Similarly, state commissions have sometimes added to their enumerations of aggravating or mitigating departure factors in the text of the guidelines, see § 6B.04(4), upon discovering that trial judges have relied upon a given nonenumerated factor with fre-

quency. The historical state, rather than the federal, approach to judicial feedback is codified in subsection (5)(d).

Subsection (5)(e) charges the commission to monitor compliance with procedural rules within the sentencing system. These rules are essential to the maintenance of the commission's information systems and the proper administration of the guidelines.

f. Guideline implementation. Subsection (6) lays down the commission's general responsibility to facilitate the proper implementation of guidelines throughout the sentencing system. Its subsections enumerate several duties that must be performed along these lines. Aside from the required elements of subsections (6)(a) through (6)(d), the commission should shape and continually improve its implementation programs, drawing upon advancing technologies and the innovations of other sentencing commissions.

Subsection (6)(a) directs attention to preparers of presentence reports—the probation office in most jurisdictions. Under a sentencing-guidelines regime, the content of presentence reports will be somewhat different than in an indeterminate sentencing structure. Reports should focus upon factors relevant to guidelines presumptions and departures as determined by the commission and judicial precedent. The accumulation of carefully prepared presentence reports is also critical to accurate reconstruction of offenders' criminal histories. The reports should also be designed to record information useful to the commission in its responsibilities under subsection (2)(c). Section 6A.08(2) contemplates that presentence reports will regularly be transmitted to the commission and will be used by commission research staff as a primary source for data collection. The sentencing commission must assist the realization of all of these objectives through the creation of manuals, forms, and

other controls found useful to enhance consistency in the contents of presentence reports.

Subsection (6)(a) also instructs the commission to develop manuals, forms, or other controls as needed to increase consistency in the completion of sentence reports by trial courts, see subsection (5)(a) and Comment *e*, above.

Subsection (6)(b) requires the commission to supply training and assistance in the use of guidelines to judges, prosecutors, defense attorneys, probation officers, and other personnel. The need for training will be especially great in the period immediately following the effective date of an initial set of guidelines. The director of education and training, and the relevant commission staff, see § 6A.03(3), cannot afford to wait, in order to build up their training and implementation capabilities at a leisurely pace. They must be ready for concentrated effort throughout the state, and at all levels of the sentencing system, as the commission nears completion of the "initial" phase of its existence as described in § 6A.04.

The need for training and assistance within an evolving sentencing structure is ongoing. New judges, lawyers, probation officers, and other personnel will continuously enter the system. Changes in legislation, guidelines, or case law will provide grist for continuing education. Large alterations in law or process—such as wholesale amendment of the guidelines—may give rise to a training and implementation "bottleneck" comparable to that following first implementation of the guidelines.

The commission's education and training staff should not regard its programming as an exercise in one-way communication, but should view its efforts as an important means to collect feedback from judges and others on the operation of guidelines in the field.

Subsection (6)(c) sets out a responsibility to "provide information" about sentencing guidelines, sentencing policies, and sentencing practices that goes beyond the more focused enterprises of education and training for purposes of proper use of the guidelines. Part of a commission's educational mission includes outreach to increase awareness of the operation of the sentencing system and the activities of the commission. Activities falling within this heading include public-relations initiatives on the part of a commission to increase understanding of and generate support for its guidelines, proposals, and other contributions to the sentencing system. Also included is the commission's responsibility to respond to reasonable requests for information by government officials or agencies, members of the bar, the public, and academic researchers.

Subsection (6)(d) catalogues a number of aids to guideline implementation that a commission may choose to produce. These are borrowed from the most useful creations of past commissions in a number of jurisdictions. The subsection does not require that any or all of the identified aids be prepared by a particular commission, but it does require that some such efforts be undertaken as needs appear.

g. Reporting duties. Subsection (7) states that a commission should make annual reports of its activities. Data collection and dissemination concerning cases entering the system, case processing, sentences imposed, and so on, will be spread too far apart if the regular reporting interval is two or more years. The provision further obliges the commission to prepare specialized reports as requested by the legislature. It does not place responsibility on the commission to prepare formal reports when requested by any other agency or government official.

Subsection (7) provides that all commission reports must be published, including the reports of any special research projects commissioned by the legislature. Publication via the Internet may satisfy the publication requirement.

When making reports of judicial sentencing practices, the commission should define a sentence "in compliance with the guidelines" as a sentence that is consistent with an applicable presumptive sentence, rule, or standard set forth in the guidelines, or a departure from any presumptive provision of the guidelines that is grounded in the purposes of § 1.02(2)(a). To treat departure sentences as "noncompliant" conveys the unwanted connotation that departure sentences are somehow unlawful or erroneous. In fact, departures grounded on proper factors are encouraged by the revised Code as essential practice within a well-ordered guideline structure, see §§ 6B.03(4), 7.XX, 7.ZZ.

The definition of "compliance" with sentencing guidelines goes beyond mere semantics. Because data gathered by sentencing commissions is public information, information about the sentencing practices of specific judges will sometimes come to light. This can occur when requested by the press, members of the public, academic researchers, or during the judicial retention process. It is essential in the reporting of judge-specific data that the exercise of proper discretion to individualize sentences not be tarred with the appellation of "noncompliance."

h. Residual responsibilities. Subsection (8) is a catch-all provision acknowledging that static legislation cannot define all responsibilities that should be shouldered by sentencing commissions, now or in the future. As stated in § 6A.01(2)(f), a commission must do its work "with the expectation that the sentencing system must strive continually to evaluate itself, evolve, and improve." Subsection (8)

gives the commission needed leeway to modify its own agenda over time. If further legislation is required to expand a commission's charter, the commission should request new statutory authority pursuant to subsection (4)(a), above.

REPORTER'S NOTE

a. Scope. The outline of § 6A.05 borrows from ABA Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.2(b) (1994) (listing major responsibilities of a sentencing commission). For provisions speaking to a sentencing commission's ongoing duties, often alongside the commission's initial duties, see Alabama Code §§ 12-25-8 and 12-25-9 (2006); Ark. Code § 16-90-802(d)(2)-(6) (2006); 11 Del. Code § 6581(j) (2006); D.C. Code §§ 3-101(b) & 3-101.01(a) (2006); Kan. Stat. § 74-9101 (2006); Mass. Gen. Laws ch. 211E, § 3(f),(g) (2006); Minn. Stat. § 244.09 (2006); Rev. Stat. Mo. § 558.019(6) (2006); N.M. Stat. § 9-3-10(D) (2006); N.C. Gen. Stat. § 164-43 (2006); Oh. Rev. Code § 181.25 (2006); Okla. Stat. tit. 22, § 1508 (2006); Or. Rev. Stat. § 137.656(2),(3) (2006); 42 Pa. Cons. Stat. §§ 2153-2155 (2006); S.C. Code § 24-26-20 (2006); 28 U.S.C. § 994(o)–(r) (2000); Va. Code § 17.1-803 (2006); Wash. Rev. Code § 9.94A.850(2) (2006); Wis. Stat. § 973.30(1) (2006).

b. Mandatory continuing duties

(1) Revision of guidelines. See ABA Sentencing Standard 18-4.2(b)(i). The periodic revision of sentencing guidelines is a near-universal responsibility of all permanent sentencing commissions. See, e.g., Ala. Code § 12-25-33(7) (2006); Ark. Code § 16-90-802(d)(2)(A) (2006) ("[t]he commission shall periodically review and may revise the voluntary sentencing standards"); Kan. Stat. § 74-9101(b)(7) (2006); Minn. Stat. § 244.09, subd. 11 (2006); Va. Code § 17.1-806 (2006); Wash. Rev. Code § 9.94A.850(2)(b) (2006).

(2) Projections of correctional populations. See ABA Sentencing Standard 18-4.2(b)(ii). See Kan. Stat. § 74-9101(b)(8), (15) (2006); Va. Code § 17.1-803(8) (2006); Wis. Stat. § 973.30(1)(h) (2006)

(3) Development and maintenance of sentencing information system. See ABA Sentencing Standards 18-4.1(b), 18-4.2(b)(ii). See Ala.

Code § 12-25-9(5) (2006); Minn. Stat. § 244.09, subd. 6 (2006); N.C. Gen. Stat. § 164-44(a) (2006); Or. Rev. Stat. § 137.656(3)(b) (2006); 42 Pa. Cons. Stat. § 2153(a)(7), (10) (2006); Wash. Rev. Code § 9.94A.850(2)(d)(1) (2006); Wis. Stat. § 973.30(1)(b) (2006).

(4) Monitoring for racial and other discrimination. See Ala. Code § 12-25-33(8) (2006) (commission's annual report should include "data showing the impact of the initial voluntary standards and the truth-in-sentencing standards by race, gender, and location of the offender"); Wash. Rev. Code § 9.94A.850(2)(h)(i) (2006) (every 2 years commission shall report to legislature on "[r]acial disproportionality in juvenile and adult sentencing, and, if available, the impact that diversions, such as youth courts, have on racial disproportionality in juvenile prosecution, adjudication, and sentencing"); Wis. Stat. § 973.30(1)(g) (2006) (sentencing commission shall "[s]tudy whether race is a basis for imposing sentences in criminal cases and submit a report and recommendations on this issue to the governor, to each house of the legislature under § 13.172(2), and to the supreme court"). See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at iv (recommending that the legislature in each state "conduct racial and ethnic disparity impact analyses, evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation, and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.").

In the assessment of racial and ethnic disparities in sentencing, it is important for commissions, when possible, to control for the race and ethnicity of crime victims. Numerous studies of capital sentencing have shown that the race of the victim in homicide cases can have powerful impact on the probabilities that a defendant will receive a death sentence. Equivalent research in subcapital sentencing, however, has not been performed. For research in the death penalty arena, see U.S. General Accounting Office, Death Penalty Research Indicates Pattern of Racial Disparities (1990); Jon Sorenson, Donald H. Wallace, and Rocky L. Pilgrim, Empirical Studies on Race and Death Penalty Sentencing: A Decade After the GAO Report, 37 Crim. L. Bull. 395 (2001) (meta-analysis of studies of victim-based racial disparities in the use of capital punishment).

c. Encouraged general responsibilities. By Professor Frase's count in 2005, only the United States Sentencing Commission had developed comprehensive guidelines for probation and parole revocations. State sentencing commissions had addressed the subject, if at all, in incomplete ways. Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (sentencing guidelines in Delaware, the District of Columbia, Minnesota, Ohio, Virginia, and Washington attempted "some" regulation of probation revocation decisions, while the guidelines in the District of Columbia, Kansas, North Carolina, Ohio, Oregon, and Utah attempted "some" regulation of parole revocation decisions). See Delaware Sentencing Accountability Commission Benchbook 2006 104-105 (sentencing guidelines include "violation of probation sentence policy;" setting forth presumption that violation of probation will result in offender being moved up only one level in Delaware's five-level continuum of sanctions; presence of aggravating circumstances may justify heavier sanction); id. at 117-28 (Delaware's sentencing guidelines include "bail guidelines"); Kan. Stat. § 74-9101(b)(10) (2006) (commission shall "develop prosecuting standards and guidelines to govern the conduct of prosecutors when charging persons with crimes and when engaging in plea bargaining"); Minn. Stat. § 244.09, subd. 6 (2006) (commission shall conduct ongoing research regarding "plea bargaining, and other matters relating to the improvement of the criminal justice system"); Wash. Rev. Code § 9.94A.850(2)(b) (2006) (every 2 years commission shall "[r]ecommend to the legislature revisions or modifications to the . . . prosecuting standards"); id. § 9.94A.850(2)(d)(1) (commission shall "conduct ongoing research regarding . . . plea bargaining").

d. Discretionary general responsibilities

(1) Recommendations of change to legislature. See ABA Sentencing Standard 18-4.2(b)(iv). See Ala. Code §§ 12-25-9(1), (3), 12-25-33(9) (2006); Kan. Stat. § 74-9101(b)(11) (2006); Minn. Stat. § 244.09, subd. 6 (2006); Okla. Stat. tit. 22, § 1501(B) (2006); 42 Pa. Cons. Stat. § 2153(a)(12) (2006); Wash. Rev. Code § 9.94A.850(2)(c) (2006)

(2) Research on recidivism. At least two states require the sentencing commission to gather recidivism data on an ongoing basis to facilitate the assessment of the effectiveness of in-prison and communi-

ty treatment programs. See N.C. Gen. Stat. § 164-47 (2006); Wash. Rev. Code § 9.94A.850(2)(h)(iii) (2006); Wis. Stat. § 973.30(1)(j) (2006).

(3) Impact of sentences on families. At least one state requires the sentencing commission to monitor the impact of prison sentences on offenders' families. See N.C. Gen. Stat. § 164-42.1(a)(8) (2006).

e. Duty to monitor the operation of guidelines. See ABA Sentencing Standard 18-4.2(b)(vii). See Ark. Code § 16-90-802(d)(4)(C) (2006); Kan. Stat. § 74-9101(b)(5) (2006); Minn. Stat. § 244.09, subd. 7 (2006); N.C. Gen. Stat. § 164-43(d) (2006); 42 Pa. Cons. Stat. § 2153(a)-(14) (2006); Va. Code § 17.1-803(8) (2006).

f. Guideline implementation. See ABA Sentencing Standards 18-4.1(b), 18-4.2(b)(v), (vi), (viii), (ix). See Ala. Code § 12-25-33(2), (3), (4) (2006); Kan. Stat. § 74-9101(b)(3), (4) (2006); Va. Code § 17.1-803(2), (3) (2006); Wis. Stat. § 973.30(1)(e) (2006).

g. Reporting duties. See ABA Sentencing Standard 18-4.2(b)(iii). See Ala. Code § 12-25-33(11) (2006); Ark. Code § 16-90-802(E)(2)(a) (2006) (requiring biennial report); Minn. Stat. § 244.09, subd. 14 (2006); 42 Pa. Cons. Stat. § 2153(b); Va. Code § 17.1-803(10) (2006); Wis. Stat. § 973.30(1)(f),(i) (2006).

h. Residual responsibilities. See Ala. Code § 12-25-33(12) (2006); 11 Del. Code § 6581(j) (2006); Kan. Stat. § 74-9101(b)(12), (16) (2006); 42 Pa. Cons. Stat. § 2153(c) (2006); Va. Code § 17.1-803(11) (2006).

STATUTORY NOTE

Kansas Statutes § 74-9101 (2006)

§ 74-9101. Kansas sentencing commission; establishment; duties.

(a) There is hereby established the Kansas sentencing commission.

(b) The commission shall:

(1) Develop a sentencing guideline model or grid based on fairness and equity and shall provide a mechanism for linking justice and corrections policies. The sentencing guideline model or grid shall establish rational and consistent sentencing standards which reduce sentence

disparity, to include, but not be limited to, racial and regional biases which may exist under current sentencing practices. The guidelines shall specify the circumstances under which imprisonment of an offender is appropriate and a presumed sentence for offenders for whom imprisonment is appropriate, based on each appropriate combination of reasonable offense and offender characteristics. In developing its recommended sentencing guidelines, the commission shall take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities. In its report, the commission shall make recommendations regarding whether there is a continued need for and what is the projected role of, if any, the Kansas parole board and whether the policy of allocating good time credits for the purpose of determining an inmate's eligibility for parole or conditional release should be continued;

(2) consult with and advise the legislature with reference to the implementation, management, monitoring, maintenance and operations of the sentencing guidelines system;

(3) direct implementation of the sentencing guidelines system;

(4) assist in the process of training judges, county and district attorneys, court services officers, state parole officers, correctional officers, law enforcement officials and other criminal justice groups. For these purposes, the sentencing commission shall develop an implementation policy and shall construct an implementation manual for use in its training activities;

(5) receive presentence reports and journal entries for all persons who are sentenced for crimes committed on or after July 1, 1993, to develop post-implementation monitoring procedures and reporting methods to evaluate guideline sentences. In developing the evaluative criteria, the commission shall take into consideration rational and consistent sentencing standards which reduce sentence disparity to include, but not be limited to, racial and regional biases;

(6) advise and consult with the secretary of corrections and members of the legislature in developing a mechanism to link guidelines sentence practices with correctional resources and policies, including but not limited to the capacities of local and state correctional facilities.

Such linkage shall include a review and determination of the impact of the sentencing guidelines on the state's prison population, review of corrections programs and a study of ways to more effectively utilize correction dollars and to reduce prison population;

(7) make recommendations relating to modification to the sentencing guidelines as provided in K.S.A. 21-4725, and amendments thereto;

(8) prepare and submit fiscal impact and correctional resource statements as provided in K.S.A. 2001 Supp. 74-9106, and amendments thereto;

(9) make recommendations to those responsible for developing a working philosophy of sentencing guideline consistency and rationality;

(10) develop prosecuting standards and guidelines to govern the conduct of prosecutors when charging persons with crimes and when engaging in plea bargaining;

(11) analyze problems in criminal justice, identify alternative solutions and make recommendations for improvements in criminal law, prosecution, community and correctional placement, programs, release procedures and related matters including study and recommendations concerning the statutory definition of crimes and criminal penalties and review of proposed criminal law changes;

(12) perform such other criminal justice studies or tasks as may be assigned by the governor or specifically requested by the legislature, department of corrections, the chief justice or the attorney general;

(13 develop a program plan which includes involvement of business and industry in the public or other social or fraternal organizations for admitting back into the mainstream those offenders who demonstrate both the desire and ability to reconstruct their lives during their incarceration or during conditional release;

(14) appoint a task force to make recommendations concerning the consolidation of probation, parole and community corrections services;

(15) produce official inmate population projections annually on or before six weeks following the date of receipt of the data from the department of corrections. When the commission's projections indicate

that the inmate population will exceed available prison capacity within two years of the date of the projection, the commission shall identify and analyze the impact of specific options for (A) reducing the number of prison admissions; or (B) adjusting sentence lengths for specific groups of offenders. Options for reducing the number of prison admissions shall include, but not be limited to, possible modification of both sentencing grids to include presumptive intermediate dispositions for certain categories of offenders. Intermediate sanction dispositions shall include, but not be limited to: intensive supervision; short-term jail sentences; halfway houses; community-based work release; electronic monitoring and house arrest; substance abuse treatment; and pre-revocation incarceration. Intermediate sanction options shall include, but not be limited to, mechanisms to explicitly target offenders that would otherwise be placed in prison. Analysis of each option shall include an assessment of such option's impact on the overall size of the prison population, the effect on public safety and costs. In preparing the assessment, the commission shall review the experience of other states and shall review available research regarding the effectiveness of such option. The commission's findings relative to each sentencing policy option shall be presented to the governor and the joint committee on corrections and juvenile justice oversight no later than November 1;

(16) at the request of the governor or the joint committee on corrections and juvenile justice oversight, initiate and complete an analysis of other sentencing policy adjustments not otherwise evaluated by the commission;

(17) develop information relating to the number of offenders on postrelease supervision and subject to electronic monitoring for the duration of the person's natural life; and

(18) determine the effect the mandatory sentencing established in section 1 and section 2, and amendments thereto, would have on the number of offenders civilly committed to a treatment facility as a sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq., and amendments thereto.

Pennsylvania Consolidated Statutes, Title 42, § 2153 (2006)

§ 2153. Powers and duties

(A) GENERAL RULE.— The commission, pursuant to rules and regulations, shall have the power to:

(1) Establish general policies and promulgate such rules and regulations for the commission as are necessary to carry out the purposes of this subchapter and Chapter 97 (relating to sentencing).

(2) Utilize, with their consent, the services, equipment, personnel, information and facilities of Federal, State, local and private agencies and instrumentalities with or without reimbursement therefor.

(3) Enter into and perform such contracts, leases, cooperative agreements and other transactions as may be necessary in the conduct of the functions of the commission, with any public agency or with any person, firm, association, corporation, educational institution or nonprofit organization.

(4) Request such information, data and reports from any officer or agency of the Commonwealth government as the commission may from time to time require and as may be produced consistent with other law.

(5) Arrange with the head of any government unit for the performance by the government unit of any function of the commission, with or without reimbursement.

(6) Issue invitations requesting the attendance and testimony of witnesses and the production of any evidence that relates directly to a matter with respect to which the commission or any member thereof is empowered to make a determination under this subchapter.

(7) Establish a research and development program within the commission for the purpose of:

(i) Serving as a clearinghouse and information center for the collection, preparation and

dissemination of information on Commonwealth sentencing practices.

(ii) Assisting and serving in a consulting capacity to State courts, departments and agencies in the development, maintenance and coordination of sound sentencing practices.

(8) Collect systematically the data obtained from studies, research and the empirical experience of public and private agencies concerning the sentencing processes.

(9) Publish data concerning the sentencing processes.

(10) Collect systematically and disseminate information concerning sentences actually imposed.

(11) Collect systematically and disseminate information regarding effectiveness of sentences imposed.

(12) Make recommendations to the General Assembly concerning modification or enactment of sentencing and correctional statutes which the commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy.

(13) Establish a plan and timetable to collect and disseminate information relating to incapacitation, recidivism, deterrence and overall effectiveness of sentences imposed.

(14) Establish a program to systematically monitor compliance with the guidelines and with mandatory sentencing laws by:

(i) Promulgating forms which document the application of the guidelines or mandatory sentencing laws, or both.

(ii) Requiring the timely completion and submission of such forms to the commission.

(B) ANNUAL REPORTS.— The commission shall report annually to the General Assembly, the Administrative Office of Pennsylvania Courts and the Governor on the activities of the commission.

(C) ADDITIONAL POWERS AND DUTIES.— The commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this subchapter or as may be provided under any other provision of law and may delegate to any commissioner or designated person such powers as may be appropriate other than the power to establish general policies, guidelines, rules and factors under subsection (a)(1).

§ 6A.06. Community Corrections Strategy.

(1) The sentencing commission shall recommend a community corrections strategy for the state, including recommendations for legislation, sentencing guidelines, and legislative appropriations necessary to implement the strategy.

(2) The community corrections strategy shall be based on the following:

(a) a review of existing community corrections programs throughout the state, the numbers of offenders they can accommodate, the level of resources they receive from state and local governments, and the available evidence of their effectiveness and efficiency in serving the purposes in § 1.02(2);

(b) the identification of additional community corrections programs needed in the state, additional resources needed for exist-

ing 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.

Comment:

a. Scope. Section 6A.06 gives specific emphasis to the sentencing commission's responsibility to encourage the greater use of intermediate punishments, see § 1.02(2)-(b)(iv), while recognizing that meaningful changes in the

way criminal sanctions are used cannot be effected by a commission alone. For example, policy-driven diversions of otherwise prison-bound offenders into community sanctions require that the necessary program slots be available. The resources devoted to community corrections, however, have not kept pace with needs in any American jurisdiction. In addition, community corrections programs are funded by local governments in most states. Without statewide coordination and funding assistance from the state legislature, or intergovernmental funding treaties, many local governments can support only the most rudimentary of sanctioning options. As a result, statewide policy in the area is difficult or impossible to implement. A sentencing commission is well situated to assess and make recommendations to ameliorate these compound difficulties.

Subsection (1) contemplates a comprehensive, statewide community corrections strategy to be recommended by the sentencing commission. The strategy will of necessity include recommendations for statutory amendments and changes in the levels of appropriations made to correctional programs around the state, see also subsection (2)(f). The strategy should also include proposals for appropriate sentencing guidelines within the new environment of expanded intermediate punishments, see § 6B.02(6) (the guidelines shall address the use of all criminal sanctions except, in jurisdictions with capital punishment, the death penalty).

Jurisdictions may take different views on the question of when to ask the commission to undertake the ambitious project of development of a community corrections strategy. The question of timing is left open in subsection (3), making the task a "part of the commission's initial and ongoing responsibilities." Each state should establish a definite time line for the commission's work under § 6A.06.

b. Bases for the community corrections strategy. Subsection (2) gives shape to the underlying work a commission must do when propounding a community corrections strategy. Subsection (2)(a) requires the commission to take stock of existing conditions and available evaluation data. In many states, a study of this kind, by itself, will be a significant contribution to state government and to the courts.

Subsections (2)(b) through (2)(g) provide foundations for the prescriptive content of the commission's community corrections strategy. Subsection (2)(b) requires the commission to produce a statewide vision for community corrections, and a specification of new programming, additional funding, and other sources of support that will be needed to implement the strategy. Subsection (2)(c) requires a specification of categories of offenders eligible for particular community sanctions. Subsection (2)(d) mandates that the commission make projections of financial costs and impacts on sentencing patterns that are anticipated if the strategy is put into place, see § 6A.07.

Subsections (2)(e) and (2)(f) ask the commission to study and recommend mechanisms for improved coordination and funding allocations of community corrections as between state and local governments.

Subsection (2)(g) requires that the commission make an effort to study the innovations of other jurisdictions that have realized success in the creative use of community corrections. See also §§ 6A.01(2)(d); 6A.04(3)(b); 6A.05(3)(c).

REPORTER'S NOTE

This provision is patterned after N.C. Gen. Stat. § 164-42.2 (2006). For other, less detailed provisions that instruct sentencing commission to study available community corrections programs and make recommendations for change to the legislature, see D.C. Code § 3-104(b)(7)

(2006); Kan. Stat. § 74-9101(b)(11),(13),(15) (2006); Mo. Rev. Stat. § 558.019.6(4) (2007); Wash. Rev. Code § 9.94A.850(2)(d),(5) (2006).

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

(1) The Commission shall develop a correctional-population forecasting model to project future sentencing outcomes under existing or proposed legislation and sentencing guidelines. The commission shall use the model at least once each year to project sentencing outcomes under existing legislation and guidelines. The commission shall also use the model whenever new legislation affecting criminal punishment is introduced or new or amended sentencing guidelines are formally proposed, and shall generate projections of sentencing outcomes if the proposed legislation of guidelines were to take effect. The commission shall make and publish a report to the legislature and the public with each set of projections generated under this subsection.

(2) Projections under the model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs.

(3) The model shall be designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.

(4) The commission shall refine the model as needed in light of its past performance and the best available information.

Comment:

a. Scope. This Section requires the sentencing commission to develop a correctional-population forecasting model, and imposes certain requirements on the model's characteristics and use. Under the revised Code, the development of a high-quality correctional-population forecasting model is one of the sentencing commission's most important responsibilities, see § 6A.04(1). Experience has shown that a commission's capacity to generate credible impact projections can have profound effects on policy formation, not only within the commission itself, but at the legislative level as well.

In presumptive sentencing-guidelines systems, future patterns of judicial sentencing rulings are far more predictable than in traditional indeterminate systems. Indeed, no other American sentencing structure has lent itself to computer modeling of punishment decisions as successfully as the presumptive guidelines jurisdictions. The reasons for this are straightforward. Judges in most guidelines systems elect to follow the recommendations set out in presumptive guidelines in the majority of cases. Even in systems in which trial courts are given wide latitude to depart from the guidelines, as in the revised Code, judicial departures tend to cluster in predictable ways. Over time, especially after a new guidelines system has been implemented, a commission's research staff can refine the projection model in light of its past performance and accumulating information, including the monitoring data collected under § 6A.05(2)(c) and (5). Subsection (4) of this provision insists that this be done.

b. Use of the model. Subsection (1) instructs the commission to develop a forecasting model that may be applied to existing sentencing laws and guidelines—and to proposed legislation and guidelines. Baseline projections are needed for the routine operation of the system, and serve as points of comparison when changes in the system are contemplated. Baseline projections for existing laws and guidelines must be generated at least once each year, see also § 6A.05(2)(b).

Projections concerning the future impacts of proposed legislation or amended guidelines are likely to constitute the commission's major workload under § 6A.07. Existing sentencing commissions have been called upon in single years to generate dozens or even hundreds of impact projections. When new or amended guidelines are on the drawing table, slight adjustments in presumptive sentence severity even for a single-offense category may be associated with large shifts in expected punishment outcomes. This is especially true for offense classifications under which large numbers of cases move through the courts each year. Similarly, incremental adjustments in variables such as criminal-history scoring may have substantial aggregate effects. Accordingly, the guidelines drafting process must be attended by repeated—and virtually continuous—use of the projection model. Subsection (1) requires that, whenever a new or amended set of guidelines is proposed formally, see § 6B.11 (alternative versions), the proposal must carry with it a report of the impacts projected by the commission.

Subsection (1) also requires that the commission use its impact-modeling technology to project the effects of proposed sentencing legislation. This provision ensures that the legislature's deliberations will benefit from high-quality information about the expected costs of each proposed

enactment. Over the past two decades, there have been numerous examples of punishment laws that were not enacted by state legislatures, or were recalibrated before enactment, as a result of information supplied in sentencing commissions' correctional-impact projections. In jurisdictions where commissions have existed for a number of years, the credibility of the commission's impact projections among legislators tends to grow with time.

The requirement of impact projections should not be understood as a mandate that the total severity of criminal sentences in a jurisdiction may never change. The correctional-impact projections are neutral in themselves—they do not speak to the wisdom or necessity of a contemplated punishment policy. Their role is to arm policymakers with foreknowledge of anticipatable costs before decisions are taken, and the ability to take timely steps to see that needed facilities and personnel are put in place in a timely fashion. These are elementary components of public fiscal responsibility. For example, an impact projection may serve as timely notice that prison construction must be funded alongside the passage of a new punishment statute or a "toughened" set of guidelines.

The sentencing commission's role in generating projections should be assiduously nonpartisan, see § 6A.01(2)(c). A commission should not lobby for or against prospective legislation, but should limit its advocacy to the promotion of informed decisionmaking, see § 6A.01, Comment *g*.

The final sentence of subsection (1) provides that the commission shall publish a report of each set of projections generated under § 6A.07. The report will be of immediate utility to government decisionmakers, and allows the public to hold government officials accountable for their decisions in light of available information, see § 1.02(2)(b)(viii).

c. Impacts on correctional resources. Subsection (2) makes clear that impact projections are to embrace all correctional resources in the state, at all levels of government. This includes prison and jail bedspaces—the most familiar subject matters of correctional forecasting—and also the full range of community sanctions, including programs of drug treatment and postrelease supervision. Assume, for example, that a proposed set of sentencing guidelines is designed to send fewer offenders to the prisons and a greater number into intermediate punishments. Policymakers need to know that these changes will entail savings in prison bedspaces—as well as predictable expenses associated with the provision of new intermediate-punishment slots. This can alert the legislature to the need for intergovernmental funding accommodations, so that local governments are not placed in the position of subsidizing—or finding themselves unable to subsidize—savings at the state level. Many attempted innovations in offender drug treatment and other community sanctions have foundered upon a state's failure to anticipate and support needed programming.

d. Demographic impacts. Subsection (3) requires the commission to produce projections of "demographic patterns" along with correctional-resource projections. The content of demographic-impact projections is left largely to the commission, except that they must always include information concerning the race, ethnicity, and gender of offenders projected to be punished.

Subsection (3) is not based on existing legislation in any jurisdiction. It is, however, grounded in the existing research capacities of contemporary sentencing commissions. Demographic projections can be generated by commissions' research staffs using the same computer modeling technology that supports resource projections.

Model legislation must choose carefully those provisions it recommends that are not based on past experience. The drafters of the revised Code concluded that the hard realities of racial and ethnic disparities in criminal punishment are of urgent social importance, and present enormous complexities, see § 1.02(2), Comment *j*. Section 6A.07(3) is but one provision among the Code's recommendations that seeks to bring greater transparency, accountability, and legitimacy to decisions concerning race, ethnicity, and punishment. See also § 1.02(2)(b)(iii) (cross-referenced throughout the Code); § 6A.05(2)(f); § 6B.06(2)(a) and (4); § 6B.07(4).

Subsection (3) requires that the demographic consequences of existing and proposed sentencing laws and guidelines become better understood, studied, and debated. The provision does not dictate the policy decisions that will result. Rather, the provision treats numerical disparities in punishment as an important societal cost that must be considered along with other factors when the existing sentencing structure is assessed, or when changes within the system are contemplated.

Projected numerical disparities by race or ethnicity will not always supply a sound basis for avoiding an otherwise justified punishment policy. Numerical disparities by gender will seldom supply such a basis.

For example, rates of homicide commission by African Americans in the most disadvantaged urban communities have exceeded those of the general population for many decades. The victims of high rates of inner-city homicide have in the vast majority of cases also been African Americans. While efforts outside the criminal law must surely be turned to the social, economic, and cultural conditions that produce high levels of homicide in specific com-

munities, the criminal-justice system cannot ignore high rates of serious violent offending, or the victims of those offenses, once they have occurred.

The nation's prisons and jails, and an appreciable share of the racial and ethnic disparities in incarceration, are not the product of penalties for homicide or other serious violent offenses, however. As offense gravity decreases, responsible officials may quickly view high levels of minority-group overrepresentations in sentenced populations as intolerable. Indeed, for crimes low on the felony scale, and especially for drug offenses, research suggests that disparities in imprisonment by race are not closely related to comparable disparities in crime commission. Subsection (3) forces these facts—and their debate—into the open.

Disparities in punishment by gender are driven worldwide by the reality that males commit greater numbers of serious crimes than females. Given the nature of human beings and cultures, it is not realistic to think that rates of criminality across gender lines will equalize. Particularly in the most serious offense categories like homicide, armed robbery, and rape, men outnumber women as offenders by overwhelming margins. Absent massive behavioral changes in society, no jurisdiction should aspire to a gender-neutral punishment policy that will produce correctional populations of equal male-female balance.

Still, the projected demographic impacts of existing or contemplated punishment policy on men and women, respectively, should be known and considered by policymakers. In recent years, the populations of women's prisons have grown at a much faster rate than the men's prisons. This has been an unplanned and unanticipated phenomenon. Few argue that it represents sensible public policy. Demographic projections as required in subsection (3) will

alert decisionmakers to foreseeable gender impacts within the sentencing system as they are occurring and before they occur.

REPORTER'S NOTE

a. Scope. Many sentencing commissions have established a proven capacity to make accurate impact projections of the effects of sentencing guidelines or legislation upon correctional resources in their jurisdictions. Impact projections may be based on current law or proposed changes in law. See Kim Hunt, Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process, 20 Law & Policy 466 (1998); Ronald E. Anderson, Development of a Structured Sentencing Simulation, 11 Social Science Computer Rev. 166 (1993). Professor Frase reported that, as of 2005, the sentencing commissions in at least 10 states were called upon to make correctional-resource projections as recommended in this Section. Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) ("resource impact projections" used on regular basis in Arkansas, Delaware, Kansas, Maryland, Minnesota, Missouri, North Carolina, Ohio, Oregon, Washington; projections sometimes used in the District of Columbia, Pennsylvania, Wisconsin, and the federal system).

See Ala. Code § 12-25-33(10) (2006) (commission shall "[s]tudy bills introduced in the Legislature affecting criminal laws and procedure and prepare impact statements of proposed legislation on Alabama's criminal justice system, including the prison population"); Ark. Code § 16-90-802(d)(6)(A),(B) (2006) ("The commission shall develop a research and analysis system to determine the feasibility, impact on resources, and budget consequences of any proposed or existing legislation affecting sentence length. . . . The commission shall prepare and submit to the legislature a report on any such legislation prior to its adoption"); 11 Del. Code § 6580(a) (2006) ("A computer-driven model of proposed sentencing criteria shall be created . . . which will be able to project the effect of alternative policy decisions on the Department of Correction resources"); id. § 6581(d) ("The Commission shall estimate to what extent public and private resources are appropriate and avail-

able to meet the specifications and supervision standards necessitated by the population of offenders to be assigned to each level"; this provision applies to confinement and community sanctions alike); D.C. Code§ 3-106 (2006) ("Any recommendations by the [Sentencing] Commission for regulatory changes or legislative amendments relating to crime, sentencing, or correctional matters shall take into consideration existing correctional and supervisory resources, including the availability of intermediate sanctions, and shall be accompanied by an assessment of the impact, if any, on the size of the District's correctional and supervised offender population resulting from such change"); Kan. Stat. § 74-9101(6)–(7), (15) (2005) (commission must ensure that sentencing guidelines effectively use state correctional resources, must prepare fiscal-impact and correctional-resource statements, and must prepare prison-population projections); Md. Code, Crim. Proc. § 6-212(3) (2006) (requiring commission to analyze fiscal and statistical impact of proposed sentencing and correctional legislation); Md. Code, Crim. Proc. § 6-213(a) (2006) ("The Commission shall use a correctional population simulation model to help determine the State and local correctional resources that: (1) are required under current laws, policies, and practices relating to sentencing, parole, and mandatory supervision; and (2) would be required to carry out future Commission recommendations for legislation and changes to sentencing guidelines"); Mass. Laws, Ch. 211E, § 2(6), (6)(B) (2006) (sentencing commission shall recommend policies and practices that "ration correctional capacity and other criminal justice resources to sentences imposed, making said rationing explicit, rational and coherent" and "evaluate, on a yearly basis, the performance of said rationing, making appropriate remedial recommendations"); Minn. Stat. § 244.09, subd. 5(2) (2006) ("In establishing and modifying the Sentencing Guidelines . . . [t]he commission shall also consider . . . correctional resources, including but not limited to the capacities of local and state correctional facilities"); N.C. Gen. Stat. § 164-40(a) (2006) ("The Commission shall develop a correctional population simulation model, and shall have first priority to apply the model to a given fact situation, or theoretical change in the sentencing laws"); id. § 164-43(h) (commission shall apply correctional population simulation model to all proposed legislation affecting criminal penalties and report to legislature); Oh. Rev. Code §§ 181.23, 181.24(C), 181.25(A) (2006) (commission must consider the capacities of state cor-

rectional facilities and programs and must project the impact its proposals will have on correctional resources); Okla. Stat. tit. 22, § 1516(A),(B) (2006) (sentencing commission "shall monitor, review, analyze and provide impact statements and reports to the Legislature concerning the criminal law of the State of Oklahoma. . . . The [commission] shall review each bill or joint resolution which impacts the Oklahoma criminal justice system introduced in the Oklahoma Legislature"); Va. Code Ann. § 17.1-803(8) (commission must "[m]onitor felony sentence lengths, crime trends, correctional facility population trends and correctional resources and make recommendations regarding projected correctional facilities capacity requirements and related correctional resource needs."); Wash. Rev. Code § 9.94A.850(2)(h)(i),(ii) (2006) (requiring biennial report to legislature on "[r]acial disproportionality in juvenile and adult sentencing" and "[t]he capacity of state and local juvenile and adult facilities and resources").

No American jurisdiction requires a sentencing commission to project demographic impacts of proposed changes in sentencing law as provided in subsection (3), although such projections have long been feasible with the same modeling techniques used for resource projections. See Ronald E. Anderson, Development of a Structured Sentencing Simulation, 11 Social Science Computer Review 166 (1993); Alfred Blumstein, Jacqueline Cohen & Harold D. Miller, Demographically Disaggregated Projections of Prison Populations, 8 J. Crim. Justice 1 (1980). Given the scale of racial and ethnic disparities in criminal punishment in the nation, see § 1.02(2), Reporter's Note to Comment *j*, this is one policy area in which model legislation must reach beyond existing practice.

The recommendation in subsection (3) was inspired by Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995), at 41-42 (arguing that legislators routinely should consider the foreseeable racial impacts of proposed legislation).

§ 6A.08. Ancillary Powers of Sentencing Commission.

(1) Upon request from the commission, each agency and department of state and local govern-

ment 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.

Comment:

a. Scope. This Section collects a number of provisions that specify the ancillary powers of a sentencing commission during both its initial phase of existence, see § 6A.04, and its ongoing existence after completion of its initial responsibilities, see § 6A.05.

b. Assistance from other state agencies. Subsections (1) and (2) recognize that the commission cannot perform its assigned tasks under §§ 6A.04 and 6A.05 without the help of other state agencies. Subsection (1), written to apply generically to all state agencies, instructs those entities upon request from the commission in the performance of the commission's duties, to provide their services, equipment, personnel, facilities, and information to the greatest extent practicable. Exception is made only for information that is legally privileged under state or federal law. For example, a state public defender's office need not supply privileged attorney-client information to a sentencing commission, and state health-care providers need not supply privileged physician-patient materials.

Subsection (2) addresses two special cases arising under subsection (1). First, all law-enforcement agencies in the state are instructed to supply the commission, upon request, with arrest and criminal-history records of offenders. Second, the provision commands the relevant agency, usually the probation or pretrial-services department, to provide copies of presentence reports to the commission upon request.

Both kinds of materials addressed in subsection (2) are arguably embraced within the general mandate of subsection (1). Special provision is made for them, however, because a number of sentencing commissions have experienced difficulty in obtaining these essential records from law-enforcement or probation agencies. Subsection (2) is also more forceful than subsection (1) in that it contains no caveat that the assistance to the sentencing commission be rendered only "to the greatest practicable extent."

c. Preservation of offender confidentiality. Wherever reasonably feasible, the commission should take steps to protect the confidentiality of individual offenders about whom it amasses personal information from a variety of sources. Subsection (3) speaks to this concern. It should be possible for the commission to erect privacy safeguards without obstructing important data on offender populations, sentencing patterns, crime trends, and recidivism from outside scrutiny. The second sentence of subsection (3) instructs the commission, where possible, to retain information about specific offenders in a coded form that allows examination of individual-level data but obscures offenders' personal identities. This provision is borrowed from the actual practice of existing commissions.

d. Sentence reports. Subsection (4) formalizes the duty of sentencing courts to complete sentence report forms as designed by the commission, see § 6A.05(5)(a), and to supply those forms to the commission. Without reliable and complete transmission of sentence reports, the commission cannot perform its basic function of monitoring sentences imposed within the systems and the correlates of and reasons for those sentences, see § 6A.05, Comment *e*.

e. Research partnerships. Subsection (5) is rooted in the reality that single jurisdictions, or lone agencies, cannot

themselves discharge the research responsibilities that should ideally be met within a sentencing and corrections system. Accordingly, means must be found to join forces with other entities. One model for multijurisdiction cooperation is to rely on the federal government as the primary actor. The support of the federal government, however, has proven inadequate to meet all needs in the area. Accordingly, the states should be encouraged to explore partnerships and consortiums that include other state governments or private associations. A number of existing commissions have undertaken such efforts, which have added meaningfully to their knowledge base and ability to improve the working of their sentencing systems.

f. Fundraising by commission. Subsection (6) gives commissions broad powers to engage in fundraising to support their operations. Particularly when a commission contemplates ambitious research programs or partnerships outside the scope of its normal operations, see subsection (5) above and § 6A.05(4)(b) and (c), its routine appropriation from the legislature may prove inadequate to the task. As with subsection (5), subsection (6) recognizes the critical shortage in criminal justice, and in the field of sentencing, of basic information and essential research. Statutory tools must be given to sentencing commissions to explore creative ways to address these shortfalls.

REPORTER'S NOTE

b. Assistance from other state agencies. See Ala. Code 12-25-11 (2006); Ark. Code § 16-90-802(d)(7)(b) (2006); Del. Code tit. 11, § 6581-(h) (2006); D.C. Code § 3-108 (2006); Kan. Stat. § 74-9106 (2005); Md. Code, Crim. Proc. §§ 6-206(a)(2), 6-207 (2006); Mass. Gen. Laws § 211E, § 1(c)(3),(e) (2006); Minn. Stat. § 244.09, subd. 8 (2006); Rev. Stat. Mo. § 558.019(8) (2006); N.M. Stat. § 9-3-10.1(B) (2006); N.C. Gen. Stat. § 164-44 (2006); 42 Pa. Cons. Stat. § 2153(a)(2),(4),(5) (2006); Or. Rev. Stat.

§ 137.661 (2006); 28 U.S.C. § 995(c) (2006); Utah Code § 63-25a-305(2) (2006); Va. Code § 17.1-804(C) (2006); Wash. Rev. Code § 9.94A.855 (2006).

d. Sentence reports. Most jurisdictions with sentencing commissions and guidelines require in legislation that sentencing courts provide basic information about sentences imposed to the commission on a routine basis, or else grant the commission authority to impose such a requirement. See Ala. Code § 12-25-35(e) (2006); Ark. Code § 16-90-802(d)(7)(A)(i) (2006); Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987); D.C. Code § 3-105 (2006); Kan. Stat. § 22-3439(a) (2005); Md. Code, Crim. Proc. § 6-210(1) (2006); Mass. Gen. Laws ch. 211E, § 3(h) (2006); Minn. R. Crim. P. 27.03, subd. 2(C) (2006); Or. Rev. Stat. § 137.010(9) (2006); 42 Pa. Cons. Stat. § 2153(a)(14) (2006); 28 U.S.C. § 994(w) (2000); Va. Code § 19.2-298.01 (2006); Rev. Code Wash. § 9.94A.480(2) (2006).

e. Research partnerships. There is no known statutory precedent for subsection (5), yet research partnerships have proven essential to some sentencing commissions to pursue projects beyond the scope of their solo capacities.

f. Fundraising by commission. A fundraising power is granted explicitly to commissions in many existing codes. See Kan. Stat. § 74-9105 (2005); Md. Code, Crim. Proc. § 6-206(a)(3) (2006); Mass. Gen. Laws. ch. 211E, § 1(c)(3), (5) (2006); Minn. Stat. § 244.09, subd. 9 (2006); N.M. Stat. § 9-3-10.2 (2006); N.C. Gen. Stat. § 164-44 (2006; Okla. Stat. tit. 22, § 1509(B) (2006); S.C. Code § 24-26-40 (2006).

§ 6A.09. Omnibus Review of Sentencing System.

(1) Every [10] years, the sentencing commission shall perform an omnibus review of the sentencing system, including:

(a) a long-term assessment of the operation of the state's sentencing laws and guidelines in meeting the purposes in § 1.02(2), and for their effects on the administration, effi-

ciency, 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.

Comment:

a. Scope. This Section addresses the fundamental need for global self-assessment of the sentencing system at regular intervals. The revised Code takes the strong view that questions of sentencing law, policy, and procedure cannot be resolved at any point in time for all future years. Indeed, the subject area should be seen as one that is continually evolving. Innovations such as restorative justice, improvements in drug-treatment effectiveness, sentencing information systems, more powerful tools of risk and needs assessments, among others, are likely to change best practices in criminal punishment in the coming years. A sound institutional structure must accommodate self-criticism, experimentation, and pathways for permanent change. Subsection (1) instructs the sentencing commission, at least once every 10 years (or a similar interval), to conduct an ambitious omnibus review of the sentencing system to inform the commission's own work, and for the benefit of others within and outside the system.

The kind of study contemplated in § 6A.09 will occur infrequently in the absence of legislative command, and legislative support. It cannot be expected that overworked commission members and staffs will have the time or resources to step back and reflect on long-term trends and big-picture goals as part of their workaday routines. Long-range planning or the search for new horizons of possibility can often appear to be luxuries when compared with the press of current business. State sentencing commissions have conducted omnibus reviews of their systems irregularly at best, but the benefits in self-awareness, concrete changes in guidelines, and improvements in the use of resources have been large. Section 6A.09 would set in place a regular cadence for such efforts, so that they are foreseeable within the life-cycle of a commission.

b. Time interval. The 10-year interval suggested in bracketed language in subsection (1) is intended as an outer boundary. A five-year or seven-year review cycle would be more desirable. Resource constraints, however, might inhibit many commissions from undertaking the task with such frequency. Even a conservative 10-year interval would produce whole-system reviews more often than they have been performed by existing sentencing commissions since the 1980s. Section 6A.09 commits the legislature to support such efforts at least once a decade.

c. Content of omnibus review. Subsections (1)(a) through (1)(f) outline the required contents of an omnibus review. The catch-all provision in subsection (1)(f) reflects the general philosophy of the revised Code that important research functions of the commission should not be narrowly defined by legislation. Over the years, the content and manner of presentation of omnibus reviews should be determined to a large degree by the commission and its research staff. Feedback from the consumers of earlier reviews and reports, see subsection (2), should loom large in a commission's planning for the next review cycle.

Subsection (1)(a) describes in general terms, again subject to the commission's best judgment and accumulating experience, the responsibility to make a long-term assessment of the operation of the state's sentencing laws and guidelines in meeting the purposes of § 1.02(2) (general purposes of the sentencing system). Section 1.02(2) focuses the commission's attention on the success of the system in delivering appropriate individual punishments within the strictures of § 1.02(2)(a), and the realization of the system-wide aspirations set forth in § 1.02(2)(b). A major portion of the omnibus review's table of contents may thus be discerned within the purposes provision itself.

To this the provision adds a particular instruction that the commission is to study the effects of sentencing laws and guidelines on the administration, efficiency, and resources of the court systems of the state. A sentencing system cannot be deemed effective, and stands small chance of faithful implementation, if the administration of sentencing laws and procedures in the courts is unduly burdensome. If disproportionate effort is required to discharge routine tasks, for example, the courts will have less available time and attention to resolve issues of difficulty and high significance. Accordingly, administrative efficiency is a critical element of the smooth operation of the sentencing system in both the trial courts and the appellate courts.

Subsection (1)(b) directs the commission's attention to long-term resource needs within the sentencing system. The commission is uniquely situated to speak to this subject because of its regular responsibilities for the preparation of correctional impact projections whenever new sentencing laws or guidelines are proposed, see § 6A.07. Subsection (1)(b) is intended to provoke a broader consideration of resource issues within the state, however, and operates on a longer time horizon than the subject-specific reports prepared under § 6A.07. Further, subsection (1)(b) requires the commission to address the difficult problem of coordination in the use of state and local correctional resources.

Subsection (1)(c) requires the commission to comment upon the adequacy of the data and research available within the sentencing system, and to identify areas in which necessary information is lacking. Severe shortages in knowledge and information have been recognized within American criminal-justice systems for more than a century. Progress in addressing these needs has been real, but slow.

Subsection (1)(c) anticipates that knowledge and information deficits will persist for some time to come, but asks the commission to prioritize for the legislature and the public those data and research needs that ought to be highest on the agenda for future development. Under subsection (1)(e), the commission may choose to recommend legislation or changes in appropriations required to address the most urgent needs it has identified.

Subsection (1)(d) continues the revised Code's philosophy that state sentencing systems should make ongoing efforts to learn from one another, see also §§ 6A.01(2)(d), 6A.03(1)(c), and 6A.05(3)(c). A commission undertaking a global reassessment of its own operations, and the sentencing system of its home jurisdiction, cannot reach sensible conclusions without a comparative awareness and perspective. Even on the level of particulars, existing sentencing commissions have found that changes within their own systems are frequently inspired by what other states have done.

The omnibus review might identify problems within the sentencing system that the commission is not empowered to rectify. Subsection (1)(e) creates an expectation, and the relevant lines of communication, so that the commission may convey its recommendations of needed changes in law to the legislature or the state's rulemaking authority.

d. Report of omnibus review. As with all of the commission's significant work, a report of the omnibus review is required in subsection (2). Because the omnibus review speaks to issues of the performance of the sentencing system as a whole, reports under subsection (2) should be of interest to a broader audience of policymakers, professionals, and members of the public than the audience for many

other reports prepared by the commission. Indeed, this is one document that can be expected to find a wide readership in other jurisdictions. The report following an omnibus review should accordingly be prepared with special care and attention to accessibility in communication.

REPORTER'S NOTE

a. Scope. This provision is based on ABA, Criminal Justice Standards, Sentencing, Third Edition, Standard 18-2.7(b) (1994) ("At least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed"). The commentary to this Standard states that the 10-year interval was "intended as an outer boundary" and that "more frequent systemic review would be desirable." Id. at 37. The revised Code delegates the task to the sentencing commission. There is no statutory precedent for § 6A.09, although a number of sentencing commissions have undertaken useful multi-year studies of major issues in their sentencing systems on an ad hoc basis. See, e.g., Minn. Sentencing Guidelines Comm'n, the Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation (1984); Wash. Sentencing Guidelines Comm'n, A Decade of Sentencing Reform: Washington and Its Guidelines 1981-1991 (1992); John Kramer & Cynthia Kempinen, The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines, 8 Fed. Sent. Rep. 74 (1995); U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform (2004); Va. Criminal Sentencing Comm'n., 2004 Annual Report (2004), at 43-65 (assessing previous decade).

The academic research community has generated important multi-year policy evaluations of the sentencing systems in a handful of states. See David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 27 (2001); Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 29 (2002); Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005).

REPORTER'S INTRODUCTORY NOTE TO ARTICLE 6B

Article 6B addresses the instructions a legislature should give a sentencing commission for the promulgation of sentencing guidelines and amended guidelines, and imposes statutory limitations on the scope and legal effect of the guidelines produced by the commission. Article 6B does not itself set forth recommended sentencing guidelines. Indeed, the revised Code assumes that the formats of sentencing guidelines, and the policy judgments reflected within them, will vary considerably from jurisdiction to jurisdiction.

A current draft of § 6B.08 (Sentences Upon Convictions of Multiple Offenses; Consecutive and Concurrent Sentences) is included below for informational purposes only. Because the Reporter contemplates substantial revision of this Section, it is not presented for approval by the membership with the remainder of Tentative Draft No. 1.

ARTICLE 6B. SENTENCING GUIDELINES

§ 6B.01. Definitions.

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.

Comment:

a. Scope. This provision sets out definitions for the basic terms used throughout Article 6B. It also gives shorthand references for the most frequently used terms (such as "commission" as an alternative to "sentencing commission" or "departure" in lieu of "departure sentence"). The legal forms and concepts catalogued here also have operation outside of Article 6B, for example, in Article 6A and in §§ 7.XX and 7.ZZ. As required in other Articles, the black-letter text or Comment cross-references Article 6B.

The revised Code does not insist upon a particular lexicon to express the concepts and mechanisms at work in a sentencing-guidelines system. See § 6A.01, Comment *a*. Indeed, even the terminology of sentencing "guidelines" might just as easily be replaced by alternatives such as sentencing standards, standard sentences, sentencing presumptions, or structured sentencing provisions.

b. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments to §§ 6B.01(2) through 6B.01(4):

> **(2) "sentencing guidelines" or "guidelines" means sentencing guidelines promulgated by the commission and made effective under § 6B.11, which include ~~presumptive~~ recommended sentences, ~~presumptive rules,~~ other guidelines ~~provisions~~ recommendations, and commentary;**
>
> **(3) "~~presumptive~~ recommended sentence" means the penalty, range of penalties, alternative penalties, or combination of penalties indicated in the guidelines as appropriate for an ordinary case within a defined class of cases;**
>
> **(4) "departure sentence" or "departure" means a sentence that deviates from a ~~presumptive~~ recommended sentence ~~or rule in the guidelines~~ or other guidelines recommendation;**

If a legislature wishes to create advisory rather than presumptive guidelines, it is no longer appropriate to speak of "presumptions" in the guidelines that may be overcome by factfinding and legal analysis performed by sentencing courts. A more accurate word choice, that better defines the operation of guidelines that are merely advisory, is that the corpus of guidelines is made up of "recommendations" for sentencing courts.

Care in the definition of terms may be especially important if a jurisdiction has chosen an advisory guidelines structure in the hope that constitutional jury factfinding requirements at sentencing will not apply to such a system. Legislatively authorized "presumptions" at sentencing might in some instances run afoul of the Sixth Amendment, if judicial factfinding were explicitly required to override guidelines presumptions. Although it is certainly possible in an advisory guidelines structure to identify sentences that are consistent or inconsistent with the guidelines, the system must avoid placing a quantifiable legal burden on trial courts to adhere to guidelines terms.

Subsections (2) through (4), adapted to an advisory regime, therefore substitute forms of the word "recommendation" wherever "presumption" occurs in the unaltered subsections.

Subsection (4) retains the concept of a "departure" from advisory guidelines. Although there can be no explicit "departure standard" in an advisory regime, see § 7.XX, Comment *i*, infra, a well-designed advisory system should nonetheless place a burden upon sentencing courts to explain the reasons for their departure decisions. This marginal burden provides at least some incentive to adhere to the guidelines in cases where the judge does not feel strongly that a sound basis for departure exists. It also ensures that sentencing courts will engage in transparent, reasoned analysis whenever their decisions do not ratify the policy judgments embedded in the advisory guidelines. Most importantly, the requirement of a statement of reasons is an absolute prerequisite for appellate sentence review as contemplated in § 7.ZZ, Comment *l*, infra.

The concept of an "extraordinary departure," as set forth in § 6B.01(5), is retained for jurisdictions that choose to employ the Code's advisory guidelines structure. The bench-

mark against which an extraordinary departure is measured is never a guideline created by the sentencing commission, as explained in subsection (5). Rather, this mechanism comes into play only when the legislature itself, or the appellate courts, create a rule that is invested with a "heavy presumption" of correctness in the sentencing process. The policy choice to have an advisory *guidelines* system should not divest the legislature or the courts of their independent lawmaking powers.

In some cases, the factual basis for an extraordinary departure at sentencing may fall subject to Sixth Amendment requirements of jury resolution under the reasonable-doubt standard. Presumably, in such instances, the legislators or appellate judges who created the heavy presumption were willing to countenance the procedural cost of a jury factfinding process. Under the Code's advisory guidelines structure, § 7.07B remains in effect to give the courts flexibility to employ juries as factfinders at sentencing when required by the Constitution.

REPORTER'S NOTE

a. Scope. Definitions provisions exist in a number of sentencing-guidelines jurisdictions, sometimes in statute and sometimes as part of the guidelines. See Ala. Code § 12-25-32 (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 7; Kan. Stat. § 21-4703 (2006); Md. Sentencing Guidelines Manual 2-4 (2007); Michigan Sentencing Guidelines Manual 9-12 (2006); Minnesota Sentencing Guidelines and Commentary 85-86 (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 18-19 (2005); N.C. Gen. Stat. § 15A-1340.11 (2006); Ohio Rev. Code § 2929.01 (2006); Or. Admin. R. 213-003-0001 (2007); Rev. Code Wash. § 9.94A.030 (2006).

b. States choosing an advisory guidelines system. For a discussion of the Sixth Amendment requirement of jury factfinding at sentencing, as applicable to presumptive guidelines systems, and as not applicable to advisory guidelines systems, see § 7.07B, Reporter's Note to Comment *a*.

§ 6B.02. Framework for Sentencing Guidelines.

(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].

Comment:

a. Scope. This provision outlines the characteristics of sentencing guidelines under the revised Code. Within the wide range of possible sentencing systems denoted as "guidelines" systems, the Code selects and recommends

those features associated with the most successful state guideline systems. At the same time, the Code allows considerable room for variation and experimentation in different states, and for guidelines to evolve in a single jurisdiction over time.

Subsection (1) states that the guidelines shall contain presumptive sentences for both felonies and misdemeanors. Most states have formulated guidelines for felonies alone, while a growing number of guidelines systems embrace both felonies and misdemeanors. Subsection (1) reflects a policy choice in favor of broader coverage of the guidelines. Large numbers of misdemeanor convictions occur in all American criminal-justice systems, considerable resources are invested in the punishment of those offenses, and the most severe misdemeanor sentences can be more punitive than the least severe felony sentences. A comprehensive approach to fairness, effectiveness, and the efficient use of resources in sentencing law should accordingly reach misdemeanors as well as felonies. Limited exceptions to the comprehensive approach of this subsection are set forth in § 6B.10(2).

b. Presumptive provisions. Subsections (1) and (2) delineate the commission's powers to author "presumptive" guideline provisions. Subsection (7) expressly limits the commission's authority through use of the same concept: No sentencing recommendation, rule, standard, or other guideline provision promulgated by the commission itself can carry legal authority greater than "presumptive" authority.

The word "presumptive" is not wholly self-defining. On its face it rules out the extremes of a mandatory guidelines system or one in which guidelines are purely advisory. Many possibilities exist in between these two extremes, however,

and all of them could potentially be labeled "presumptive." In order to grasp the quantum of legal force assigned to presumptive guidelines in the revised Code, it is necessary to review the interlocking provisions of §§ 6B.04 (Presumptive Guidelines and Departures); 7.XX (Judicial Authority to Individualize Sentences); and 7.ZZ (Appellate Review of Sentences). As explained in the Comments following those Sections, the revised Code places heavy emphasis on the preservation of judicial sentencing discretion within a framework of sentencing law. When adequate reasons can be given in specific cases, in light of the purposes of punishment set out in § 1.02(2), the courts hold ultimate discretion to deviate from guideline presumptions.

Subsection (2) permits the commission to draft presumptive guidelines provisions in addition to the statements of presumptive sentences and the enumerations of aggravating and mitigating factors expressly required in subsection (1). This reflects a general theme in § 6B.02 that the exact form and means of expression of guidelines should not be dictated by the legislature, but should be within the remit of the commission, see subsection (3). Many conceivable guideline provisions fall within the scope of subsection (2). A commission, for example, will find it necessary to promulgate presumptive rules that address the choice between concurrent and consecutive sentences in particular categories of cases, see § 6B.08. Section 6B.03(5) invites the commission to develop principles for prioritization of the utilitarian and restorative purposes of sentencing as applied to identified categories of cases. A commission might decide that offenders' criminal histories shall not be considered in the derivation of presumptive sentences, but choose instead to create other rules or principles on the subject, see § 6B.07(1). The revised Code authorizes the commission to produce standards to assist courts in weighing a defendant's

cooperation with the government as a factor at sentencing, see § 6B.06(6). Beyond these examples, commissions may find it desirable to address many other recurring subject matters not specified by statute.

c. Flexibility in means of expression. Subsection (3) gives the commission wide latitude to determine the best means of expression of presumptive sentences and other guidelines provisions. Although most American guidelines jurisdictions have favored a two-dimensional grid (or "chart" or "matrix"), with axes for crime severity and criminal history, the revised Code does not insist upon such a format. A handful of states have experimented with narrative guidelines, or guidelines reduced to offense-specific worksheets. These innovations and others are allowed and encouraged under the Code.

The two-dimensional grid carries certain advantages that a commission should consider. Most guidelines grids are simple to use. A grid also displays at a single glance numerous policy choices of critical importance to the system as a whole. With modest study, for example, it is easy to discern comparative levels of sentence severity across crime categories. The visual aid of a one-page grid, with its wealth of reference points, can assist the commission in the goal of furthering proportionality in punishment across different offenses, see § 1.02(2)(a)(i). Indeed, the physical layout of a guidelines grid makes it difficult to avoid thinking about proportionality relationships. Suppose for example, in a proposed set of guidelines, a property offender with a prior record of property offending is slated to receive a heavier penalty than a serious violent offender with past convictions for violent crimes. This kind of anomaly can appear glaring in the pictorial layout of a guidelines grid. Similarly, the grid format may be useful for the efficient display of data about the operation of the sentencing system, such as the numbers

of cases expected to arise in each "grid box," or the rate of guideline departures in one zone of the guidelines as opposed to another. Ultimately, these visual tools can facilitate thought and promote insights about sentencing practices in a jurisdiction.

A disadvantage of the two-dimensional grid is that it gives primacy to the sentencing factors charted on its x and y axes. Further, the configuration of the grid can impose a logic upon policy decisions that ought to be called into question. See, e.g., § 6B.07, Comment *b* (existing guideline grids assume a linear relationship between offenders' lengthening criminal histories and severity in punishment). In evaluating these shortcomings, it is important to understand that no American guidelines system is limited to consideration only of the factors represented on the twin axes of the grid. All guidelines systems allow sentencing judges to weigh "non-grid" factors, which add dimension to the operation of the guidelines. The number and significance of non-grid factors varies across jurisdictions. Virtually all American guidelines systems, for example, include enumerated aggravating and mitigating factors within the guidelines that may be used as reasons for deviation from presumptive sentence recommendations. These factors typically represent considerations that cannot be quantified in advance for whole categories of cases, see § 6B.04(4) and Comment *e*. Most systems also allow room for judge-made departure factors, which can add greatly to the substantive concerns that play a role in sentencing decisions. See § 7.XX(2)(a) (expressly authorizing the creation of judge-made departure factors grounded in the purposes of § 1.02(2)(a)). The commission and the courts can also develop principles for the application of sentencing purposes to individual cases. Some commissions have indicated that different goals of punishment should operate, or should be considered in different orders

of priority, depending on the type of offense before the court. This approach is encouraged in § 6B.03(5) of the revised Code. The appellate courts in a number of jurisdictions have also created substantial bodies of case law devoted to the consideration of sentencing purposes by trial courts within the guideline system. See § 7.ZZ(1). All of these added dimensions of analysis allow the simple device of a grid to work as a starting point for punishment determinations, while still permitting a wide range of subjective or case-specific factors to assume a formal role in case decisions.

Despite decades of experience with guidelines grids across a number of state guideline systems, the drafters of the revised Code concluded that it was neither a timeless nor perfected instrument of sentencing policy. The pros and cons of the grid format should remain open to study and debate as further innovations in sentencing reform are pioneered in the coming years. A small number of states have used narrative sentencing guidelines with success. Other jurisdictions have experimented with guideline worksheets for specific offenses or categories of offenses. Fully computerized iterations of guidelines may be closely at hand. The ability of guidelines to contribute to the operation of the system bears no necessary relation to their means of expression. Indeed, the decision to avoid "numerical" guidelines has in some jurisdictions proven to be popular with judges and practitioners, and has perhaps been an important element of the political acceptability of guidelines reform in those states.

d. Simplicity in guidelines. Subsection (4) states the qualified principle that simplicity in guideline drafting is desirable when it is feasible. Some sentencing commissions have produced byzantine guidelines. In the federal system, for example, the operation of the "relevant conduct" provi-

sion and the criminal-history rules are often quite difficult for the parties to anticipate in advance. Even calculations of offense severity require numerous steps, and cases involving multiple counts of conviction encounter formidable complexities. Most state systems, in contrast, have produced sentencing guidelines that are relatively easy to apply. Other things being equal, a simple system facilitates guidelines compliance more readily than a complex system, and is less likely to stir resentment among officials who must work with the guidelines on a daily basis.

e. Nonbinding guideline commentary. Subsection (5) requires the commission to append nonbinding commentaries to its guideline provisions. The commentary serves a dual function. First, it ensures that the commission has adequately explained its reasoning in promulgating guidelines, see § 6A.01(2)(e). Second, it may assist actors in the sentencing system in the proper application of the guidelines.

Under the revised Code, the guidelines commentary carries no force of law. This reflects the Code's general approach of limiting the authority of the commission in relation to the judicial branch. The courts may, of course, choose to endorse specific commentaries as a matter of judicial lawmaking.

f. Array of sanctions. Subsection (6) requires the commission to address the full range of criminal sanctions in guidelines provisions, with the exception of the death penalty. The exception applies only in jurisdictions that authorize capital punishment, and is accordingly set forth in brackets.

Some sentencing commissions have produced guidelines that speak only to the questions of whether prison sanctions should be imposed, and the length of prison terms. Several state commissions, in contrast, have formulated guidelines that address the full range of community sanc-

tions, from the most to least restrictive. A number of these states have had success in giving structure to nonprison sanctioning decisions, and in encouraging the greater use of intermediate punishments, see § 1.02(2)(b)(iv).

The inclusion of the full menu of criminal sanctions within the ambit of guidelines is also needed for planning purposes. The ability of a commission to project future needs in community-based programs, see § 6A.07(2), is greatly increased when the demands on those programs are channeled through guidelines. The commission, for example, when proposing new guidelines to divert some proportion of prison-bound offenders into drug treatment, can alert the legislature to anticipated needs for additional program slots if the new guidelines were to take effect. Among American jurisdictions without sentencing commissions and guidelines, experience has shown that desired changes in sentencing policy can be frustrated by the lack of high-quality projections of resource needs, and advance planning for meeting those needs.

g. Limitation on commission authority. The primary limitation on the power of the sentencing commission under the revised Code is the institutional choice that the commission can author no affirmative recommendation, principle of limitation, or prohibitive standard that carries legal authority greater than presumptive force. Subsection (7) makes this limitation express and unmistakable. As defined in the Code, the legally binding character of guideline presumptions is relatively modest, allowing considerable latitude for judicial sentencing discretion in particular cases. See Comment *b*, above.

The Code does contemplate that some rules applicable to sentencing decisions will carry greater weight than presumptive guidelines provisions. These must be laid down by

official decisionmakers other than the commission, however. Subsection (7) provides that the legislature or the state's highest court may create and enforce rules that are more forceful than guidelines presumptions.

h. Guidelines to operate within statutory maximum penalties. Subsection (8) sets forth a rule, all but universal among American guidelines systems, that no sentence recommended by the guidelines may exceed the statutory maximum penalty for the offense or offenses of conviction. These maxima for felonies and misdemeanors are set out in §§ 6.06 and 6.09 of the 1962 Code.

i. Resource management under the guidelines. When promulgating sentencing guidelines, subsection (9) requires that the commission make use of the correctional-population forecasting model described more fully in § 6A.07. The second sentence of subsection (9) instructs the commission that any guidelines it formally proposes must not be designed to produce sentences that will exceed the existing or funded correctional resources of state and local governments. The commission may not by itself commit state and local governments to new expenditures, nor may it seek to implement sentencing policy without assurance that the required facilities and personnel will be made available.

Subsection (9) does not foreclose a commission from propounding guidelines that would require new correctional resources in the state. All existing sentencing commissions have done so. Some have written guidelines that have contributed to planned incarceration growth; some have produced guidelines that have expanded the need for intermediate punishment programming. What subsection (9) does require is that requisite facilities and personnel be funded in conjunction with the adoption of guidelines that are expected to call upon those resources. If the legislature,

or local governments, will not or cannot provide what is needed, the commission's freedom of action must be limited by those realities. The commission's guidelines may of course introduce new priorities for the efficient and effective use of existing resources. But the commission may not produce guidelines to fit an imaginary correctional system.

j. Compliance with administrative-procedure act. The notice, hearing, and explanation requirements of each state's administrative-procedure act should supply the template for procedural requirements visited upon sentencing commissions. Subsection (10) so provides. An open and visible lawmaking process is especially valuable in the field of criminal sentencing, where broad input from diverse constituencies is needed for the best operation and legitimacy of the system as a whole.

k. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (1), (2), (3), and (7), as follows:

> **(1) The sentencing guidelines shall set forth ~~presumptive~~ recommended sentences for cases in which offenders have been convicted of felonies or misdemeanors, and nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences, subject to § 6B.04.**

(2) The guidelines may set forth additional ~~presumptive rules~~ recommendations applicable to sentencing decisions as determined by the commission, or when required by law.

(3) The commission shall determine the best formats for expression of ~~presumptive~~ recommended sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression. . . .

(7) No provision of the guidelines shall have legal force ~~greater than presumptive force as described in this Article~~ in the absence of express authorization in legislation or a decision of the state's highest appellate court. The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court.

Most of the alterations suggested above are needed to carry forward the substitution of the concept of "recommendations" about sentencing where the stronger term "presumption" occurs in the unaltered provision, see § 6B.01, Comment *b*.

Subsection (7) recognizes, however, that the guidelines may incorporate legally enforceable rules or proscriptions created by the legislature or controlling court decision. Thus, for example, advisory guidelines in any American system could state with authority that criminal punishment may not be increased based on a defendant's race or religious beliefs. This would merely incorporate constitutional law. In each

jurisdiction, however, it is open to the legislature or courts to impose additional, subconstitutional rules on the sentencing process, see § 6B.06. For instance, a jurisdiction might choose to provide through statute or appellate-court opinion that a defendant's decision to plead guilty cannot lawfully supply a basis, without more, for a sentence markedly more lenient than the judge would have imposed in the absence of a guilty plea. If such a rule were to be formulated by the legislature or the courts in an advisory guidelines jurisdiction, the sentencing commission can be expected to incorporate into "advisory" guidelines the legally binding rule created by an authority external to itself.

REPORTER'S NOTE

a. Scope. Several American sentencing-guidelines schemes regulate both felony and misdemeanor sentencing, as recommended in subsection (1). See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (sentencing guidelines in Delaware, Maryland, North Carolina, Pennsylvania and Tennessee cover misdemeanors as well as felonies; guidelines in Utah and the federal system cover selected misdemeanors). Ohio may be added to this list. See Ohio Rev. Code §§ 2929.11—2929.22 (2006). See also Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research, vol. 32 (2005), at 210 ("Misdemeanor sentences overlap substantially with felony intermediate sanctions; regulating the latter but not the former would produce serious proportionality problems").

The majority of existing guidelines schemes extend only to felonies, or to selected felonies. See Ala. Code § 12-25-31.1(a)(1) (2006); Ark. Code § 16-90-803(a)(2) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.3; Kansas Sentencing Commission Website (last visited February 12, 2007); Michigan Sentencing Guidelines Manual 1 (2006); Minnesota Sentencing Guidelines and Commentary § I (2006); Mo. Rev. Stat. § 558.019.6(3) (2007); Utah

Sentencing Comm'n, Adult Sentencing and Release Guidelines 7 (2006); Va. Code Ann. § 17.1-803(1) (2006); Rev. Code Wash. § 9.94A.905 (2006).

b. Presumptive provisions. On the continuum of stopping points between a purely advisory sentencing-guidelines system and one that is wholly mandatory, see Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155-173 (2005).

c. Flexibility in means of expression. The "grid" (sometimes called "matrix" or "chart") format has been a popular but not universal means of expression for American sentencing guidelines. In a sentencing guidelines grid, the severity of the current conviction is arrayed on one axis of the grid (usually, as a matter of arbitrary convention, on the vertical axis) and the offender's criminal history is arrayed on the other axis. Guidelines sentences, or ranges of sentences, are displayed in a "cell" or "grid box" at the intersection of the appropriate rows and columns in each case. See Ark. Code § 16-90-802(d)(1)(A) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.2; Kan. Stat. §§ 21-4704 & 21-4705 (2006); Md. Code, Crim. Proc. § 2-210(2); Mich. Comp. Laws §§ 777.61-.69 (2006); Minnesota Sentencing Guidelines and Commentary § II.C (2006); N.C. Gen. Stat. § 15A-1340.13(b) (2006); 204 Pa. Code §§ 303.16—303.18 (2005); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 22-23, 26-27, 37-38, 41 (2005); Or. Admin. R. 213-004-0001 (2007); Tenn. Code § 40-35-101 Commentary (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 10, 13-14; Rev. Code Wash. §§ 9.94A.510, 9.94A.517 (2006). The use of a guidelines grid is rarely insisted upon in legislation directing a sentencing commission to formulate guidelines. See, e.g., 11 Del. Code § 6581(c)(1) (2006); D.C. Code § 3-101(b)(1), (4) (2006); Kan. Stat. § 74-9101(b)(1) (2006); N.C. Gen. Stat. § 164-42 (2006).

Alabama, Delaware, Ohio, Virginia, and Wisconsin have created sentencing guidelines that use formats other than the two-dimensional guidelines grid. See Alabama Sentencing Commission: Initial Voluntary Sentencing Standards & Worksheets (2006), at 22; Delaware Sentencing Accountability Commission Benchbook 2006, at 26-90 (series of tables displaying "presumptive sentences" for offenses by category); Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines,

Offense Worksheets (9th ed. 2006); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes (2006) (worksheets). In Ohio, the framers of the state's guidelines felt it important to avoid the perceived inflexibility of a numerical grid system. The Ohio guidelines are set forth in narrative, statutory form. See Ohio Criminal Sentencing Commission, Judicial Decision Making after *Booker* (2005), at 12; Burt W. Griffin and Lewis R. Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan, 53 Case Western Reserve L. Rev. 1 (2002).

d. Simplicity in guidelines. On the relative simplicity of most state sentencing-guidelines systems, and the relative complexity of the federal system, see Kevin R. Reitz, The Federal Role in Sentencing Law and Policy, 543 The Annals of the American Academy of Political and Social Science 116 (1996); Marc Miller, True Grid: Revealing Sentencing Policy, 25 U.C. Davis L. Rev. 587 (1992).

f. Array of sanctions. Many existing guidelines schemes extend to the full range of available criminal sanctions, with the exception of the death penalty. Sometimes this is required in legislation. See Ala. Code § 12-25-33(5) (2006); 11 Del. Code § 6581(c)(1) (2006); N.C. Gen. Stat. § 164-42(a) (2006); 42 Pa. Cons. Stat. § 2154.1-2154.2 (2006); Va. Code § 17.1-803(4) (2006). For an overview of state practices, see Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1196 table 1 (2005) (sentencing guidelines included intermediate sanctions in Arkansas, Delaware, North Carolina, Oregon, Pennsylvania, and Tennessee; guidelines covered "some" intermediate sanctions in Michigan, Missouri, Utah, Virginia, Washington, Wisconsin, and the federal system).

Some existing codes do not require, but merely permit, the sentencing commission to create guidelines for the broad menu of criminal punishments, including prison, jail, and community penalties of varying intensity. The legislature's failure to make this responsibility mandatory can result in a guidelines scheme that does not speak to the full array of subcapital sanctions. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research 134 (2005) (although authorized to create guidelines for jail and community sanctions, "the [Minnesota sentencing] commission chose not to regulate any of these decisions").

h. Guidelines to operate within statutory maximum penalties. See, e.g., Rev. Code Wash. § 9.94A.599 (2006) ("If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence"). See also Ark. Code § 16-90-803(b)(3)(C) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 3.8; Md. Code, Crim. Proc. § 6-216(b)(1) (2006); Minnesota Sentencing Guidelines and Commentary § II.H (2006); Mo. Rev. Stat. § 558.019.6(3) (2007); Or. Admin. R. 213-008-0003(2) (2007); 204 Pa. Code § 303.9(g) (2005).

i. Resource management under the guidelines. Most sentencing-guidelines legislation requires or encourages the sentencing commission to formulate guidelines that are projected to operate within the jurisdiction's correctional resources. See, e.g., N.C. Gen. Stat. § 164-42(d) (2006), which provides in part:

> The Commission shall include with each set of sentencing structures a statement of its estimate of the effect of the sentencing structures on the Department of Correction and local facilities, both in terms of fiscal impact and on inmate population. If the Commission finds that the proposed sentencing structures will result in inmate populations in the Department of Correction and local confinement facilities that exceed the standard operating capacity, then the Commission shall present an additional set of structures that are consistent with that capacity.

See also Ala. Code § 12-25-2(a)(4) (2006) (commission instructed to promulgate sentencing recommendations to "[p]revent prison overcrowding and the premature release of prisoners."); 11 Del. Code § 6580(c) (2006) ("The Commission shall develop sentencing guidelines consistent with the overall goals of ensuring certainty and consistency of punishment commensurate with the seriousness of the offense and with due regard for resource availability and cost"); D.C. Code § 3-104(b)(4), (7) (2006) (The commission must project the impact of its proposals on offender populations and must estimate the cost for proposed alternatives to incarceration.); id. § 3-106 (In making recommendations, the

Commission must consider "existing correctional and supervisory resources, including the availability of intermediate sanctions"); Kan. Stat. § 74-9101(b)(6) (2006) (commission shall "advise and consult with the secretary of corrections and members of the legislature in developing a mechanism to link guidelines sentence practices with correctional resources and policies, including but not limited to the capacities of local and state correctional facilities. Such linkage shall include a review and determination of the impact of the sentencing guidelines on the state's prison population, review of corrections programs and a study of ways to more effectively utilize correction dollars and to reduce prison population"); Md. Code, Crim. Proc. § 6-213(b) (2006) ("If the recommendations of the Commission for changes in legislation would result in State and local inmate populations exceeding the operating capacities of available facilities, the Commission shall present additional sentencing model alternatives consistent with these capacities."); Mass. Laws, Ch. 211E, § 2(6), (6)(C) (2006) (sentencing commission shall recommend policies and practices that "ration correctional capacity and other criminal justice resources to sentences imposed, making said rationing explicit, rational and coherent" and "prevent the prison population in the commonwealth from exceeding the capacity of the prisons"); Minn. Stat. § 244.09, subd. 5(2) (2006) (in establishing or modifying sentencing guidelines, commission shall consider "correctional resources, including but not limited to the capacities of local and state correctional facilities"); Mo. Rev. Stat. § 558.019.6(3)(d) (2007) ("The recommended sentence for each crime shall take into account . . . [t]he resources of the department of corrections and other authorities to carry out the punishments that are imposed."); N.C. Gen. Stat. § 164-42(b)(5) (2006) (when formulating sentencing structures, commission shall consider "[t]he available resources and constitutional capacity of the Department of Correction, local confinement facilities, and community-based sanctions"); Oh. Rev. Code § 181.24(B)(4) (2006) (commission shall develop new comprehensive sentencing structure for state that includes "[p]rocedures for matching criminal penalties with the available correctional facilities, programs, and services"); Or. Admin. R. 213-002-0001(3)(a) (2007) (included among "[t]he basic principles which underlie these guidelines" is: "The response of the corrections system to crime, and to violation of post-prison and probation supervision, must reflect the resources available for that response"); 28 U.S.C. § 994(g) (2000) (commission, in promulgating

guidelines "shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission"); Utah Code § 63-25a-304(2) (2006) ("The purpose of the commission shall be to develop guidelines . . . in order to . . . relate sentencing practices and correctional resources."); Rev. Code Wash. § 9.94A.850(2)(b) (2007) ("If implementation of . . . revisions or modifications would result in exceeding the capacity of correctional facilities, then the commission shall accompany its recommendation with an additional list of standard sentencing ranges which are consistent with correction capacity").

Some jurisdictions mobilize the commission's resource-matching capabilities to respond to crises of prison crowding through amendments to the guidelines. See Kan. Stat. § 21-4725 ("The secretary of corrections shall notify the commission at any time when it is determined that prisons in the state have been filled to 90% or more of their overall capacity. The commission shall then propose modifications which amend the sentencing guidelines grid, including severity levels, criminal history scores or other factors which would result in the reduction of any sentence, as deemed necessary to maintain the prison population within the reasonable management capacity of the prisons"); Rev. Code Wash. § 9.94A.870(1) (2007) ("If the governor finds that an emergency exists in that the population of a state residential correctional facility exceeds its reasonable, maximum capacity, then the governor may . . . [c]all the sentencing guidelines commission into an emergency meeting for the purpose of evaluating the standard ranges and other standards. The commission may adopt any revision or amendment to the standard ranges or other standards that it believes appropriate to deal with the emergency situation."); id. § 9.94A.875 (2007) (analogous provision for county jail crowding).

j. Compliance with administrative-procedure act. For provisions similar to subsection (10), see Ark. Code § 16-90-802(d)(2)(B),(C)

(2006); Md. Code, Crim. Proc. § 6-211(a) (2006); Or. Admin. R. 213-001-0005(1) (2007); Utah Code Ann. § 63-25a-301(1) (2006); Rev. Code Wash. § 9.94A.850(6) (2006). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.3(d) (1994); Ronald F. Wright, Amendments in the Route to Sentencing Reform, 13 Crim. Justice Ethics 58 (2004) (observing that sentencing commissions "have found the greatest success" when they have followed APA processes); Rachel F. Barkow, Administering Crime, 52 UCLA L. Rev. 715 (2005). In some codes, the Administrative Procedure Act is not made formally applicable to the promulgation of sentencing guidelines by the sentencing commission, but alternative procedures for notice and comment are nevertheless mandated. See, e.g., Minn. Stat. § 244.09, subd. 5(2) (2006); 42 Pa. Cons. Stat. § 2155 (2006).

k. States choosing an advisory guidelines system. Sentencing guidelines in an advisory system do not share the measured degree of enforceability of the presumptive guidelines in the revised Code. Various terminology in statute or guidelines is used to express the "advisory" or "voluntary" or "discretionary" character of the guidelines. See Ala. Code § 12-25-33(1) (2006) ("voluntary sentencing standards"); Ark. Code § 16-90-803 (2006) ("Voluntary presumptive standards"); Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987) ("sentencing standards" are "voluntary and non-binding"); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.1 ("guidelines are voluntary"); Md. Code, Crim. Proc. § 6-211(b) (2006) ("voluntary sentencing guidelines"); Mo. Rev. Stat. § 558.019.6(3) (2007) ("system of recommended sentences"); Pa. Sentencing Guidelines Standards (2005), at 137 ("sentencing recommendations"); Tenn. Code Ann. § 40-35-210(c) (2006) ("advisory sentencing guidelines"); Va. Code § 17.1-801 (2006) ("discretionary sentencing guidelines"); Wis. Stat. § 971.30(1)(c) (2006) ("advisory sentencing guidelines").

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

(1) In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2).

(2) The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.

(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.

Comment:

a. Scope. This provision underscores and gives content to the commission's obligation to produce sentencing guidelines that are based in the legislative purposes of sentencing and corrections set forth in § 1.02(2). This is part of the Code's general strategy to give prominence and effect to the purposes provision as applied throughout the sentencing system. In addition, § 6B.03 is needed because some sentencing commissions—most famously the United States Sentencing Commission—have elected to produce guidelines with no articulated connection to the fundamental goals of the system.

Subsection (1) states the general import of the provision as a whole, with elaborations to follow in the ensuing subsections.

b. Proportionality and guidelines. Subsection (2) explicitly links the Code's proportionality principle, see § 1.02(2)-(a)(i), to the commission's collective task of fixing presumptive sentences for "ordinary cases," see § 6B.04(2). Under the Code, utilitarian or restorative objectives are never sufficient to justify a penalty that is disproportionately lenient or severe in light of the gravity of the offense, the harm done to the crime victim, and the blameworthiness of the offender. Because these retributive anchor points do not translate mathematically into sentencing outcomes, however, the Code views proportionality constraints as flexible in nature. In a given case, they can accommodate a "range" of possible penalties that are not disproportionate, see § 1.02(2)(a)(i).

Against this backdrop, subsection (2) requires the commission to apply its best collective judgment to modal or "ordinary" cases expected to arise under presumptive guideline provisions. The experience of commission mem-

bers is called upon in the first instance to identify those scenarios most often presented in run-of-the-mill cases. Commissioners must then apply their collective moral judgment to the visualized cases. The goal of the process is not to reach a definitive statement of proportionality, nor should the commission attempt to capture in guidelines the full spectrum of potentially just sentences. Neither task is realistic in the abstract, nor can one expect commission members of diverse perspectives to agree with one another to the point of deontological exactitude. What may be expected, however, is that commission members will find agreement that a defined presumptive sentencing range for each category of case is safely within the outer limits of undue lenity or severity.

So understood, the guidelines can play a meaningful role in the furtherance of just sentences without overstating the commission's powers of moral discernment, and without unrealistic expectations of moral consensus among commissioners. Just as importantly, guidelines that are helpful but modest in their proportionality claims do not purport to tie the hands of sentencing courts in individualized decision-making.

c. Utilitarian and restorative purposes under guidelines. Presumptive guideline provisions may incorporate utilitarian and restorative goals of sentencing, as recognized in subsection (3). This provision reflects an important development in the conception of sentencing-guidelines reform since the 1970s and 1980s, when these reforms were widely associated with a singular emphasis on the philosophy of just deserts. With increasing frequency over the years, American sentencing commissions have produced guidelines that respond to risk and needs assessments of particular offenders, see § 6B.09 (to be drafted). Particularly in the areas of drug treatment and other intermediate punish-

ments, the best commissions have searched for ways to identify those offenders most likely to benefit from specific programs. Most guidelines systems to some degree have attempted to reserve the longest prison sentences for those offenders who present the gravest dangers of serious reoffending. Commissions in some jurisdictions have also revised their guidelines to accommodate the fact that judges frequently decide to tailor penalties to best serve utilitarian objectives, see subsection (4). Indeed, the shift toward a hybrid approach of retributive and utilitarian goals in sentencing reform has become all but universal. There is no guidelines system in the nation that currently operates solely on bases of retribution or just deserts.

Subsection (3) endorses and encourages these preexisting trends. It contemplates whole categories of cases in which "ordinary" scenarios will lend themselves to pursuit of a defined utilitarian or restorative result. The commission is authorized to pursue those goals provided there is "realistic prospect for success," see also § 1.02(2)(a)(ii).

Illustration:

1. Based on research undertaken or reviewed by the sentencing commission, it appears that the ordinary offender convicted of certain classes of drug offenses will stand a good chance of treatment success if enrolled in an intensive substance-abuse program. There is a realistic basis to believe that such offenders will learn to control their substance dependency and return to a law-abiding lifestyle. The commission may promulgate presumptive guideline provisions that recommend the sanction of intensive drug treatment for such offenders, provided this sanction would not, in the collective judgment of commissioners, be disproportionately lenient or severe.

d. Individualized sentences under guidelines. One overarching goal in the revised Code's sentencing structure is to preserve room for judicial discretion to individualize punishments. Subsection (4) articulates this goal as part of the express legislative instructions given the commission for formulation of sentencing guidelines.

Judicial discretion, in light of the underlying purposes of sentencing and corrections, is not antithetical to the legal framework of criminal punishment. It is necessary and desirable when justified by the circumstances of individual cases. Subsection (4) instructs the commission to adopt such a view when crafting guidelines. Under no circumstances may the guidelines foreclose the individualization of sentences; rather, they should invite the exercise of trial-court discretion in those many instances when the guidelines' conception of an "ordinary case" does not fit the particular circumstances before the court.

e. Prioritization of the purposes of sentencing within guidelines. It is a commonplace observation in sentencing theory that utilitarian goals often conflict with one another, or may conflict with retributive goals. Some theoreticians, in answer to this difficulty, have posited systems that respond primarily or exclusively to retributive purposes, or to particular utilitarian objectives. These approaches carry advantages of philosophical coherence, but the drafters of the revised Code concluded that they are too narrow to reflect the complexities and ambiguities of human response to criminal behavior. Section 1.02(2)(a) instead adopts a mixed or hybrid approach to sentencing purposes that allows different goals to operate in different settings. The organizing principle in § 1.02(2)(a) is that proportionality constraints always act as outer limits upon utilitarian or restorative impulses. Within the boundaries of proportionality, however, § 1.02(2)(a) gives no basis to prefer one util-

itarian or restorative objective over another. See § 1.02(2), Comment *e*.

Subsection (5) invites the sentencing commission to provide further guidance to sentencing courts than is contained in § 1.02(2)(a) on questions of multiple and conflicting purposes. It posits that there will be no single best hierarchy of considerations applicable in all criminal cases, but that the commission may usefully craft provisions that speak to discrete categories of cases. For example, a commission might promulgate a guideline stating that, for serious violent offenses, the primary purposes to be weighed by sentencing courts should be retribution and incapacitation of the offender. Another guideline might provide that, for certain kinds of property crime, the leading considerations ought to be restitution to the crime victim and specific deterrence of the offender through the application of economic sanctions. For categories of cases at the lowest end of the gravity scale, the guidelines may direct the courts chiefly to restorative sentences that address the needs of victims, offenders, and their communities.

There is no reason to suppose that the operative goals of punishment should be the same from top to bottom of the criminal-justice system, and much experience that dictates otherwise. Authority to make categorical pronouncements in this difficult area should be conferred with caution. The commission under subsection (5) is empowered to make only presumptive statements of preference among sentencing purposes. If good reasons exist in particular cases to privilege other goals, the courts enjoy substantial discretion to override the guidelines.

f. Mandatory penalties and guidelines. Subsection (6) provides that the commission must always produce guidelines that are best designed to serve the goals of the system,

and should not base its judgments about appropriate sentences upon any mandatory-penalty provisions that may exist in the jurisdiction. The effect of this subsection is to limit the distortion introduced by mandatory penalties within the overall sentencing structure. The 1962 Code and the revised Code both disapprove of mandatory-penalty laws, see § 6B.05 (to be drafted). Where mandatory penalties exist alongside sentencing guidelines, they frequently introduce punishments that are disproportionate, not subject to the exercise of judicial discretion, and cut free from the prioritization of the use of correctional resources built into the guidelines schemes.

All of these problems are compounded, however, if a commission treats mandatory penalties as benchmarks for penalty levels within the guidelines. For example, suppose that a state legislature has recently enacted a mandatory penalty for a specific drug offense so that the minimum sentence must be a prison term of 10 years. Imagine also that the sentencing guidelines in effect, before the mandatory penalty was enacted, recommended much shorter prison terms for this and equivalent drug offenses, including some drug crimes arguably more serious than the offense covered by the mandatory penalty. In response to the new mandatory provision, the commission decides to amend its guidelines so that all offenses closely comparable to the crime subject to the 10-year minimum sentence will now also be assigned presumptive sentences under the guidelines of at least 10 years. Drug offenses of somewhat lesser gravity are assigned presumptive punishments of nearly 10 years in prison, and so on. Ultimately, many of the guidelines' provisions for drug crimes will be realigned due to the gravitational pull of the mandatory penalty.

Subsection (6) forecloses the above scenario. It preserves to the greatest extent possible the commission's

unique function of reaching collective judgments about appropriate penalties in light of the experience, expertise, and moral sensibilities of the commission's membership. The deliberative process demanded of the commission would be trivialized if guideline drafting were allowed to become merely a process of interpolation within external reference points.

g. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) through (5), as follows:

> **(2) The commission shall set ~~presumptive~~ recommended sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.**
>
> **(3) Within the boundaries of severity permitted in subsection (2), the commission may tailor ~~presumptive~~ recommended sentences for defined classes of cases to effectuate one or more of the utilitarian 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~~ <u>recommendations</u> that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes.

Most of the changes suggested above are needed to carry forward the substitution of the concept of "recommendations" about sentencing where the stronger term "presumption" occurs in the unaltered provision, see § 6B.01, Comment *b*.

Subsection (4) is deleted in its entirety because it is unnecessary, and a non sequitur, in an advisory guidelines structure. In a presumptive guidelines system, subsection (4) plays the important role of exhorting the commission to be respectful of trial courts' authority to individualize sentences, and to fashion guidelines that assist in rather than trammel upon the individualization process. These exhortations are not required in an advisory system because the sentencing commission holds no formal power to suppress proper (or improper) exercises of discretion by sentencing courts. Further, subsection (4) expressly bans all attempts by a sentencing commission to "foreclose" the individualization of sentences on grounds relevant to the purposes stated in § 1.02(2). This provision serves no purpose when the

commission holds no power to author legally effective guidelines of any kind.

REPORTER'S NOTE

a. Scope. Statements that sentencing commissions must formulate guidelines based on statutory purposes of sentencing are common in existing codes. See Ala. Code § 12-25-2 (2006); 11 Del. Code § 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Code, Crim. Proc. § 6-202 (2006); N.C. Gen. Stat. § 164-42(b) (2006); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Va. Code Ann. § 17.1-801 (2006); Rev. Code Wash. § 9.94A.850(2)(a) (2007); Wis. Stat. § 973.30(1)(c) (2006).

The chief alternative to "prescriptive," or purpose-driven, guidelines is the "descriptive" approach, in which guidelines are designed to replicate typical preguidelines punishments. See ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.3(b) (1994) (endorsing the prescriptive and rejecting the descriptive approach). Of course, knowledge of past judicial sentencing patterns can be important to the formulation of purposes-driven guidelines. For example, the distribution of judicial sentences sheds light on what penalties have been thought proportionate for particular crimes in the jurisdiction, and helps identify "outlier" sentences that are disproportionate by mainstream judicial standards. It is also possible to investigate the considerations and policy rationales used regularly by sentencing judges even in a discretionary system. See, e.g., Supreme Court of Va., Voluntary Sentencing Guidelines: Pilot Program Evaluation (1989), at 21-38; Stanton Wheeler, Kenneth Mann, & Austin Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals (1988).

For criticisms of a sentencing-guidelines system constructed without explicit reference to underlying purposes, see Andrew von Hirsch, Federal Sentencing Guidelines: Do They Provide Principled Guidance?, 27 Am. Crim. L. Rev. 367, 371 (1989); Marc Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 419 (1992).

b. Proportionality and guidelines. Nearly all existing guidelines systems incorporate proportionality in sentencing as one important aim of

the guidelines, usually stated alongside a number of utilitarian goals. See Ark. Code § 16-90-801(b)(1) (2006); 11 Del. Code § 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Crim. Proc. Code § 6-202 (2006); Minnesota Sentencing Guidelines and Commentary (2006), at 1; Ohio Rev. Code § 181.24 (2006); Or. Admin. R. 213-002-0001(3)(d) (2007); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 4 (2006); Rev. Code Wash. § 9.94A.010(1) (2007). For scholarly discussions of the interaction between proportionality limits and other objectives of sentencing, see John Monahan, The Case for Prediction in the Modified Desert Model of Criminal Sentencing, 5 Internat'l J. Law & Psych. 103, 109-110 (1982); Richard S. Frase, Limiting Retributivism, in Michael Tonry ed., The Future of Imprisonment (2004).

c. Utilitarian and restorative purposes under guidelines. Some of the pioneering state sentencing-guidelines systems, designed in the late 1970s and early 1980s, made retribution or just deserts the dominant philosophy of the guidelines. See Andrew von Hirsch et al., The Sentencing Commission and Its Guidelines (1987), at 84-93; Model Penal Code and Commentaries: Part I, §§ 6.01 to 7.09 (1985). Today, the vast majority of American sentencing-guidelines systems expressly incorporate crime-reductive utilitarian goals, and some embrace restorative goals. See Ala. Code § 12-25-31(b) (2006); 11 Del. Code § 6580(c) (2006); D.C. Code. § 3-101(b)(2) (2006); Md. Code, Crim. Proc. § 6-202 (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 4 (2005); N.C. Gen. Stat. § 164-41(b) (2006); Or. Admin. R. 213-002-0001(1) (2007); 204 Pa. Code § 303.11(a) (2005); Tenn. Code § 40-35-102 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Determinations: A Philosophical Approach (2006), at 1; Va. Code Ann. § 17.1-801 (2006); Rev. Code Wash. § 9.94A.850(2)(a) (2007); Wis. Stat. § 973.30(1)(c) (2006).

For a discussion of the evolution of the Minnesota sentencing-guidelines system from its just-deserts origins to include a broader palate of utilitarian purposes, see Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005). One of the "newer" guidelines systems, designed in Virginia in the 1990s, places heavy emphasis on incapacitation theory—and the identification of high-risk and low-risk

offenders through the use of criminological research and individualized risk-assessment instruments. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002) (evaluating program to identify especially low-risk property and drug offenders; guidelines recommend nonprison sanctions); Va. Crim. Sentencing Comm'n, Annual Report 2005 (2006), at 67-70 (reporting on use of actuarial tools to predict high risk of recidivism among sex offenders; guidelines recommend extended prison sentences).

Illustration 1 is based on Sentencing Accountability Commission of Delaware, Sentencing Trends and Correctional Treatment in Delaware (2002) (discussing research sponsored by commission to evaluate drug-treatment programs in the state, and efforts to make adaptations in sentencing system in light of research findings); Kansas Sentencing Commission and Kansas Department of Corrections, 2003—Senate Bill 123: Alternative Sentencing Policy for Non-Violent Drug Possession Offenders (2006) (reporting on initiative to overhaul the state's drug-sentencing scheme including the broader use of assessments of risk of recidivism for drug-involved offenders).

d. Individualized sentences under guidelines. Many state codes or guidelines stress the importance of judicial sentencing discretion to fashion individualized penalties under a sentencing-guidelines system. See Ala. Code § 12-25-2(a)(2) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.3; Kansas State Sentencing Guidelines Desk Reference Manual (2006), at 79; Md. Crim. Proc. Code § 6-202(3) (2006); Mass. Laws, Ch. 211E, § 2(4) (2006); Md. Crim. Proc. Code § 6-202(3) (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 11; Ohio Rev. Code § 181.24 (2006); Pa. Sentencing Guidelines Standards 49 (2005) (Commentary to 204 Pa. Code § 303.1(b) (2005)); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 1; Rev. Code Wash § 9.94A.010 (2007); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 2. See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 37 ("The policy of the American Bar Association is clear. Guidelines that help sentencing courts in imposing fair and equitable sentences are favored. But judicial discretion is necessary to assure that

sentences reflect the totality of circumstances regarding an offender and offense").

e. Prioritization of the purposes of sentencing within guidelines. Although § 1.02(2)(a) imposes some ordering of the purposes of sentencing in individual cases, see id., Comment *b*, § 6B.03(5) contemplates that further prioritization among goals may sometimes be desirable. Subsection (5) was inspired by the Pennsylvania Sentencing Guidelines, which are subdivided into five "levels," with a different statement of operative sentencing purposes applicable to each level. See 204 Pa. Code § 303.11(a),(b) (2005). As one moves upward within the sentencing guidelines grid, from the least to most serious crimes, and from lesser to greater criminal histories, the "primary purposes" of sentencing change as follows: (1) "minimal control necessary to fulfill court-ordered obligations"; (2) "control over the offender and restitution to victims"; (3) "retribution and control over the offender"; (4) "punishment and incapacitation"; and (5) "punishment commensurate with the seriousness of the criminal behavior and incapacitation to protect the public." The valuable insight of this approach—whatever the merits of the stratification of goals as formulated in Pennsylvania—is that no single statement of sentencing purposes need operate uniformly for all offenses and offenders.

For a related proposal, see Robin L. Lubitz and Thomas W. Ross, National Institute of Justice, Sentencing Guidelines: Reflections on the Future (2001), at 4-5 (suggesting that one part of sentencing-guidelines grid, at the low level of crime seriousness, could include presumption in favor of restorative-justice goals and processes).

f. Mandatory penalties and guidelines. Where legislatively enacted mandatory minimum penalties exist, and where they conflict with sentencing guidelines, the statutory penalties typically supersede the guidelines. See Ark. Code § 16-90-803(b)(3)(C) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 3.9; Md. Code, Crim. Proc. § 6-216(b)(2) (2006); Md. Code Regs. 14.22.01.14 (2007); Mich. Comp. Laws § 769.34(2)(a) (2006); Minn. Stat. § 244.101, subd. 4 (2006); N.C. Gen. Stat. § 15A-1340.13(b) (2006); Or. Admin. R. 213-009-0001(1) (2007); 204 Pa. Code § 303.9(h) (2005); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 8 (2006); Virginia Criminal

Sentencing Commission, Virginia Sentencing Guidelines (9th ed. 2006), at 5.

Almost universally, state sentencing commissions have not calibrated their sentencing guidelines to reflect the terms of statutory mandatory penalties. Instead, the commissions have made independent policy judgments about appropriate punishment levels to be reflected in guidelines. See Michael Tonry, Sentencing Matters (1995), at 96-97 (as of 1995, no state sentencing commission had chosen "to incorporate the statutory minimums into the guidelines and scale all other penalties around the mandatories"); Minnesota Sentencing Guidelines and Commentary, Comment II.E.02 (2006) (explaining that some guidelines sentences are less severe than those specified in statutory mandatory minimum provisions due to commission's independent judgment of proportionality of sentence in relation to severity of crime).

The United States Sentencing Commission was for a time the only American sentencing commission that elected to scale all guidelines sentences against the benchmarks set by statutory mandatory penalties. See Tonry, Sentencing Matters, at 97-98. Sentencing guidelines effective in Alabama in 2006 followed suit. See Ala. Code § 12-25-34(c) (2006) ("Voluntary sentencing standards shall take into account and include statewide historically based sentence ranges, including all applicable statutory minimums and sentence enhancement provisions").

§ 6B.04. Presumptive Guidelines and Departures.

(1) The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts.

(2) The commission shall fashion presumptive sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling

within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. Presumptive sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the presumptive sentence shall specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.

(b) The guidelines shall include presumptive provisions for determinations of the severity of 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.

Comment:

a. Scope. Section 6B.04 is one of three cornerstone provisions that frame the relative discretionary powers of the sentencing commission, the trial courts, and the appellate courts under the sentencing structure of the revised Code. This Section, § 7.XX (Judicial Authority to Individualize Sentences), and § 7.ZZ (Appellate Review of Sentences), read as an interlocking whole, define the limited extent to which the sentencing commission's "presumptive" guidelines are legally binding upon the judiciary, and are enforceable through the appellate process.

Section 6B.04 addresses the legal force of presumptive guidelines provisions as a general matter, the role of presumptive sentences in the governance of punishment severity, and the commission's responsibilities to assist courts in the exercise of their departure power. Section 6B.05 (to be drafted) speaks to the role of presumptive guideline provisions in the selection and use of different types and combinations of criminal sanctions.

b. Legal force of the guidelines. It is possible to design a sentencing system in which guidelines are mandatory, wholly advisory, or carry a quantum of legal force at any point along the continuum between those extremes. The revised Code recommends neither polar position.

Mandatory guidelines are unsound as a matter of public policy. Since the 1962 Code, the Institute has expressed

its strong condemnation of mandatory-minimum penalty provisions. The policies supportive of this view are in no way affected when mandatory punishments are enacted under the rubric of guidelines.

The revised Code recommends that guidelines carry a modest measure of legal force and enforceability. When afforded presumptive weight, guidelines supply an authoritative "rough draft" of proportionate penalties across categories of cases. Presumptive guidelines articulate starting points for reasoned judicial analysis in cases of departure from their benchmarks. A moderate degree of enforceability thus facilitates the task of developing a departure "jurisprudence" through the common-law process. Indeed, the practice of appellate sentence review is best founded upon principles of law, and not mere advisements, to be applied at the trial level.

As "presumptive legal force" is defined throughout the revised Code, the judiciary possesses greater control over sentencing decisions in individual cases than does the commission. The revised Code does not construct a system in which the relative authorities of the courts and commission are in equipoise, exactly halfway between the mandatory (commission-driven) and advisory (full-judicial-discretion) alternatives. Instead, the Code gives the judicial branch ultimate decisional power over every issue arising in the guidelines, with the exception of specific subject areas where the legislature itself—or the judiciary itself, by decision of the state's highest appellate court—has removed or limited such judicial authority, see §§ 6B.02(7); 6B.06; 7.XX(2).

For a full discussion of the sentencing courts' departure power, see § 7XX, Comment *c*. A sentencing court may depart from any presumptive guidelines provision upon finding "substantial circumstances" in an individual case

that the guidelines "will not best effectuate the purposes in § 1.02(2)(a)" (general purposes of the sentencing system for decisions affecting individual offenders). The commission may not proscribe the factors upon which sentencing courts may base departures, nor may the commission quantify the effects of particular factors, see § 7.XX(2)(a) and subsection (4), this provision. On appeal, the general standard of review applicable to departure standards is meaningful yet deferential to the trial court, see § 7.ZZ(6), Comment *g*.

Judicial discretion to deviate from the guidelines is substantially more confined than described above only in the case of "heavy presumptions." A heavy presumption may not be elided by courts except through the exercise of their "extraordinary departure" power, see § 6B.01(5); § 7.XX(3), Comment *d*. The commission itself holds no power to create heavy presumptions, however. These must be authored by the legislature or the courts themselves.

Subsection (1) lays down the general rule that sentencing guidelines will carry "presumptive legal force," to be understood in light of the trial courts' departure power as defined in § 7.XX. The subsection further provides that the commission may choose to designate certain provisions of the guidelines as merely advisory to the courts. The commission may encounter circumstances in which it wishes to provide some guidance to judges, but lacks the degree of confidence that would support a presumptive provision, see, e.g., § 6B.08(1)(d) (for some categories of cases, the commission may decline to state a presumptive rule on whether a concurrent or consecutive sentence should be imposed, leaving the matter to the discretion of the sentencing court).

c. Ordinary cases as the bases for guidelines presumptions. Subsection (2) states the operational philosophy of presumptive sentence provisions. By virtue of its collective

membership, see § 6A.02, a well-constituted commission may speak with credibility to the appropriate sentencing benchmarks in categories of "ordinary cases." In arriving at such judgments, the commission must hew to the purposes of the sentencing system, see § 6B.03(1). The commission should arrive at its conceptions of "ordinary cases," and should assign guideline penalties to categories of those cases, in light of the varied experience of the membership, the best available information, and the members' deliberative efforts to represent the moral sentiments of the whole community. The task is not easy. No set of guidelines will be defensible from all lines of attack. The legitimacy of the guidelines does not flow from the commission's ability to arrive at incontestable conclusions, however. It flows directly from the quality and diversity of the commission membership, and the roundtable process of commission deliberations—as well as from the fact that the guidelines must be crafted in a manner expected to win high rates of judicial acceptance. The guidelines are not ukases but a framework for decisionmaking to be tested, and checked if necessary, in their application to individual cases.

d. Presumptive guidelines and sentence severity. The primary subject of subsection (3) is the guidelines' role in the determination of the severity of punishments in several particular contexts. The first sentence of the provision speaks broadly to the selection of sanctions as well as the question of their severity. The guidelines must be concerned with both matters. The issue of dispositional choice, including legislative guidance to the commission on the proper use of confinement sanctions in guideline presumptions, is treated in § 6B.05 (to be drafted).

The second sentence of subsection (3) continues the theme of flexibility concerning the means of expression of guidelines established in § 6B.02(1). Depending on the type

of case, presumptive sentences might best be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties. The commission may select different means of expression for different categories of offenses. For example, statements of presumptive penalties for misdemeanors might be considerably simpler than those for felonies. Within felony guidelines, some commissions have identified borderline cases where they have chosen to recommend either an incarceration term or a restrictive community punishment within a single presumptive provision. Subsection (3) is intended to allow for and encourage exactly this kind of flexibility in the communication of the commission's preferences.

The severity of prison and jail sentences are traditionally denoted by their lengths of term (or the amount of time of freedom that they subtract). American guideline systems have, to date, focused on this feature of total confinement in their formulations of presumptive penalties. Subsection (3)(a) anticipates that this will continue to be a central concern of any scheme of presumptive incarcerative terms in the future. However, subsection (3)(a) is not intended to rule out presumptive guideline provisions of the future that might address the conditions of confinement as well as duration.

Subsection (3)(a) speaks to the desirable breadth of guideline ranges for sentences of total confinement. Existing American guidelines systems vary markedly in their approaches to this question. At a far extreme, guideline ranges may be so broad that they approximate the expansive statutory ranges found in traditional indeterminate sentencing systems. Where this is the case, the guidelines add little value to the preexisting sentencing regime in the encouragement of proportionate sentences, consistency of thought process across individual cases, or reasonably

accurate forecasting of the foreseeable effects of changes in the sentencing system.

The revised Code adopts the view that guidelines ranges for incarceration terms should be fairly narrow, with the understanding that a generous departure power resides in the sentencing courts to move beyond those narrow constraints when necessary to tailor appropriate punishments to the facts of individual cases.

Some existing guideline systems employ an algebraic formula to describe the boundaries of guideline ranges for prison and jail sentences. For example, if *x* is the midpoint of the range; the upper boundary of the range cannot exceed *1.15 x*, and the lower boundary must be at least *0.85 x*. There is no magic in such formulas, but they convey unmistakably to the commission that reasonably narrow guidelines are wanted.

Subsection (3)(a) eschews algebra, and seeks to communicate the need for reasonably narrow guideline ranges in functional terms. The provision is intended to produce results comparable to those achieved with algebraic boundaries, while avoiding arbitrary numerical cutoffs. One benefit of the functional approach is that it does not lock the commission into the same formula for incarceration sentences of varying lengths. The primary disadvantage of the functional approach is its fuzziness. If the legislature envisions guideline ranges of a certain amplitude, it may be unwise to grant the commission discretion to determine otherwise.

Subsection (3)(b) instructs the commission to develop guidelines for the severity of community punishments, which must be crafted in light of the principles for selection among sanctions in § 6B.05 (to be drafted). Of particular importance is the inclusion of postrelease supervision as a

stand-alone "community punishment" in subsection (3)(b). This continues the 1962 Code's policy determination that the time period of "parole" supervision—now "postrelease" supervision—should not turn on the residuum of an offender's prison sentence unserved on the date of release, but should be fixed independently based on the underlying purposes of postrelease interventions. See 1962 Model Penal Code § 6.10(2).

Subsection (3)(c) extends the principles stated in (3)(a) and (3)(b) to cases, which are expected to arise with frequency, in which an offender is sentenced to more than one sanction. Combinations of sanctions can be overlapping, as where a defendant sentenced to community supervision is also sentenced to make restitution to the crime victim. Indeed, economic sanctions of numerous types and rationales are often imposed upon single offenders, with limited sense of priority or overall proportionality, see § 6B.05, Comment and Reporter's Notes (to be drafted). Combinations of sanctions may also be sequential, as when a prison sentence is followed by a period of postrelease supervision. In any of these circumstances, some mechanism is required to govern the total severity of all penalties rendered, or else the requirement of proportionate punishments in § 1.02(2)(a)(i) becomes meaningless.

Subsection (3)(c) could be interpreted to embrace the complex but increasingly important subject of collateral consequences that attend criminal convictions, to varying effects, in all jurisdictions. Convicted felons, for example, may lose eligibility for government housing, welfare, and educational assistance, and may be barred from employment in numerous fields. Property—including cash, automobiles, entire residences—may be forfeited to the government in civil proceedings. Noncitizens may be subject to deportation or other immigration-law consequences. In

some states, convicted felons lose their rights to vote, for a defined or indefinite period. In most states, at least some felons forfeit their right to own a firearm.

Although most collateral sanctions are defined as *civil* disqualifications rather than criminal punishments—and therefore escape constitutional proportionality review—they are inarguably painful visitations upon persons convicted of crime, with heavy potential impacts on offenders' life chances. Any comprehensive program to effect the revised Code's fundamental concerns for proportionality in crime response and the furtherance of forward-looking, crime-reductive, and reintegrative goals, cannot ignore the expanding domain of collateral consequences of criminal convictions.

Subsection (3)(d), a bracketed provision, would extend the commission's prescriptive rulemaking powers into the realm of sentence revocations. Nationwide, roughly 40 percent of prison admissions result from revocation decisions rather than new court commitments. A small number of American commissions have experimented with the creation of "revocation guidelines." No one approach to this matter has yet emerged as definitive.

Independent of this subsection, the revised Code has already taken the view that sentencing commissions should explore the desirability of greater regulation of revocation decision-points, see § 6A.05(3)(b) (commission should "study the desirability of regulating through statute, guidelines, standards, or rules . . . the discretionary decisions of officials with authority to impose sanctions for the violation of sentence conditions"). Bracketed subsection (3)(d), if adopted by a legislature, would preempt the commission's responsibility to study and make recommendations on this subject, and would cede immediate responsibility to the commission to produce

revocation guidelines. Under § 6A.04(1), unless some other timeline were specified by the legislature, bracketed subsection (3)(d) would be a component of the commission's initial responsibilities to be discharged in the first two years of its existence. See § 6A.04(1). A jurisdiction with high volumes of sentence revocations, especially when there is a perceived crisis in the area, may prefer the accelerated time frame set forth in bracketed subsection (3)(d).

e. Departure factors within the guidelines. Subsection (4) codifies the practice of most American sentencing commissions. First, the provision instructs the commission to provide guidance to sentencing courts, voiced from the collective wisdom of the commission membership, concerning those case-specific factors that should appropriately be considered as grounds for departure from presumptive penalties. As with all other guidelines provisions drafted by the commission, the enumerated grounds for departure may carry presumptive legal force, but no more. Aggravating and mitigating factors may be responsive to proportionality concerns, or they may speak to utilitarian or restorative purposes within the boundaries of proportionate punishment, see § 1.02(2)(a)(i), (ii).

Illustrations:

1. A sentencing commission may include as enumerated grounds for departure (1) the aggravating factor that the harm done by the offender was greater than in an ordinary case because the crime victim was a person of unusual vulnerability, or (2) the mitigating factor that defendant was less blameworthy than in an ordinary case because the crime victim was at fault in provoking the commission of the offense in a manner not rising to a defense at trial. Both factors speak directly to proportionality concerns in § 1.02(2)(a)(i).

2. A sentencing commission may include a provision that designated offenders are to be assessed for drug and alcohol dependency and for their amenability to different programs of substance-abuse treatment in and out of confinement. So long as the resulting penalty does not violate the proportionality constraints in § 1.02(2)(a)(i), the commission may authorize sentencing courts to impose sanctions of greater or lesser severity than the presumptive sentence, as needed to best address the treatment needs of individual offenders. Such an enumerated departure provision would speak to the utilitarian goal of offender rehabilitation in § 1.02(2)(a)(ii).

3. A sentencing commission may include a provision that designated cases (probably limited to cases in which victim and offender assent) are eligible for a restorative sentencing procedure, such as a "family group conference" in which the offender, the offender's family, the victim, the victim's family, and representatives of the community meet to discuss, and attempt to reach consensus upon, the appropriate sanction in the case. If the conference results in a suggested penalty of greater or lesser severity than the presumptive sentence normally given in the guidelines, the commission may encourage trial courts to treat the recommendation of the family group conference as a sufficient ground for an aggravated or mitigated sentence, so long as the resulting punishment is not disproportionate under § 1.02(2)(a)(i). This departure provision would further the goal of restoration of crime victims and communities under § 1.02(2)(a)(ii).

Subsection (4) stresses that the catalogue of departure factors enumerated in guidelines must be nonexclusive. This

is consistent with the general approach of the revised Code to preserve judicial sentencing discretion within the framework of sentencing guidelines. The commission may neither mandate nor proscribe the consideration of any departure factor supported by the purposes of sentencing and corrections in § 1.02(2), see § 6B.02(7). Further, it is no part of the commission's institutional role to police the use of judge-made departure factors for their fidelity to legislative purposes. That task is assigned to the appellate courts in the revised Code, see § 7.ZZ(1).

Finally, and consistent with the Code's theory of precedence of judicial discretion within a guidelines system, the second sentence of subsection (4) forbids the commission to quantify the effect to be given to specific departure factors. Presumptive penalties in guidelines must often be given quantitative expression. The revised Code, however, takes the strong view that individualization of sentences is frequently needed in response to case-specific factors that are subjective, unforeseeable in advance, and interactive with one another in subtle ways. The departure power is designed to address a wide universe of special circumstances, which may call for small deviations from presumptive penalties in some cases, and dramatic changes in others. In the Code's structure, a commission's guidelines supply starting points for the courts' individualization process. The commission through its guidelines may not attempt mechanistically to control that process.

f. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments throughout § 6B.04:

§ 6B.04. ~~Presumptive~~ Guidelines Recommendations and Departures.

(1) The guidelines shall ~~have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts~~ be advisory to sentencing courts, subject to the requirements of consultation, analysis, and articulation of the sentencing court's reasoning when imposing sentence as set forth in § 7.XX.

(2) The commission shall fashion ~~presumptive~~ recommended sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. ~~Presumptive~~ Recommended sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the ~~presumptive~~ recommended sentence shall specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of

cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.

(b) The guidelines shall include ~~presumptive~~ recommended provisions for determinations of the severity of community punishments, including postrelease supervision.

(c) Where the guidelines ~~permit~~ contemplate the imposition of a combination of sanctions upon offenders, the guidelines shall include ~~presumptive provisions~~ recommendations for determining the total severity of the combined sanctions.

[(d) The guidelines shall include ~~presumptive provisions~~ recommendations for the determination of the severity of sanctions upon findings that offenders have violated conditions of community punishments.]

(4) The guidelines shall include nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences in individual cases. ~~The commission may not quantify the effect given to specific aggravating or mitigating factors.~~

Section 6B.04 as a whole must be modified in jurisdictions that choose to implement guidelines as advisory recommendations. Nearly all of the amendments suggested above merely convert language of "presumptions" into

alternative formulations using the word "recommendations."

The meaning of § 6B.04 cannot be grasped without a close understanding of § 7.XX (Judicial Authority to Individualize Sentences). The cross-reference remains explicit in the altered version of § 6B.04(1).

The amended subsection (1) also declares the status of the guidelines as "advisory," yet frames this characterization against the procedural requirements of consideration, analysis, and explanation that are the core of § 7.XX (as modified for an advisory guidelines structure). See § 7.XX, Comment *i*, infra.

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b. Legal force of the guidelines. In existing guidelines systems, the most common formulation of the departure standard is that there must be a "substantial and compelling" reason or circumstance to justify a departure sentence. This language was first used in Minnesota. See Minnesota Sentencing Guidelines and Commentary § II.D (2006) ("the judge shall pronounce a sentence within the applicable [guidelines] range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 94; Kan. Stat. § 21-4716 (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.1; Mich. Comp. Laws § 769.34(3); Or. Admin. R. 213-008-0001 (2007); Rev. Code Wash. § 9.94A.535 (2006).

The revised Code adopts a less stringent "substantial circumstances" departure standard, see § 7.XX(3). See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(iv) (1994) (recommending "substantial reasons" standard). A requirement of "compelling" reasons suggests that few departure penalties should be affirmed on appeal, which is contrary to the intent of the revised Code.

No state guidelines system has produced high rates of reversal of sentences on appeal. One survey of appellate-court decisions under

state sentencing guidelines observed that trial-court departures are generally upheld on the basis of "substantial" reasons, even when "substantial and compelling" reasons are required by the literal terms of the state's guidelines. See Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Northwestern L. Rev. 1441 (1997).

c. Ordinary cases as the bases for guidelines presumptions. For a policy discussion, see Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 691-695 (1993). For state-specific accounts, see Kansas State Sentencing Guidelines Desk Reference Manual (2006), at 38 (guidelines address "typical case scenarios"; departures are permitted in "atypical cases"). See also Minnesota Sentencing Guidelines and Commentary (2006), at 1; Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 11; Pa. Sentencing Guidelines Standards (2005), at 65; Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 7; Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines, (9th ed. 2006), at 3; Washington Adult Sentencing Guidelines Manual (2006), at II-147. Accord, ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(i) (1994).

d. Presumptive guidelines and sentence severity. For an example of a code that uses algebraic formulae to specify the breadth of sentencing guidelines ranges, see Minn. Stat. § 244.09, subd. 5(2) (2006) (guidelines shall establish "[a] presumptive, fixed sentence for offenders for whom imprisonment is proper . . . . The guidelines shall provide for an increase of 20 percent and a decrease of 15 percent in the presumptive, fixed sentence"). See also Va. Code Ann. § 17.1-805(A) (2006); Rev. Code Wash. § 9.94A.850(4) (2006). In support of the functional approach in subsection (3)(a), see ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standards 18-2.5(a), 18-4.4(b)(ii) (1994).

e. Departure factors within the guidelines. Most existing sentencing guidelines schemes enumerate aggravating and mitigating factors that may be used when departing from the guidelines, and most such provisions state that the enumerated factors are nonexclusive—or else include catch-all factors to the same effect. Sentencing codes sometimes

require that the sentencing commission include such enumerations in the guidelines. See Ark. Code § 16-90-804(c) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, §§ 5.2.2–5.2.3; Kan. Stat. § 21-4716 (c)(1), (2) (2006); Md. Sentencing Guidelines Manual (2007), at 45; Minnesota Sentencing Guidelines and Commentary § II.D.2 (2006); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 23, 27, 31, 38, 41; N.C. Gen. Stat. § 15A-1340.16(d), (e) (2006); Or. Admin. R. 213-008-0002(1) (2007); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 15, 16; Wis. Stat. Ann. § 973.017(3)–(8) (2006).

Washington State takes a different approach. While the enumerated mitigating factors in the guidelines are nonexclusive, the enumeration of aggravating departure factors is expressly an "exclusive list." Rev. Code Wash. § 9.94A.535(1),(2),(3) (2006). At least one state sentencing commission elected to include no enumeration of departure criteria in guidelines. See Pa. Sentencing Guidelines Standards (2005), at 188.

For statements against the policy advisability of assigning specific weights to guidelines departure factors, see ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.3(d) (1994); The Constitution Project, Principles for the Design and Reform of Sentencing Systems: A Background Report (2006), at 34.

f. States choosing an advisory guidelines system. Although it remains linguistically appropriate to speak of "departures" from advisory guidelines—and departure thresholds and criteria may even be recommended to sentencing courts—in an advisory system there is no formal, legally enforceable departure standard such as those catalogued in the Reporter's Note to Comment *a*, above. Instead, in advisory structures, judges are admonished or encouraged to adhere to guidelines recommendations. The mere provision of information—about condign penalties in the view of a sentencing commission, or the collective practices of other judges—may hold substantial persuasive force in itself. Judges may also perceive that costs attach to flouting the guidelines, particularly if records of individual judges' sentencing practices are put in the public domain. Through such means, the advisory systems' designers aim toward volun-

tary compliance in meaningful numbers of cases. For illustrations of encouragements and admonitions, see Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987) ("The Court is satisfied that it is in the best interests of the administration of justice to encourage Delaware's trial courts to implement, insofar as possible, the Commission's sentencing standards."); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.2.1 ("In order to eliminate unwarranted disparities in sentencing, the Commission hopes for and expects a high degree of compliance [with voluntary guidelines]."); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 2-3 (2006) ("Judges are encouraged to sentence within the guidelines unless they find aggravating or mitigating circumstances justifying departure.").

Advisory guidelines systems can impose much structure upon judicial sentencing discretion through mechanisms other than a formally enforceable departure standard. Three such mechanisms are discussed below.

First, the majority of advisory systems require that judges "consider" the guidelines before pronouncing sentence. See Ala. Code § 12-25-35(b) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Md. Code, Crim. Proc. § 6-216(a)(1) (2006); Ohio v. Mathis, 846 N.E.2d 1, 8 (Ohio 2006); 42 Pa. Cons. Stat. § 9721 (2006); Tenn. Code § 40-35-210(c) (2006); Va. Code Ann. § 19.2-298.01(A) (2006); Wis. Stat. § 973.017 (2), (10) (2006). In some jurisdictions this is a pro forma requirement that may be satisfied by as little as a statement that the court has indeed consulted the guidelines. See, e.g., Ala. Code § 12-25-35(b),(c) (2006). In its strongest form, however, meaningful "consideration" may be premised on a number of subrequirements: that courts engage in factfinding necessary to perform guidelines classifications or calculations; that pertinent guidelines be interpreted correctly and applied appropriately to the facts; that courts weigh any aggravating or mitigating factors relevant under the guidelines to the specific case; and that courts assess whether a departure would be proper under the terms of the guidelines. See, e.g., U.S. v. Crosby, 397 F.3d 103 (2d Cir. 2005). In other words, the strongest form of "consideration" mandates a great deal of structured thought process, even though the substantive endpoint of the process is styled as a recommendation.

Second, most advisory guidelines systems require that courts provide a statement of reasons, in writing or on the record, whenever a sentence departs from guidelines recommendations. See Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Md. Code Regs. 14.22.01.05(A) (2007); 204 Pa. Code § 303.1(d) (2005); Tenn. Code § 40-35-210 (2006); Va. Code § 19.2-298.01(B) (2006). But see Ark. Code § 16-90-804(a) (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 2. If no statement of reasons is needed for a sentence within the guidelines, a modest incentive is generated in favor of recommended penalties. Further, the discipline of an articulated reasoning requirement may be assumed, at least on occasion, to spur courts to think through the bases of a departure sentence more carefully than they otherwise would have done.

Finally, although it has rarely occurred, it is in theory possible for a meaningful process of appellate sentence review to operate in a system of advisory guidelines. See United States v. Booker, 543 U.S. 220 (2005); Kim S. Hunt & Michael Connelly, Advisory Guidelines in the Post-*Blakely* Era, 17 Fed. Sent'g Rep. 233 (2005). At a minimum, appellate courts can enforce whatever requirements are in place that guidelines be considered and trial courts give reasons for departures. Advisory guidelines can even attain quasi-enforceability, if appellate courts create standards of review that are deferential to lower-court sentences that comport with guidelines recommendations, but give closer scrutiny to departures. See § 7.ZZ, Comment *l*. See also U.S. v. Clairborne, 439 F.3d 479 (8th Cir. 2006), cert. granted in part sub nom. Claiborne v. U.S., 127 S. Ct. 551 (2006); U.S. v. Rita, 2006 WL 1144508 (4th Cir., May 1, 2006) (unpublished opinion), cert. granted in part sub nom. Rita v. U.S., 127 S. Ct. 551 (2006). Taken far enough, affirmance and reversal patterns in an advisory system may give de facto enforceability to advisory guidelines that is indistinguishable from the de jure enforceability of presumptive guidelines. See Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2005).

Policymakers should take note that the achievement of de facto enforceability of advisory guidelines, as described above, may render the sentencing system subject to Sixth Amendment jury factfinding

requirements at sentencing. See Cunningham v. California, 127 S. Ct. 856, 875-876 (2007) (Alito, J., dissenting).

§ 6B.05. Selection Among and Use of Sanctions. [*To be drafted***]**

§ 6B.06. Eligible Sentencing Considerations.

(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.

Comment:

a. Scope. This provision speaks to those considerations that may be weighed by the sentencing commission when creating sentencing guidelines. Parallel provisions speak to other decisionmakers in the sentencing system. Considerations eligible to sentencing courts are addressed in Article 7. In Part III, similar questions of permission and limitation must be posed for official actors empowered to make prison-release decisions, and for courts or other actors authorized to set penalties for sentence violations.

Under the revised Code, the commission has no power to forbid or require the consideration of any sentencing factor. Only the legislature and the courts possess that authority, see § 6B.02(7). The legislature should use its authority sparingly when addressing the commission and the courts—the actors closest to the complex and mutable issues of sentencing law and policy. Fixed legislative directives preempt dialogue between commission and courts, and hinder the evolution of a common law of sentencing.

The legislature should forbid the judiciary and the commission to weigh specific sentencing factors only when strong public-policy or constitutional concerns are present. Section 6B.06, read together with the parallel provision in Article 7 addressed to the courts [to be drafted], set forth those few areas in which considerations relevant to the purposes in § 1.02(2) should nonetheless be declared ineligible by legislative command.

b. General authority and limitations. Many jurisdictions through statute or case law grant sweeping authority to

decisionmakers to weigh virtually all conceivable factors concerning the offense or the offender when making sentencing determinations. Section 6B.06(1) refines the typical approach in two ways. First, subsection (1) requires that sentencing considerations must be relevant to the purposes of sentencing and corrections in § 1.02(2). This is intended to be a meaningful and enforceable substantive limitation upon the reach of the general permission extended in subsection (1), and is part of the revised Code's thoroughgoing program to elevate the importance of the statement of purposes in § 1.02(2).

Second, subsection (1) expressly recognizes that its general grant of authority may be qualified by constitutional command, statutory provision, or controlling judicial precedent. The remainder of § 6B.06 sets out the most important legislative limitations recommended in the Code. It is equally important, however, to highlight the permissibility of judge-made limitations. Without explicit statutory authorization, the courts may not recognize their own discretion to carve out exceptions to the general grant of permission in subsection (1).

c. Prohibited personal characteristics of offenders. Many jurisdictions have provisions in statute or guidelines similar in spirit to subsection (2)(a), addressed to the commission or other decisionmakers in the sentencing system. In part, subsection (2)(a) restates federal constitutional law under the First Amendment, Due Process, and Equal Protection Clauses, and analogous state constitutional guarantees. Yet the subsection in no way depends upon constitutional foundations. Its provisions represent good public policy in an egalitarian society even if not demanded by constitutional strictures.

Some jurisdictions go further than subsection (2)(a) in prohibiting the consideration of the personal characteristics of offenders, and have removed from consideration such things as age, family circumstances, community ties, educational attainment, and employment history. At the extreme, the federal guidelines in the past foreclosed consideration of a defendant's amenability to drug treatment or other rehabilitative programming. Such expansive restrictions were founded on good intentions (in particular, the concern that many of the factors on the extended list correlate with race, ethnicity, or class), but have drawn much criticism because they disadvantage defendants who might otherwise have made justifiable claims of mitigation. Indeed, charges have been leveled that an overlong list of prohibited sentencing factors works to *increase* the severity of punishments imposed upon racial and other minority groups. Given the uncertainties, this is not an area in which model legislation can pronounce a firm recommendation. The relatively streamlined catalogue of prohibitions in subsection (2)(a) invites further study of these issues in each jurisdiction.

d. Exceptions to subsection (2)(a). Subsection (4)(a) states a general proposition that operates as an exception to subsection (2)(a), but also carries independent force. Subsection (2)(a) may not be read to prohibit consideration of an offender's race, ethnicity, sexual orientation or identity, natural origin, religion or creed, or political affiliation or belief, if such factors are part of a showing that the defendant presents circumstances of hardship, deprivation, vulnerability, or handicap that ought to be weighed in mitigation of sentence. Such circumstances, for example, might affect judgments of personal blameworthiness under § 1.02(2)(a)(i), or individualized treatment needs under § 6B.09 (to be drafted).

Subsection (4)(b) states an important but limited exception to the prohibition in subsection (2)(a) of consideration of an offender's gender. This exception is based on powerful statistical and social-science evidence that gender is a robust predictive factor, at least in some settings, of the future criminality of persons who have a prior record of offending. The legislature should not prohibit the commission, or other decisionmakers in the sentencing system, from weighing this knowledge when making or facilitating actuarial predictions of future criminal behavior. An unqualified bar to gender-based criteria, if left to stand in subsection (2)(a), would discriminate against women as a group when measured against their observed propensity for criminal behavior.

Subsection (4)(b) further recognizes that women offenders as a group may present treatment needs relevant to rehabilitative sentencing that are distinct from the needs of male offenders as a group. Again, the commission should not be foreclosed from responding to such knowledge, where it exists.

The exceptions stated in subsection (4)(b) operate only when the commission has "a reasonable basis in research or experience" to incorporate the consideration of gender into guidelines. Further, the exceptions are limited to risk and needs assessments, and thus go only to such sentencing purposes as incapacitation and rehabilitation in § 1.02(2)(a)(ii). Subsection (4)(b) has no effect on considerations of proportionality in punishment in § 1.02(2)(a)(i). As stated explicitly in § 1.02(2)(a)(ii), any adjustment of penalties due to the outcome of a risk or needs assessment as applied to an individual offender cannot exceed "the boundaries of proportionality in [§ 1.02(2)(a)(i)]."

Subsection (4)(c) ensures that the amounts of fines and other economic sanctions, and conditions of payment such as installment schedules, may be allowed to vary with the wealth and income stream of particular offenders. A "day fine" system, for example, encouraged elsewhere in the Code revision (provision to be drafted), could not be incorporated into guidelines without the qualification stated in subsection (4)(c).

e. Alleged nonconviction offenses. Subsection (2)(b) reflects the policy view that, if criminal penalties are to be assessed for crimes government officials believe a defendant has committed, those crimes must first be charged and proven at trial beyond a reasonable doubt or admitted by the defendant. The provision embraces the "conviction-offense" philosophy of a number of state sentencing guideline systems and the American Bar Association's Criminal Justice Standards for Sentencing. It rejects the modified "real-offense" approach of the federal sentencing guidelines.

Subsection (2)(b) bars consideration at sentencing of alleged criminal offenses that have never been charged, that have been charged but dismissed (perhaps as part of a plea agreement), or that have been charged and tried resulting in acquittals. These rules respond to the concern that determinations of guilt of statutorily defined offenses are attended by numerous constitutional and subconstitutional safeguards at trial that often evaporate in the relative informality and brevity of sentence proceedings. These trial protections include a defendant's right to a jury trial, the presumption of innocence, the requirement of proof of all constituent elements of offenses beyond a reasonable doubt, the right to confront adverse witnesses, the availability of the exclusionary-rule remedy for unconstitutionally acquired evidence, the Double Jeopardy guarantee barring

relitigation of an acquittal, and the rules of evidence. These protections have not traditionally been available at sentencing proceedings.

In addition to differences in formal procedure, subsection (2)(b) also responds to the practical reality that, while there may be occasional exceptions, sentence proceedings typically command far less time, care, and attention on the part of the court and the parties than a full-blown criminal trial. The total "procedural differential" between trial and sentencing is a chasm rather than a crevice. Even if the Constitution is not offended, it is nonetheless an anomaly with grave impacts upon fairness and process regularity to allow the litigation of criminal guilt for the first time at sentencing, or to permit the relitigation of charges that could not be sustained at trial. The anomaly is all the more serious—as often occurs under "real-offense" sentencing—when the penalty consequences attending a finding of "guilt" at sentencing are identical to those that would have resulted from a formal conviction at trial.

Subsection (2)(b) does not adopt an idealized conviction-offense philosophy that would disallow all sentencing considerations other than the bare facts of conviction as established in the elements of the conviction offenses. No American jurisdiction has gone to this extreme. Instead, the provision adopts a modified conviction-offense philosophy that permits expansive consideration of extra-offense facts. Subsection (2)(b) does not forbid sentencing consideration of any aggravating or mitigating circumstances surrounding offenses of conviction, or any personal characteristic of the offender, or any consideration of the impact of an offense on its victim, or any other factor relevant to the purposes of sentencing under § 1.02(2)(a)—with the exception of factual considerations that have been defined by the legislature as crimes separate or different from the conviction offenses.

Even in the case of separately defined crimes, of course, punishment for the additional offenses is not barred by subsection (2)(b). Rather, a burden is placed on the prosecution to charge and obtain convictions for additional or more serious offenses before punishment for those offenses may be imposed.

Illustration:

1. A sentencing commission may not promulgate guideline provisions that increase the presumptive penalty following a drug conviction if it is established at sentencing proceedings that the defendant committed additional drug crimes that were never charged, were charged and dismissed, or were charged but resulted in acquittals at trial. Nor may the commission enumerate aggravating factors, based on similar alleged nonconviction offenses, as grounds for departure from presumptive sentences under the guidelines. The commission may, however, incorporate into the guidelines factors such as: the defendant played a leadership role in a drug crime involving more than one offender, drugs sold by the defendant were of unusually poor and dangerous quality, drugs were sold to an underage or otherwise vulnerable buyer, and the like—so long as those factors do not replicate elements of separate offenses as defined by the legislature.

Subsection (2)(b) does not attempt a full resolution of the difficult policy question of which facts may appropriately be resolved at sentencing and which facts are sufficiently "elemental" to determinations of guilt or statutory grading that they should be reserved for adjudication at trial. Subsection (2)(b) does supply a partial answer to the question, however. A legislative judgment that designated facts are of

sufficient importance to be included in statutory elements of offenses is the clearest possible signal that those facts are major markers of guilt, innocence, or grading distinctions. The legislature, commission, and courts may develop additional rules or presumptions concerning the division of factfinding labor as between trial and sentencing. Under the philosophy of the Code revision and this subsection, such further explorations of best policy are encouraged, but they should build upon and not subtract from the foundational rule stated here.

f. Double counting of offense elements. Subsection (3) ensures that a fact already established as part of the determination of a defendant's guilt cannot be counted a second time as a departure factor in aggravation of sentence. Similarly, it prevents any single factor from counting more than once as a ground for departure or extraordinary departure, even when not an offense element. While the commission cannot on its own authority lay down prohibitions of sentencing considerations in the guidelines, subsection (3) authorizes and requires the commission to do so in these instances.

g. Plea agreement as a mitigating factor. Subsection (5) proceeds from the assumption that, as a general rule, a plea agreement or sentence agreement standing alone should provide no grounds for a departure or extraordinary departure from applicable guidelines or statutory sentencing law. Once again, the commission itself would not be free to author such a prohibition. The legislature here, and in Article 7 (when addressing sentencing courts), should seek to address the effect of bargaining by the parties, which otherwise might function as a limitless avenue of deviation from sentencing presumptions. In Article 7 [provision to be drafted], the revised Code provides that:

In the absence of express authorization from the sentencing commission in the sentencing guidelines, the fact of a plea agreement or sentence agreement standing alone shall not be sufficient justification to support a departure or extraordinary departure.

As indicated by the above-quoted language, subsection (5) does not carve an absolute prohibition in stone. It does, however, grant exclusive authority to the commission to design and calibrate relevant provisions if needed.

h. Cooperation as a mitigating factor. Subsection (6) must be understood in relation to its parallel provision in Article 7 (to be drafted). The two subsections together will ensure that sentencing courts always have authority to consider a defendant's cooperation with the government as a factor in mitigation of sentence. Black-letter language in Article 7 will clarify that a court's authority to do so may follow a motion by the government, the defense, or the court's own motion. This provision is made necessary by the contrary approach of the federal sentencing guidelines, which have prohibited such consideration except upon motion of the relevant prosecutor. The commission in subsection (6) is granted authority to author presumptive guidelines provisions on this subject, but no restrictions more forceful than presumptions, subject to the departure power in § 7.XX, may be placed on sentencing courts' discretion.

REPORTER'S NOTE

b. General authority and limitations. The common-law rule, still applied in many jurisdictions, places almost no limitations on the information the court is permitted to consider at sentencing. See People v. Arbuckle, 587 P.2d 220, 223 (Cal. 1978); People v. Newman, 91 P.3d 369,

371-372 (Colo. 2004); State v. Bletsch, 912 A.2d 992, 1003 (Conn. 2007); State v. Malone, 694 S.W.2d 723, 727 (Mo. banc 1985); State v. Aldaco, 710 N.W.2d 101, 110-111 (Neb. 2006); State v. McKinney, 699 N.W.2d 460, 466 (S.D. 2005). For a codification of the rule, see 18 U.S.C. § 3661 (2006) ("Use of information for sentencing"):

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

c. Prohibited personal characteristics of offenders. For provisions similar to subsection (2)(a), see Ala. Code § 12-25-2(a)(2) (2006) ("geography, race, or judicial assignment."); Ark. Code § 16-90-801-(b)(3) (2006) ("race, gender, social, and economic status"); District of Columbia Code § 24-112(d) (2006) ("race, sex, marital status, ethnic origin, religious affiliation, national origin, creed, socioeconomic status, and sexual orientation of offenders"); Mich. Comp. Laws § 769.34(3)(a) (2006) ("gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion"); Minnesota Sentencing Guidelines and Commentary § II.D.1 (2006) (race, sex, employment or employment history, impact of sentence on profession or occupation, educational attainment, living arrangements, length of residence, and marital status); Oh. Rev. Code § 2929.11(C) (2006) ("race, ethnic background, gender, or religion of the offender"); Tenn. Code § 40-35-102(4) (2006) ("race, gender, creed, religion, national origin and social status of the individual").

A few jurisdictions rule out consideration of the defendant's personal characteristics or circumstances more expansively than subsection (2)(a). The broadest prohibitions exist in Washington and Kansas. The Washington Sentencing Guidelines proscribe "discrimination as to any element that does not relate to the crime or the previous record of the defendant." Rev. Code Wash. § 9.94A.340 (2006). As explained by the sentencing commission:

> [T]he Legislature considered enumerating specific factors which could *not* be considered in sentencing the offender, including race, creed and gender. However, the Legislature decided that to list such factors could narrow the scope of their intent, which was to prohibit discrimination as to any element that does not relate to the crime or the previous record of the defendant.

Washington Adult Sentencing Guidelines Manual (2006), at II-23–24. Kansas law is the same. See Kan. Stat. § 21-4702 (2006). The Kansas provision was expressly aimed at the elimination of unconscious racial and ethnic discrimination in sentencing. See Kansas Sentencing Commission, Final Recommendations (1991), at 4. The federal sentencing guidelines likewise contain expansive prohibitions, or strong discouragements, of consideration of defendants' personal characteristics or circumstances at sentencing. See U.S.S.G. §§ 5H1.1—5H1.6, 5H1.10—5H1.12 (2006) (factors "not relevant" to sentence include "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status" and "Lack of Guidance as a Youth and Similar Circumstances"; factors "not ordinarily relevant" include "Age," "Education and Vocational Skills," "Mental and Emotional Conditions," "Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction," "Employment Record," "Family Ties and Responsibilities," and "Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works"). For criticism of such sweeping rules, and an argument that they disadvantage minority defendants, see Charles J. Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938 (1988).

Some guidelines systems do not broadly prohibit the consideration of an offender's personal characteristics or circumstances as sentencing factors, and some even invite the consideration of specified personal circumstances. North Carolina, for example, counts among the factors supportive of a mitigated sentence that the defendant has been honorably discharged from the armed services, has a positive employment history or is gainfully employed, or has a "support system in the community." N.C. Gen. Stat. § 15A-1340.16(e)(14), (18), (19) (2006). See also Mo. Sentencing Authority Comm'n, Report and Implementation

Update (2005), at 73 (offender's education level and employment status should be considered in measuring risk of recidivism); Virginia Sentencing Guidelines, 9th Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet used by judges at sentencing includes age and sex of offender, whether offender was regularly employed, and whether offender was ever married); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 5, 7 (guidelines encourage the consideration of the offender's age, education, employment history, and whether the defendant has "strong and stable ties" to family and community).

d. Exceptions to subsection (2)(a)

(1) Hardship or deprivation. Subsection (4)(a) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(c) (1994). See Tenn. Code § 40-35-113(7) (2006) (mitigating factors include: "The defendant was motivated by a desire to provide necessities for the defendant's family or the defendant's self.").

(2) Gender. A pronounced gender gap in rates of serious criminality is found in all societies, and is stable across time. See Michael R. Gottfredson and Travis Hirschi, A General Theory of Crime (1990), at 144-149. For example, in 2005, police departments nationwide reported that males were 89 percent of those arrested for murder, 99 percent for rape, 89 percent for robbery, and 79 percent for aggravated assault. Federal Bureau of Investigation, Crime in the United States 2005: Uniform Crime Reports (2006), tbl. 33.

At least one American sentencing commission uses a defendant's sex as one important variable in a risk-assessment instrument that identifies low-risk offenders who may safely be diverted from prison under the state's guidelines. See Virginia Sentencing Guidelines, 9th Edition, Drug Schedule I/II (2006), at 11 ("Nonviolent Risk Assessment" worksheet based on current offense type, single or multiple counts, prior record, age and sex of offender, whether offender regularly employed, and whether offender was ever married). The instrument was based on a multi-year recidivism study of Virginia offenders. It was validated in an independent evaluation, and has been used by Virginia judges as a basis for the diversion of thousands of offenders, who would otherwise have been recommended for a prison sentence under the guidelines,

into community sanctions. See Brian J. Ostrom et al., National Center for State Courts, Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Virginia Sentencing Commission, 2005 Annual Report, at 29-31. The research base for Virginia's program satisfies the requirement in subsection (4)(b) that the use of gender as a sentencing factor must have "a reasonable basis in research or experience."

(3) Financial circumstances. Subsection (4)(c) is based on ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.4(b) (1994). See, e.g., Ohio Rev. Code § 2929.18(E) (2006) ("A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it").

e. Alleged nonconviction offenses. Subsection (2)(b) follows the approach endorsed in ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.6 (1994) ("Sentence should not be based upon the so-called 'real offense,' where different from the crime of conviction"). Most state sentencing-guidelines systems adopt a "conviction offense" philosophy to the following extent: Guidelines presumptions or recommendations are based on offenses for which defendants have been convicted (including current offenses and criminal history), and take no account of different or additional "nonconviction" offenses defendants are alleged during sentencing proceedings to have committed. See Michael Tonry, Sentencing Matters (1996), at 94 ("sentencing commissions in Arkansas, Canada, Delaware, Kansas, Florida, Louisiana, Minnesota, New York, North Carolina, Ohio, Oregon, Pennsylvania, Washington, and Wisconsin unanimously rejected real offense sentencing and based guidelines on conviction offenses").

A handful of states affirmatively forbid consideration at sentencing of alleged offenses or offense elements beyond those for which there have been formal convictions. See Minnesota Sentencing Guidelines and Commentary § II.A.02 (2006):

> Offense severity is determined by the offense of conviction. The Commission thought that serious legal and ethical questions would be raised if punishment were to be determined on the basis of alleged, but unproven, behavior, and prose-

> cutors and defenders would be less accountable in plea negotiation. It follows that if the offense of conviction is the standard from which to determine severity, departures from the guidelines should not be permitted for elements of offender behavior not within the statutory definition of the offense of conviction. Thus, if an offender is convicted of simple robbery, a departure from the guidelines to increase the severity of the sentence should not be permitted because the offender possessed a firearm or used another dangerous weapon.

The Minnesota proscription has been enforced by the appellate courts. See, e.g., State v. Womack, 319 N.W.2d 17 (Minn. 1982). See also Rev. Code Wash. §§ 9.94A.520 & 9.94A.530(2) (2006); Washington Adult Sentencing Guidelines Manual (2006), at II-138 ("The Commission believed that defendants should be sentenced on the basis of facts which are acknowledged, proven, or pleaded to. Concerns were raised about facts which were not proven as an element of the conviction or the plea being used as a basis for sentence decisions, including decisions to depart from the sentence range."); State v. McAlpin, 740 P.2d 824 (Wash. 1987).

Despite the general "conviction offense" orientation of most state sentencing-guidelines systems, some states make exceptions, and include specified "nonconviction" crimes or other misconduct among the aggravating factors enumerated in guidelines. See, e.g., Rev. Code Wash. § 9.94A.535(3)(g) (2006) (aggravating factors include: "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 99; N.C. Gen. Stat. § 15A-1340.16(d)-(18) (2006) (grounds for aggravated sentence include a finding that "[t]he defendant does not support the defendant's family"); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 4; Rev. Code Wash. § 9.94A.535(3)(h)(i).

Three state guidelines systems—all of them advisory systems—explicitly permit the consideration of nonconviction conduct of any kind. See Md. Code Regs. 14.22.01.09(A) (2007); State v. Winfield, 23

S.W.3d 279 (Tenn. 2000); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

The federal sentencing-guidelines system is the only system in the United States to *require* sentencing courts to base guidelines sentences upon both conviction and nonconviction offenses. See U.S.S.G. § 1B1.3 (2006) (the "Relevant Conduct" provision). The Supreme Court has held that the "real conduct" approach was central to Congress's intent in authorizing creation of the federal guidelines. See United States v. Booker, 543 U.S. 220, 250 (2005) (Breyer, J., Opinion of the Court) ("Congress' basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction"). For criticisms of the relevant conduct rules, see David Yellen, Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing, 58 Stan. L. Rev. 267 (2005); Michael Tonry, Sentencing Matters (1996), at 93-95; Kate Stith and José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998), at 148-150.

For a discussion of different approaches to these issues nationwide, see Kevin R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 Stan. L. Rev. 523 (1993).

f. Double counting of offense elements. Provisions similar to subsection (3) are found in a number of guidelines jurisdictions. See Alaska Stat. § 12.55.155(e) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 94; Pa. Sentencing Guidelines Standards (2005), at 160; Tenn. Code § 40-35-114 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 16; Rev. Code Wash. § 9.94A.537 (2006). A close variation on this theme is found in Kan. Stat. § 21-4716(c)(3) (2006) ("If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the crime severity scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime"). See also Mich. Comp. Laws § 769.34(3)(b) (2006).

g. Plea agreement as a mitigating factor. Numerous approaches to the effects of plea bargains on sentences have been taken in American

guidelines jurisdictions, see below, although no one in any jurisdiction claims to have successfully addressed the issue. In the absence of a proven model, subsection (5) allows sentencing commissions to experiment, and grants commissions authority to promulgate authoritative regulations on the subject.

The federal sentencing-guidelines system offers a fixed sentencing discount applicable to most defendants who plead guilty. U.S.S.G. § 3E1.1 (2006) (two-level reduction in offense level on guidelines grid for a defendant who "clearly demonstrates acceptance of responsibility for his offense"). A handful of states emulate the "acceptance of responsibility" approach, although no state follows the federal example of quantifying the precise degree of mitigation to be awarded defendants. See N.C. Gen. Stat. § 15A-1340.16(e)(15) (2006); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

Some sentencing-guidelines jurisdictions have introduced rules, procedures, or admonitions in the attempt to regulate or mute the effect of plea bargains upon sentences. See Ark. Code § 16-90-804(b) (2006) ("If both sides agree on a recommended sentence, the judge may choose to accept or reject the agreement based upon the facts of the case and whether those facts support the presumptive sentence or a departure different from any recommendation."); Kan. Stat. § 21-4713 (2006) (limiting concessions prosecutors may make in plea negotiations, e.g., prosecutor may "recommend a particular sentence outside of the sentencing range only when departure factors exist and shall be stated on the record," but may not "make any agreement to exclude any prior conviction from the criminal history of the defendant"); Minnesota Sentencing Guidelines and Commentary, Comment II.D.04 (2006) ("When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted"); Mo. Sentencing Advisory Comm'n, Report and Implementation Update 12 (2005) ("The commission is aware that, in many cases, the sentence is the result of a plea agreement. The information in the [sentencing recommendations] will be useful in determining appropriate dispositions in plea-agreed cases. Counsel and courts should be aware that, although a plea agreement is done before entry of a plea and preparation of a Sentencing Assessment Report, a probation and parole

officer or prison official would prepare a report in any event."); Virginia Sentencing Guidelines (9th ed. 2006), General Instructions at 1 ("Reasons for departure should be specific. 'Plea agreement' as a reason for departure does not provide information on why the plea agreement was accepted"); Rev. Code Wash. § 9.94A.535(2)(a) (2006) (it is an enumerated aggravating factor, supportive of a sentence above the standard guidelines range, if "[t]he defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act"); id. § 9.94A.431(2) (providing that the "sentencing judge is not bound by any recommendations contained in an allowed plea agreement," and "[i]f the court determines it is not consistent with the interests of justice and with the prosecuting standards, the court shall, on the record, inform the defendant and the prosecutor that they are not bound by the agreement").

Other jurisdictions make no attempt to limit the dispositive effect of plea agreements upon sentence. See District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.1 (Plea agreements that are accepted by the sentencing court control the applicable sentence and displace the guidelines); Md. Code Regs. 14.22.01.05(B)(1) (2007) ("Common reasons for departure under the guidelines range include . . . [t]he parties reached a plea agreement that called for a reduced sentence").

h. Cooperation as a mitigating factor. Most sentencing-guidelines jurisdictions recognize a defendant's cooperation with an ongoing government investigation as a mitigating factor at sentencing. See Ark. Code § 16-90-804(c)(1)(H),(I) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 94, 98; District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.3(7); Mo. Sentencing Advisory Comm'n, Report and Implementation Update (2005), at 23; N.C. Gen. Stat. § 15A-1340.16(e)(7) (2006); Pa. Sentencing Guidelines Standards (2005), at 188; Tenn. Code § 40-35-113(9)-(10) (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 15-16; Rev. Code Wash. § 9.94A.450(2)(b) (2006); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 7.

Two guidelines jurisdictions require a government motion before the defendant's cooperation may be considered as a ground for mitigated sentence. See Kan. Stat. § 21-4716(e) (2007) ("Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist"); U.S.S.G. § 5K1.1 (2006) (same). Subsection (6) is not so qualified. See also ABA, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.10(b) (2004) (rejecting government motion requirement, but stating that prosecutor's views should be "considered" by the sentencing court); Cynthia K.Y. Lee, Prosecutorial Discretion, Substantial Assistance and the Federal Sentencing Guidelines, 42 UCLA L. Rev. 105 (1994) (criticizing government motion requirement in federal law).

§ 6B.07. Use of Criminal History.

(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of presumptive sentences, as 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.

Comment:

a. Scope. This provision speaks generally to the commission's use of criminal history as a sentencing factor within the guidelines. Section 6B.07 is closely related to the more particularized § 6B.09 (Risk and Needs Assessments of Offenders) (to be drafted), which addresses the use of criminal history, along with other factors, in support of predictions of recidivism and the selection of the most appropriate correctional interventions for individual offenders.

b. Broad discretion to the commission. Section 6B.07(1) does not require a commission to build into guidelines the consideration of offenders' criminal histories, but it does require the commission to "consider" whether and in what circumstances it is desirable to do so. The provision explicitly opens the door to a number of possible vehicles for guide-

lines provisions on criminal history: as part of the determination of presumptive sentences in the first instance (this is the majority approach of American guidelines systems today), as an aggravating factor in support of departure (the present minority approach), or as a component of any other kind of presumptive provision or recommendation in the guidelines (allowing for future experimentation).

Subsection (1) further makes clear that the commission's approach to criminal history in the guidelines need not be unitary across all case categories. If the commission finds it appropriate to do so, it may develop different approaches to the use of criminal history for different classes of offenders, current offenses, and prior offenses.

The broad flexibility—and lack of firm direction—conveyed in subsection (1) is fully intended by the drafters. At the outset of the 21st century, there is enormous variation across jurisdictions—including American guidelines and non-guidelines jurisdictions and the various legal systems in other democratic countries—in the approaches taken to the use of criminal history as a sentencing factor. No best practice has emerged. In fact, the study of the purposes and effects of the varied approaches has until recent years been stunted. Section 6B.07 recognizes that the subject of prior offending is of great importance and merits thoughtful deliberation by every commission. This is an area in which innovation, conjoined with continuous evaluation, should be encouraged, see subsection (4).

Much like § 6B.02(1), § 6B.07(1) calls into question the use of the "grid" format for the expression of sentencing guidelines. Most American guidelines systems in the early 2000s employed two-dimensional grids (or "matrices" or "charts") with the gravity of current offenses scored on one axis and the offender's criminal history scored on the other.

These grid calculations of course are not the end of the decisional process. All systems allow extra-grid factors to influence penalties in the form of departure factors or other adjustments. In some systems the full catalogue of extra-grid factors that must or may be considered by sentencing courts is quite expansive. Yet the grid concentrates attention on its twin elements. Moreover, the grid—whether intentionally or unconsciously—defines a way of thinking about prior offending. It suggests, by its very configuration, a linear relationship between criminal history and appropriate punishment severity.

Sections 6B.02 and 6B.07 would allow future commissions to use a two-dimensional grid, mapping offense severity and criminal history, when designing the format of sentencing guidelines. Indeed, the grid format carries proven advantages, see § 6B.02(3) and Comment *c*. At least a handful of states, however, have elected to present their guidelines in other forms, such as narrative statements or offense-specific worksheets. In at least some of these systems, the impact of offenders' criminal history on punishment is not reducible to the mechanical, additive impacts often found in grid-based guidelines.

As part of its duty to "consider" the uses of criminal history in subsection (1), the commission should consider the possibility of removing or limiting such consideration for whole classes of cases. There is controversy within the research community about the degree of predictive power of criminal history standing in isolation, and reason to believe that predictive accuracy varies with circumstances. There are also concerns that sentencing schemes that place heavy weight on prior offending exacerbate punishment disparities affecting racial and ethnic minority groups. Given that current knowledge on these important subjects is far from adequate, § 6B.07 leaves open the possibility

that, for some, many, or all offenses, commissions of the future might decide the consideration of criminal history should be eliminated or given muted effect.

c. Theoretical underpinnings of the consideration of criminal history at sentencing. Any use of criminal history as a factor in the guidelines must be driven by the underlying purposes of sentencing and corrections in § 1.02(2), see § 6B.03(1) ("In promulgating and amending the guidelines the commission shall effectuate the purposes of sentencing as set forth in § 1.02(2)"); see also § 6A.01(2)(e) (the commission shall "perform its work and provide explanations for its actions consistent with the purposes of the sentencing system in § 1.02(2)"). In application to individual cases, therefore, the criminal-history provisions of the guidelines must work within the limits of proportionality expressed in § 1.02(2)(a)(i).

The revised Code does not insist that all jurisdictions employ identical understandings and applications of proportionality limitations. Proportionality is a flexible construct that gains content through the choices of authoritative decisionmakers, including the commission and the courts. The commission's incorporation of criminal history as a guideline factor must be done in light of the commission's best collective judgments about proportionality in the severity of sentences, see § 1.02(2)(a)(i). If criminal history is made part of the guidelines in furtherance of utilitarian goals, the commission must attend to the strictures of § 1.02(2)(a)(ii) and, if relevant, the requirements of § 6B.09 (Risk and Needs Assessments of Offenders) (to be drafted).

The importance of underlying purposes to the operation of criminal history within the guidelines does not end with the commission, however. The sentencing courts and

appellate courts are authorized to depart from the guidelines' criminal-history presumptions if, in the particular case, there are substantial reasons to conclude that the guidelines provisions do not best further the purposes of § 1.02(2)(a), see § 7.XX(2). Courts are further empowered to create their own departure factors, see § 6B.02(7), and these may include factors responsive to aspects of offenders' criminal histories.

d. Juvenile adjudications. Section 6B.07(2) authorizes but does not demand that the commission include consideration of juvenile adjudications as part of the guidelines' treatment of prior offending. Here again, there is a diversity of approach across jurisdictions, although the vast majority of American guidelines systems give weight, usually in defined circumstances, to past juvenile offending. Subsection (2) pronounces no definitive view of best practice on the subject.

A commission's choices about the incorporation of juvenile records in criminal history must be informed—but are not dictated—by the analytic framework of § 1.02(2). For example, a commission must ask (collectively) whether it is morally justifiable to hold adult offenders more blameworthy, and deserving of increased punishment under § 1.02(2)(a)(i), because of their past actions when juveniles. It is possible that one commission might conclude on moral grounds that there should be no residual increment of blameworthiness carried forward from the transgressions of youth. Another commission, however, might decide, in light of available evidence, that it is sometimes morally defensible to consult prior juvenile convictions when they support predictions of future criminality, see§ 1.02(2)(a)(ii) and § 6B.09 (to be drafted).

Subsection (2) adds an important caveat to the analytic required under § 1.02(2). In many jurisdictions, the safeguards attendant to juvenile-court proceedings fall short of those in the adult criminal process. If juvenile-court safeguards are not at least "comparable" to those in adult criminal trials, the fairness and accuracy of prior juvenile adjudications is called into question. If juvenile adjudications are to be used as a desideratum of "criminal" history, subsection (2) makes this permissible only when a true "criminal" process has been employed for the establishment of that history.

e. Limitation periods. Subsection (3) expresses a legislative judgment that the justifications for consideration of offenders' prior convictions diminish with time. This is true under retributive and utilitarian theories of punishment. Accordingly, in light of the purposes in § 1.02(2), the commission should designate limitation periods after which offenders' prior records of offending will no longer be taken into account in the guidelines. Limitation periods may vary by type of past criminal conduct and its relationship to current offenses. In addition, subsection (3) allows a commission to assign a sliding scale in its criminal-history provisions to depreciate the importance assigned to prior offenses as they become more distant in time, even before they decay entirely.

f. Ongoing monitoring for disproportionate impacts. Subsection (4) underscores the commission's ongoing duty to monitor the operation and effects of the criminal-history provisions of the guidelines, legislation that incorporates criminal history as a factor relevant to punishment, and sentencing courts' consideration of criminal history (which may reflect guideline terms, legislation, judicial discretion, or judge-made law). Subsection (4) gives particular emphasis

to the question of whether the consideration of criminal history creates or exacerbates disproportionate sentencing outcomes among disadvantaged groups. Arguably, the responsibilities stated in subsection (4) are already comprehended in the more general duties contained in § 6A.05(2) and (5). The drafters of the revised Code, however, took the view that criminal history is a pivotal variable in the sentencing process that has not been studied adequately by sentencing commissions—or by researchers in other walks of professional life. General commands such as those in § 6A.05 have not proven sufficient to ensure that a commission devotes adequate time, attention, and critical scrutiny to the subject of criminal history.

g. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (1) and (3) as follows:

> **(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of ~~presumptive~~ recommended sentences, as an aggravating factor enumerated as a ground for departure from a ~~presumptive~~ recommended 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. . . .**

(3) The commission shall ~~fix~~ suggest 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~~ recommendations that give decreasing weight to prior convictions and juvenile adjudications with the passage of time.

The suggested revisions substitute terminology appropriate to sentence "recommendations" where language of "presumptions" occurs in the unaltered provision. See § 6B.01, Comment *b*.

REPORTER'S NOTE

b. Broad discretion to the commission. Existing sentencing commissions have arrived at varying policy determinations of the role that an offender's criminal history should play in sentencing guidelines. See Julian V. Roberts, The Role of Criminal History in the Sentencing Process, in Michael Tonry ed., Crime and Justice, vol. 22 (1997); Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1212-1214 (2005). Roberts observed, however, that "[f]or almost all state guideline systems, at the highest criminal history levels at least, the offender's criminal record is a more powerful determinant of sentence severity than the seriousness of the offense." Roberts, supra, at 345.

See Minnesota Sentencing Guidelines and Commentary, § II.B, Comment II.B.01 (2006) ("The sentencing guidelines reduce the emphasis given to criminal history in sentencing decisions. Under past judicial practice, criminal history was the primary factor in dispositional decisions. Under sentencing guidelines, the offense of conviction is the primary factor, and criminal history is a secondary factor in dispositional decisions").

Sentencing commissions typically produce formulae for the weighting of prior convictions, depending on a host of variables. These include the offense types of current and prior convictions, the degree of similarity between current and prior offenses, the sentence served for the prior offense, whether the offender was serving a sentence when the current crime was committed, the offender's age when the prior offense was committed, whether prior convictions grew out of a single or separate episodes, and the amount of time between the prior and current conviction. See generally Ark. Code § 16-90-803(b)(2) (2006); District of Columbia Sentencing Commission, 2006 Practice Manual, § 2.2; Minnesota Sentencing Guidelines and Commentary § II.B(1) (2006); N.C. Gen. Stat. § 15A-1340.14 (2006); Or. Admin. R. 213-004-0007 (2007); 204 Pa. Code § 303.4(a) (2005); Tenn. Code §§ 40-35-106, 40-35-107, 40-35-108, 40-35-109 (2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 4-6 (2006); Rev. Code Wash. § 9.94A.650(2) (2006).

Some commissions, at least in some cases, allow trial judges to weigh the presence or absence of a defendant's prior criminal history as a departure factor, justifying punishment above or below the guidelines sentence. See Tenn. Code § 40-35-114 and Commentary (2006); Rev. Code Wash. § 9.94A.535(2)(b),(d) (2006); Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6. See also Ohio Rev. Code § 2929.12(D) (2006) (sentencing courts have discretion to consider prior convictions in assessing likelihood that offender will commit future crimes).

There is no general agreement on approach, and virtually no policy literature on the subject. See Roberts, supra, at 341. Subsection (1) recognizes that the treatment of offenders' prior convictions is a complex and policy-laden question that should be resolved by the sentencing commission in each jurisdiction.

Existing codes usually instruct sentencing commissions to include offenders' criminal histories in sentencing guidelines but, like subsection (1), generally give free rein to the commission to decide how this should be done. See 11 Del. Code § 6581(c)(1) (2006); D.C. Code § 3-101(b)(2) (2006); Md. Code, Crim. Proc. § 6-208(6)(b)(2) (2006); Mo. Rev. Stat. § 558.019.6(3)(b) (2007); N.C. Gen. Stat. § 164-42(b)(4) (2006); Rev. Code. Wash. § 9.94A.010(1) (2007). But see Va. Code

§ 17.1-805 (2006) (detailing treatment to be given criminal history in specific instances).

c. Theoretical underpinnings of the consideration of criminal history at sentencing. There is no theoretical literature that explains the observation, nearly universal across American jurisdictions, that an offender's criminal history has a very significant effect upon punishment. See Frase, supra, at 1212. Existing scholarship, most of it written from a retributivist perspective, would allow no impact or very little impact. See George Fletcher, Rethinking Criminal Law (1978), at 466 ("There are serious ethical issues in punishing a person more severely on the basis of past crimes already once punished); Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (1985), at 77-91 (arguing that only a modest increment of additional punishment for prior offenses is permissible in just-deserts theory). It is well established in criminology, however, that criminal record is a useful predictor of future criminality. See D. Champion, Measuring Offender Risk: A Criminal Justice Sourcebook (1994).

Theoretical bases for the treatment of criminal history in sentencing guidelines have sometimes been articulated by sentencing commissions or legislatures. The most common justification is deontological: repeat offenders are seen as more culpable than first-time offenders; proportionality in sentencing demands harsher punishment. Some authorities give utilitarian reasons: that criminal history signals a pronounced risk of future offending. See Ark. Code § 16-90-801(c)(1) (2006) (proportionality); Kansas Sentencing Commission, Final Recommendations (1991), at 53 (culpability); Minnesota Sentencing Guidelines and Commentary, § II.B, Comment II.B.101 (2006) (culpability); Ohio Rev. Code § 2929.12(D) (2006) (risk of future criminality); Or. Admin. R. 213-002-0001(3)(d) (2007) (proportionality); 204 Pa. Code § 303.11(a) (2005) (proportionality); Tenn. Code § 40-35-103 and Commentary (2006) (risk of future criminality); Rev. Code. Wash. § 9.94A.010(1) (2007) (proportionality).

d. Juvenile adjudications. Most sentencing commissions include at least some juvenile adjudications in an offender's criminal history under sentencing guidelines, although these are often given less weight than

adult convictions. See Ark. Code § 16-90-803(b)(2) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 21; Minnesota Sentencing Guidelines and Commentary § II.B(4) (2006; District of Columbia Sentencing Commission, 2006 Practice Manual, § 2.2.2; Kan. Stat. § 21-4710 (2006); Md. Code Regs. 14.22.01.10(B)(2)(a) (2007); N.C. Gen. Stat. § 15A-1340.16(d)(18a) (2006); Ohio Rev. Code § 2929.12(D) (2006); Or. Admin. R. 213-004-0006(2) (2007); 204 Pa. Code § 303.6(a) (2005); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines 5 (2006); Va. Code § 17.1-805(B) (2006); Rev. Code Wash. § 9.94A.525(2)(f) (2006); Washington Adult Sentencing Guidelines Manual (2006), at II-49; Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6. The primary justification for consideration of juvenile adjudications at sentencing would appear to be their usefulness in predicting future criminal behavior. See Alfred Blumstein, Using Juvenile Records to Predict Criminal Behavior, in Bureau of Justice Statistics, National Conference on Juvenile Justice Records: Appropriate Criminal and Noncriminal Use (1997).

Juvenile justice proceedings in most states are attended with fewer procedural safeguards than adult criminal trials. See Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court 109-165 (1999). At least one state has concluded, consistent with subsection (2), that the use of juvenile adjudications as a basis for criminal-history scoring later in life ought to depend on the level of due process attending the juvenile adjudications. See Minnesota Sentencing Guidelines and Commentary, Comment II.B.401 (2006) (noting that consideration given juvenile adjudications in adult criminal history scoring was "broadened" after the legislature created new procedural rights in the state's juvenile-justice system, including the right to effective assistance of counsel and the right to a jury trial in some cases).

e. Limitations periods. Many sentencing commissions or legislatures have provided for limitations periods, sometimes called "decay" periods, beyond which an offender's prior convictions will no longer be counted as criminal history for purposes of a current guidelines sentence. Often, the rules of decay vary depending on type of crime, and whether the offense was committed when the defendant was an adult or juvenile. See Ark. Code § 16-90-803(b)(2)(C) (2006); Delaware Sentencing Accountability Commission Benchbook 2006, at 21; District of

Columbia Sentencing Commission, 2006 Practice Manual, §§ 2.2.3 & 2.2.4; Md. Code Regs. 14.22.01.10(B)(3)(f) (2007); Mich. Comp. Laws §§ 777.50(1) (2006); Minnesota Sentencing Guidelines and Commentary §§ II.B(1)(f), II.B(3)(c), & II.B(4)(d) (2006); Mo. Sentencing Authority Comm'n, Report and Implementation Update, at 72 (2005); Rev. Code Wash. § 9.94A.525(2) (2006).

Some states do not allow prior convictions to lapse for purposes of criminal-history calculations in sentencing guidelines. See Kan. Stat. § 21-4710(d)(3)-(8) (2006) (no decay period for adult convictions, but some juvenile adjudications decay); N.C. Gen. Stat. § 15A-1340.14 (2006); 204 Pa. Code § 303.6(c) (2005) (limitations period only for juvenile history); Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines, General (9th ed. 2006), Instructions at 18.

As opposed to a binary approach, in which prior convictions either count fully or do not count at all in criminal history, subsection (3) invites sentencing commissions to use a graduated approach that gives decreasing weight to prior convictions with the passage of time. This was suggested in Roberts, supra, at 335-336. See Wisconsin Sentencing Commission, Wisconsin Sentencing Guidelines Notes, at 6 (judges given discretion in weight given to criminal history because "[a]s prior convictions become more distant from the present offense, they become less reliable indicators of risk").

f. Ongoing monitoring for disproportionate impacts. There is a danger that prosecutorial power will be enhanced unintentionally by a system of formal criminal-history scoring. In their exercise of charging and plea-bargaining discretion, for example, prosecutors may structure the resolution in a current proceeding to have maximum impact when counted as criminal history in a later case. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research 131, 157, 160, 177-178, 183-184, 194-195, 214 (2005) (documenting changes in prosecutorial practices following adoption of sentencing guidelines in Minnesota aimed toward building up offenders' criminal history scores, and sentencing commission's modifications of the guidelines in light of changed prosecutorial behavior). One important control upon undue prosecutorial power within the system, therefore, is the commission's ongoing responsibility to monitor the use of criminal history and to create safeguards

to reduce the opportunities for prosecutorial manipulation. See, e.g., Minnesota Sentencing Guidelines and Commentary, Comment II.B.103 (2006).

There is evidence that criminal-history scoring, although seemingly a neutral sentencing criterion, can have differential impacts by race. African American defendants appear in criminal courtrooms, on average, with larger numbers of past convictions than white defendants. See Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., 32 Crime and Justice: A Review of Research 131, 177, 200 (2005); Shawn D. Bushaway and Anne Morrison Piehl, Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing, 35 Law & Soc'y Rev. 733, 741, 761 (2001); John Kramer & Jeffrey J. Ulmer, Sentencing Disparity and Departure from the Guidelines 13 Justice Q. 81 (1996). Subsection (4) thus highlights this as a special area of concern in a sentencing commission's ongoing efforts to monitor the operation of sentencing guidelines.

The following provision is not submitted for approval as part of Tentative Draft No. 1. It is presented for informational purposes only.

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

(1) The commission shall include presumptive provisions in the guidelines for cases in which offenders are to be sentenced for multiple current convictions in a single proceeding, multiple current convictions in separate proceedings, or current convictions for offenses committed while offenders were serving sentences or awaiting trial for other offenses. For cases arising under this Section:

(a) The guidelines shall set forth a default presumption in favor of concurrent sentences in most cases. It is the legislature's judgment that a penalty of proportionate

severity normally may be rendered for the most serious among multiple convictions. For the most serious offense, the commission shall include presumptive provisions in the guidelines concerning appropriate adjustments in sentence severity to reflect the offenders' other current convictions.

(b) For selected categories of cases, the commission may create presumptions in favor of consecutive sentences.

(c) The sentencing courts shall have discretion to depart from the guidelines presumptions in subsections (1)(a) and (1)(b), with adequate reasons stated in writing, as provided in § 7.XX.

(d) For selected categories of cases, the commission may provide that there is no guidelines presumption on the question of concurrent versus consecutive sentences, leaving the matter to the discretion of sentencing courts without reference to the requirements of § 7.XX.

(e) In enumerating exceptions to the default presumption in subsection (1)(a), the commission shall ground its decisions on the purposes of sentencing of individual offenders in § 1.02(2)(a).

(f) The guidelines shall include presumptive provisions to ensure that the recommended sentences for multiple current convictions will be the same whether the offenses were charged in a single proceeding or were charged separately.

(g) The guidelines shall include presumptive provisions addressing the total severity of consecutive sentences, including cases where the sentences include a combination of sanctions.

(2) When consecutive sentences to incarceration are imposed, there shall be a heavy presumption in the guidelines that the total sentence length will not exceed double the maximum term of the presumptive sentence for the most serious of the offender's current convictions. Deviation from the heavy presumption by sentencing courts shall be treated as an extraordinary departure under § 7.XX(3).

Comment:

a. Scope. This Section addresses the guidelines' treatment of a variety of scenarios, as catalogued in subsection (1), in which multiple counts of conviction are to be sentenced at one time, or in separate penalty proceedings that will produce overlapping punishments. Section 6B.08 interacts with § 7.06 of the original Code ("Multiple Sentences: Concurrent and Consecutive Terms") (to be revised). Section 6B.08 speaks to the guidance the commission may give to sentencing courts in the exercise of their judicial authority under § 7.06.

The issue of merger of separate offenses for purposes of sentencing is addressed in § 7.06 (to be revised), and is not a subject mediated by sentencing guidelines.

b. Default rules and departures. No American jurisdiction has formulated a satisfactory approach to the punishment of offenders convicted of multiple current offenses.

Moreover, no consensus rationale exists for the analysis of such cases. There is widespread agreement that an offender convicted of two similar offenses, or three, should not as a general rule receive a simplistic additive punishment of two times, or three times, the penalty that would be handed down for a single offense. There is an equally strong intuition that the multiple offender should not generally receive a sentence identical to that appropriate for a single crime. Between the extremes of additive punishment and no incremental punishment at all, however, no broadly applicable principle for appropriate resolution of these cases has been articulated.

Section 6B.08 therefore works on a plan of default rules that allow substantial latitude for individualized decisionmaking in specific cases. Subsection (1)(a) provides that, in the majority of cases, the commission should lay down a presumption in favor of concurrent sentences. This reflects an explicit legislative judgment that a penalty of proportionate severity can usually be assessed for the most serious among the current convictions. The presumption also reflects judicial practice. Trial judges with unfettered discretion in multi-count cases select concurrent penalties more often than consecutive penalties.

The presumption in subsection (1)(a) is not intended to operate as a bar against consecutive sentences. In order to depart from the default rule, a sentencing court must find substantial reasons grounded in the purposes of sentencing, see §§ 1.02(2)(a) and 7.XX(2). Such departures are subject to the deferential standard of appellate review in § 7.ZZ(6).

The default mechanism carries important advantages for a subject area that has produced so little consensus in theory or policy. A default presumption ensures that trial courts must give reasons when consecutive sentences are

pronounced. Thus, a jurisprudence of consecutive sentencing can grow up over time. Under this program, the governing law is not ultimately the province of the legislature or commission. Instead, the judiciary holds greatest authority to develop a principled framework through the common-law process. This approach is to be preferred to a one-size-fits-all rule imposed from above. The default strategy is also to be preferred over a system in which consecutive penalties may be imposed without explanation or opportunity for review. This practice, followed for many years in most states, has contributed little to the principled analysis of a difficult and important issue.

c. Severity adjustments in concurrent sentences. The general presumption in favor of concurrent sentences should work side-by-side with provisions that allow for appropriate adjustments in the severity of penalties to take account of offenders' multiple criminal acts. The commission is charged in subsection (1)(a) with the promulgation of such adjustments, to attach to the sentence imposed for the most serious count of conviction. Some existing guidelines systems, for example, treat multiple offenses (other than the most serious count) in the same way the guidelines would otherwise treat offenders' criminal history. In these systems, scoring of the additional counts can result in marked increases in the recommended punishment for the most serious crime. The precise mechanism chosen by a state commission is not dictated by the revised Code. The important principle embedded in subsection (1)(a), however, is that the rules in multi-count cases should not treat additional offenses as "free" and subject to no additional penalty.

d. Exceptions to default presumptions. Subsections (1)(b) and (1)(d) allow the commission to designate selected categories of multi-count cases as outside the general presumption of subsection (1)(a). Subsection (1)(e) pro-

vides that, when this is done, the commission must base its actions upon the purposes of sentencing in individual cases as laid out in § 1.02(2)(a). Two kinds of exceptions are permitted. First, the commission may select some categories of cases as appropriate for a presumption in favor of consecutive penalties on multiple counts. Second, the commission may select some categories of multi-count cases for which there is no presumption.

When the revised Code speaks of "categories of cases," as in subsections (1)(b) and (1)(d), the language is intended to give the commission broad discretion to formulate the operative categories. A "category" may be defined by the types of crime in a multi-count case, the most serious count standing alone, the relationship between the multiple counts, the current convictions in conjunction with an offender's prior record, offender-based determinations under a risk-assessment instrument, or myriad other possibilities.

Illustration:

1. Although a sentencing commission's guidelines set forth a default presumption in favor of concurrent sentences in multiple-count cases, the guidelines may set forth a presumption in favor of consecutive sentences for offenders with current convictions of more than one count of sexual assault, applicable to offenders who have a prior conviction for an act of sexual or other violence within 10 years of the current crimes. In justifying this exception, the commission might rely upon proportionality grounds, see § 1.02(2)(a)(i), or the goal of incapacitation of dangerous offenders in § 1.02(2)(a)(ii).

It will probably be wise for a newly chartered commission to exercise its powers under subsections (1)(b) and (1)(d) with caution, until data on sentencing patterns and departures away from the general rule in subsection (1)(a) have accumulated. The commission should also be guided heavily by the developing case law in multi-count cases, as well, see § 6A.05(5)(d) (commission shall "study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law").

e. Multiple proceedings. The total sentencing outcome in instances of multiple offending should not turn on the happenstance of whether separate crimes were charged in a single, or in multiple, proceedings. Accordingly, subsection (1)(f) instructs the commission to create mechanisms in the guidelines to recommend sentences that will be the same in both scenarios. This is an important check upon prosecutorial charging discretion in multiple-count cases.

f. Presumptive rules for total severity of consecutive sentences. The sheer stacking effect of consecutive sentences may result in overall penalties that are disproportionate, or that are not tailored defensibly to serve utilitarian or restorative purposes. The commission must address these potential difficulties in the guidelines, with special attention to cases in which a combination of sanctions are imposed.

g. Heavily presumptive limits on consecutive sentences to incarceration. Subsection (2) addresses the problem of total severity in the context of incarceration sentences through the device of the heavy presumption, see §§ 6B.01(5) and 7.XX(3). The provision creates a heavy presumption that the total incarceration term ordered in a consecutive sentence will not exceed double the maximum term of the presumptive sentence for the most serious of the current convictions. In order to go beyond this limita-

tion, a sentencing court must meet the standard for an extraordinary departure in § 7.XX(3). The court must find that there are extraordinary circumstances in the case such that a consecutive sentence of twice the presumptive penalty would be unreasonable in light of the purposes in § 1.02(2)(a). Extraordinary departures are subject to a de novo standard of appellate review under § 7.ZZ(6)(e).

h. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments to subsection (1):

> **(1) The commission shall include ~~presumptive provisions~~ recommendations in the guidelines for cases in which offenders are to be sentenced for multiple current convictions in a single proceeding, multiple current convictions in separate proceedings, or current convictions for offenses committed while offenders were serving sentences or awaiting trial for other offenses. For cases arising under this Section:**
>
> > **(a) The guidelines shall set forth a default ~~presumption~~ recommendation in favor of concurrent sentences in most cases. It is the legislature's judgment that a penalty of proportionate severity normally may be rendered for the most serious among multiple convictions. For the most serious offense, the commission shall include ~~presumptive~~**

~~provisions~~ recommendations in the guidelines concerning appropriate adjustments in sentence severity to reflect the offenders' other current convictions.

(b) For selected categories of cases, the commission may create ~~presumptions~~ recommendations in favor of consecutive sentences.

(c) ~~The sentencing courts shall have discretion to depart from the guidelines presumptions in subsections (1)(a) and (1)(b), with adequate reasons stated in writing, as provided in § 7.XX~~. Sentencing courts shall give full consideration to the recommendations in subsections (1)(a) and (1)(b). If a sentencing court deviates from those recommendations, the court shall comply with the departure procedures set forth in § 7.XX.

(d) For selected categories of cases, the commission may provide that there is no guidelines ~~presumption~~ recommendation on the question of concurrent versus consecutive sentences, leaving the matter to the discretion of sentencing courts without reference to the requirements of § 7.XX.

(e) In enumerating exceptions to the default ~~presumption~~ recommendation in subsection (1)(a), the commission shall ground its decisions on the purposes of sentencing of individual offenders in § 1.02(2)(a).

(f) The guidelines shall include ~~presumptive provisions to ensure that the recommended~~ recommendations to encourage

the imposition of sentences for multiple current convictions ~~will be~~ that are the same whether the offenses were charged in a single proceeding or were charged separately.

(g) The guidelines shall include ~~presumptive provisions~~ recommendations addressing the total severity of consecutive sentences, including cases where the sentences include a combination of sanctions.

Most of the changes suggested above substitute the concept of guidelines "recommendations" for the stronger term "presumptions" in the unaltered provision, see § 6B.01, Comment *b*, while retaining the structure and logic of the provision as a whole.

The suggested revision of subsection (1)(c) cross-references § 7.XX, and ensures that deviations by the sentencing court from the recommendations in § 6B.08 will be subject to the same procedural requirements as other departures from the guidelines. Although the guidelines are mere recommendations in the Code's advisory guidelines structure, the sentencing court must still give full consideration to those recommendations, weigh them in light of the purposes of the sentencing system, and provide a written statement of reasons for any departure from guidelines recommendations. See § 7.XX, Comment *i*.

Subsection (2) is retained without alteration in the Code's advisory guidelines system. This reflects a policy judgment that the mechanism of an "extraordinary departure" remains useful to policy makers in selected circumstances, even in a sentencing structure in which all guidelines promulgated by the sentencing commission are advisory. See § 6B.01, Comment *b*. The heavy presumption in

subsection (2) is created by the legislature. Although its terms may be reiterated within the guidelines, it is a creature of statute.

Factfinding necessary to overcome the heavy presumption laid down in subsection (2) will sometimes implicate the Sixth Amendment requirements of jury factfinding and the reasonable-doubt standard of proof. When the jury-trial right is engaged, § 7.07B sets out appropriate procedures.

§ 6B.09. Risk and Needs Assessments of Offenders. [*To be drafted***]**

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

(1) The sentencing commission shall promulgate guidelines applicable to all felony and misdemeanor offenses under state law except as provided in this Section.

(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad that presumptive sentences cannot reasonably be fashioned, or for other sufficient reasons 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.

Comment:

a. Scope. This Section recognizes the reality discovered in every sentencing-commission jurisdiction that there are some offenses in the criminal code that are so obscure, infrequently enforced, or poorly defined that the promulgation of sentencing guidelines for those crimes would serve little purpose. In addition, although not expressly authorized by § 6B.10, commissions sometimes fail inadvertently to promulgate guidelines for discrete offenses. This Section allows the commission to make deliberate omissions of offenses from the guidelines in defined circumstances, and sets out provisions for the sentencing of cases where crime categories have been purposefully or mistakenly omitted from the coverage of guidelines.

Subsection (1) reiterates § 6B.02(1) (providing that the guidelines shall include presumptive sentencing provisions for offenders convicted of felonies and misdemeanors) but states further that exceptions to the coverage of the guidelines must be in accordance with this Section.

b. Offenses that may be omitted from the guidelines. Borrowing from the actual practice of state sentencing commissions, subsection (2) permits the calculated omission from the guidelines of offenses for which prosecutions are rarely initiated, that are defined so broadly in the criminal code that presumptive sentences cannot reasonably be fashioned, or for other sufficient reason why inclusion would be of marginal utility.

With respect to poorly defined offenses, it must be remembered that § 6B.04(3)(a) (both alternative versions) instructs the commission to create presumptive sentencing ranges that are relatively narrow from lower to upper boundary. This task cannot sensibly be performed by the commission for offenses that are so amorphous as to

encompass an expansive variety of offense behaviors, harms to victims, or levels of culpability on the part of offenders. In such instances, the commission should recommend that the legislature tighten the relevant statutory definitions, and perhaps introduce appropriate grading distinctions, to better segregate meaningful legal categories for criminal punishment, see §§ 6A.04(4)(B), 6A.05(4)(a). See also 1962 Code, § 1.02(1)(e) (one general purpose of the Code's provisions governing the definition of offenses is "to differentiate on reasonable grounds between serious and minor offenses").

c. Sentencing of offenses not covered by guidelines. Offenses not included in the guidelines, whether this is done deliberately pursuant to subsection (2), or through neglect of the commission, must nonetheless receive sentences following convictions. Subsection (3), and the more detailed § 7.XX(5), provide the basic procedure that courts are to follow. Penalties in such cases are within the discretion of the trial courts, within statutory limits. Trial-court discretion is guided, however, by the purposes of sentencing in individual cases, see § 1.02(2)(a), the treatment of analogous offenses in the guidelines, and any presumptive provisions included in the guidelines that are applicable generally to noncovered offenses, see subsection (4). In cases that result in an incarceration term, the trial judge must produce a written explanation for the punishment imposed, which is appealable under the deferential standard of review in § 7.ZZ(6)(d). If sufficient case precedent arises under these provisions, the commission may derive principles from the judicial rulings to support the promulgation of new guidelines to cover previously omitted offenses. Alternatively, the commission may use the judicial decisions as one source of wisdom when considering recommendations for legislative change under § 6A.04(4)(B) or § 6A.05(4)(a).

d. Presumptive provisions for omitted offenses. The commission may choose to include presumptive rules or standards in the guidelines to assist trial courts in the sentencing of offenses not specifically covered by the guidelines. For example, the guidelines may set out a hierarchy of types of injuries to crime victims that the commission itself has used in reaching judgments about proportionate penalties within the guidelines. (This example assumes that the commission has employed such a scaling of victim injuries; nothing in the revised Code requires that a commission use this exact methodology.) The guidelines might further provide that a sentencing court should consult this schematic of harms as part of its thought process in pronouncing sentence for an omitted crime.

The useful guidance that may be provided under this subsection is left to the commission's discretion and, indeed, subsection (4) leaves the question of whether to do so to the election of the commission. Section 7.XX(5) requires trial courts to consult such provisions, if made by the commission, whenever setting punishment for a non-guideline crime.

e. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) and (4) as follows:

> **(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad**

that ~~presumptive~~ recommended sentences cannot reasonably be fashioned, or for other sufficient reasons why inclusion in the guidelines would be of marginal utility. . . .

(4) The commission may promulgate ~~presumptive rules to be used by~~ recommendations for sentencing courts in cases where offenses have inadvertently or otherwise been omitted from the guidelines.

The suggested revisions merely substitute terminology appropriate to sentence "recommendations" where language of "presumptions" occurs in the unaltered provision, see § 6B.01, Comment *b*.

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b. Offenses that may be omitted from the guidelines. Subsection (2) is based on Minnesota Sentencing Guidelines and Commentary § II.A.04 (2006). See also Washington Adult Sentencing Guidelines Manual (2006), at I-1. The provision contemplates that a sentencing commission will amend its guidelines if the conditions of subsection (2) are found to be inapplicable. See Minnesota Sentencing Guidelines and Commentary § II.A.04 (2006) ("If a significant number of future convictions are obtained under one or more of the unranked offenses, the Commission will reexamine the ranking of these offenses and assign an appropriate severity level for a typical offense"); Washington Adult Sentencing Guidelines Manual (2006), at II-120.

c. Sentencing of offenses not covered by guidelines. In most sentencing guidelines jurisdictions, the sentencing commission provides rules or recommendations for judges who must pronounce sentence for an offense not covered by the guidelines. See Arkansas Sentencing Commission Website, Omitted Offenses Policy (2007); Kan. Stat. § 21-4707(c)(2) (2006); Minnesota Sentencing Guidelines and Commentary § II.A.04 (2006); Md. Code Regs. 14.22.01.09(B)(2)(g) (2007); Mo. Sentencing Advisory Comm'n, Report and Recommendation Update

(2005), at 25; 204 Pa. Code § 303.3(f) (2005); Or. Admin. R. 213-004-0004 (2007); Pa. Sentencing Guidelines Standards (2005), at 65; Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines (9th ed. 2006), General Instructions at 5–6; Rev. Code Wash. § 9.94A.505(2)(b) (2007).

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

(1) The sentencing commission shall promulgate its initial set of proposed sentencing guidelines no later than [date]. The proposed guidelines shall take effect [180 days later] unless disapproved by act of the legislature.

(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.

Comment:

a. Scope. These alternative provisions address the question of how and when sentencing guidelines promulgated by the commission shall take legal effect. Both alternatives speak to the commission's initial set of guidelines proposals, see § 6A.04(1), and later guidelines or guideline amendments, see § 6A.05(2)(a).

b. Legislative override versus legislation adoption. The alternative mechanisms set forth in these provisions mirror a split in practice among American guideline jurisdictions. The law in a number of jurisdictions provides that the commission's guidelines, once formally proposed, shall take effect after a stated period of time in the absence of disap-

proval by act of the legislature. This might be called the "legislative override" approach, and is reproduced in the first version of § 6B.11. The law in a comparable number of guideline jurisdictions, in contrast, requires that the legislature affirmatively adopt the commission's guideline proposals before they take legal effect. This could be called the "legislative adoption" approach, and is the basis for Alternative § 6B.11.

Successful state guideline systems have grown up under both legislative override and adoption frameworks. Strong arguments can be advanced in favor of either approach. In theory, the legislative-override plan cedes greater independence to the commission, and greater insulation from political interference, than the legislative-adoption alternative. In practice, however, commissions in legislative-adoption states have often played strong and effective roles, and have achieved a degree of political insulation comparable to commissions in legislative-override states. The working relationship between a commission and the legislature appears to be a more important variable in the lawmaking process than the manner by which guidelines are to become effective.

Proponents of the legislative-adoption approach assert that guidelines formally enacted by the legislature enjoy greater legitimacy than guidelines in override jurisdictions. This argument, too, carries surface plausibility. But experience in a number of states has shown that the widespread acceptance of the guideline system, and high levels of judicial agreement with presumptive guideline recommendations, can both be realized within the legislative-override framework.

The drafters of the revised Code concluded that the choice between "override" and "adoption" alternatives

should be made by each state in light of their local political circumstances.

c. Offenses covered by the guidelines. Subsection (3) is identical in both alternative versions of § 6B.11. It provides that new or amended guidelines shall apply to offenses committed after their effective date. When newly effective guidelines work an increase in the severity of punishments to be imposed, as compared with prior law, the effective-date provision in subsection (3) is constitutionally required by the Ex Post Facto Clause.

For new or amended guidelines that represent a decrease in severity as compared with prior law, however, it is constitutionally permissible, and desirable as a matter of public policy, that the benefit of the new provisions be extended to offenders otherwise subject to the prior law. The precise means by which such retroactive adjustments should be made is a complex subject, however. The practical difficulties of retroactive application vary substantially among offenders who committed offenses under the regime of prior law but are not yet charged, those who offended under prior law and are in the midst of the adjudication process, and those already sentenced under prior law. In the latter category particularly, it may be difficult retroactively to duplicate the judicial sentencing process that would have unfolded if the new guidelines had been in effect at an earlier time.

Rather than setting down a fixed statutory approach to these potentially convoluted problems, subsection (3) requires the commission to suggest an appropriate set of accommodations to the legislature whenever new or amended guidelines are promulgated.

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b. Legislative override versus legislation adoption. For states employing a legislative-override mechanism, see Ark. Code § 16-90-802(d)(2)(D)(i) (2006) ("revised [voluntary sentencing] standards will be in effect unless modified by the General Assembly at its next session or until revised again by the commission"); Minn. Stat. § 244.09, subd. 11 (2006) ("Any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or in the early release of any inmate, with the exception of a modification mandated or authorized by the legislature or relating to a crime created or amended by the legislature in the preceding session, shall be submitted to the legislature by January 15 of any year in which the commission wishes to make the change and shall be effective on August 1 of that year, unless the legislature by law provides otherwise"); 42 Pa. Cons. Stat. § 2155(c) (2006) ("Sentencing guidelines adopted by the commission shall become effective 90 days after publication in the Pennsylvania Bulletin . . . unless disapproved [by concurrent resolution of the General Assembly]."); Va. Code Ann. § 17.1-806 (2006) ("any modification to the discretionary sentencing guidelines adopted by the Commission shall be contained in the annual report required under § 17.1-803 and shall, unless otherwise provided by law, become effective on the next following July 1.").

States using the legislative-adoption model usually enact sentencing guidelines into statutory law. Jurisdictions following this approach include Alabama, Kansas, North Carolina, Ohio, Oregon, and Washington. See Ala. Code § 12-25-34(d) (2006); Or. Rev. Stat. § 137.667(2) (2005); S.C. Code § 24-26-50 (2006); Rev. Code Wash. §§ 9.94A.850(2)(b) & 9.94A.865 (2006).

In Delaware, the legislature provided that the original sentencing guidelines drafted by the sentencing commission would have no force or effect until adopted into court rules by the Delaware Supreme Court. 11 Del. Code § 6581(a) (2006). The same mechanism applies to guidelines amendments. See Supreme Court of Delaware, Administrative Directive Number Seventy-Six (1987).

There is no evidence that choice between legislative adoption and override models is related to a sentencing commission's long-term success and influence. See Ronald F. Wright, Amendments in the Route to Sentencing Reform, 13 Crim. Justice Ethics 58 (1994).

c. Offenses covered by the guidelines. Guidelines, or amended guidelines, are generally applicable only to offenses committed after the new guidelines become effective. See, e.g., Minnesota Sentencing Guidelines and Commentary § III.F (2006); Or. Rev. Stat. § 137.669 (2005); 204 Pa. Code § 303.1(c) (2005); Rev. Code Wash. § 9.94A.345 (2006). Even without an express statutory provision, guidelines that increase penalty severity over prior law would violate the Ex Post Facto Clause if applied to offenses committed before their effective date. See Calder v. Bull, 3 U.S. 386 (1798); Lindsey v. Washington, 301 U.S. 397, 401 (1937); Weaver v. Graham, 450 U.S. 24 (1981); Miller v. Florida, 482 U.S. 423, 433-434 (1987); Collins v. Youngblood, 497 U.S. 37, 43 (1990).

REPORTER'S INTRODUCTORY NOTE TO ARTICLE 7

The following materials include revision of only a small portion of the entire Article 7 of the Model Penal Code. The subjects addressed for Tentative Draft No. 1 include judicial sentencing discretion and new procedures for jury factfinding at sentencing when constitutionally required. Section 7.XX is a cornerstone of the revised Code's commitment to the preservation of judicial discretion under a system of sentencing guidelines. With respect to mandatory minimum penalties, § 7.XX enlarges judicial sentencing discretion over that held by judges in any American jurisdiction. Under the Code's scheme, there is never a circumstance in which judicial discretion to individualize punishment is absent at a sentencing proceeding.

A current draft of § 7.ZZ (Appellate Review of Sentences) is included below for informational purposes only. Because the Reporter contemplates substantial revision of this Section, it is not presented for approval by the membership with the remainder of Tentative Draft No. 1.

ARTICLE 7. AUTHORITY OF THE COURT IN SENTENCING

§ 7.XX. Judicial Authority to Individualize Sentences.

(1) The courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2).

(2) In sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a).

(a) A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02-(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.

(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.

Comment:

a. Scope. This provision defines the authority of trial courts to individualize sentences within the revised Code's structure of sentencing guidelines and appellate sentence review. It must be read in conjunction with § 6B.04 (limiting to "presumptive legal force" all guidelines created by the commission) and § 7.ZZ (setting forth a meaningful yet deferential standard of appellate review of sentencing decisions in individual cases). These three provisions together carve out the relative powers of the commission, the trial courts, and the appellate courts.

b. Judicial discretion in light of legislative purposes. Section 7.XX repeatedly frames sentencing courts' discretionary authority, the limitations upon that authority, and the courts' burdens of explanation in terms of the underlying purposes of the sentencing and corrections system set forth in § 1.02(2). This is part of the revised Code's broad-

based effort to make the purposes provision integral to decisions at all stages of the sentencing process, see § 1.02(2), Comment *a*.

Subsection (1) has exact parallels in § 7.ZZ(1) (addressed to appellate courts) and § 6B.03(1) (addressed to the sentencing commission). It states that all exercises of judicial authority under Article 7 must be consistent with the legislative purposes in § 1.02(2). Later subsections within § 7.XX address particularized applications of this requirement, and use § 1.02(2)(a) as a vehicle for the delineation and preservation of judicial discretion in individual cases. Subsection (1) is broader than any later reference to the purposes provision, however, in that it explicitly embraces the whole of § 1.02(2). The remainder of § 7.XX speaks to sentencing discretion in individual cases—a subject treated in § 1.02(2)(a) (general purposes of sentencing in individual cases). The courts, however, must sometimes attend to systemic purposes in the course of deciding specific cases, see § 1.02(2)(b) (general purposes of sentencing system as a whole). This may occur when a court is called upon to interpret an ambiguous statutory command setting forth a legal standard, prohibition, requirement, or process rule. Subsection (1) makes clear that sentencing courts must attend to systemic purposes whenever these are implicated by judicial action.

Illustrations:

1. A court is faced with alternative possible readings of a statutory requirement that it give reasons for a particular kind of sentencing decision, cf. § 7.XX(4) and (5). On one construction, the court would be called upon to provide a statement of reasons for the sentence imposed; on another interpretation, the court would not

be required to provide an explanation. Decision must be informed by the court's best understanding of § 1.02(2) as a whole. The court may rely upon § 1.02(2)(b)(viii) as grounds for giving broad rather than narrow construction to the statute's requirement. Under § 1.02(2)(b)-(viii), one general purpose of the sentencing and corrections system, in matters affecting the administration of the system as a whole, is "to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities."

2. The proper construction of a statutory or guideline provision that addresses the sentencing consideration to be given a personal characteristic of an offender is in doubt. The court has grounds to believe that one interpretation would exacerbate racial or ethnic disparities in punishment in the jurisdiction, while an alternative construction would avoid this result. Decision must be informed by the court's best understanding of § 1.02(2) as a whole. The court may rely upon § 1.02(2)(b)(iii) in support of the second interpretation of the ambiguous provision. Section 1.02(2)-(b)(iii) states that one general purpose of the sentencing system, in matters affecting the administration of the system as a whole, is "to eliminate inequities in sentencing across population groups." The court might also look to the underlying spirit of § 1.02(2)(b)(iii) (general purpose "to ensure that steps are taken to forecast and prevent unjustified overrepresentations of racial and ethnic minorities in sentenced populations when laws and guidelines affecting sentencing are proposed, revised, or enacted").

c. Departure authority. Subsection (2) addresses the question of judicial sentencing discretion in individual cases as it will arise most frequently in a guidelines system: To what extent do trial courts possess authority to deviate from presumptive sentences in the guidelines, or from other rules set forth in guidelines? If guidelines are mandatory in effect, then sentencing courts have no discretion beyond that granted by the commission in guidelines. On the opposite end of the continuum, if guidelines are wholly advisory, then judicial sentencing discretion within statutory limits is not constrained by the commission's actions. The revised Code strikes an institutional balance of authority between these two extremes. The courts and the commission both hold meaningful authority within the Code's sentencing structure, although greater discretion over sentencing outcomes ultimately rests with the judiciary rather than the commission, see § 6B.04, Comment *b*.

Subsection (2) lays down the general guidelines "departure standard" for the revised Code. This is the single most important design feature of a guidelines system in mediating the relative authorities of the commission, the trial courts, and the appellate courts. The departure standard—including the rigor with which it is enforced on appeal—defines the guidelines structure as mandatory, nearly mandatory, strongly presumptive, moderately presumptive, weakly presumptive, or advisory—with minute calibrations possible all along this continuum.

Under subsection (2), a trial judge, when sentencing an individual offender, may depart from a presumptive penalty or any other presumptive provision in the guidelines "when substantial circumstances exist that the presumptive sentence or provision will not best effectuate the purposes in § 1.02(2)(a) (general purposes of sentencing and correc-

tions in individual cases)." The "substantial circumstances" standard is meant to be less restrictive than the "substantial *and compelling* circumstances" standard in use in many American jurisdictions with presumptive sentencing guidelines.

Subsection (2)(a) adds operational detail to the general approach stated in the first clause of subsection (2). When departing from a presumptive guideline sentence, trial courts may rely upon the enumerated aggravating and mitigating factors in the guidelines themselves, but courts are not limited to these enumerated considerations. See also § 6B.04(4) ("The guidelines shall include nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences in individual cases"). Subsection (2)(a) explicitly opens the door to judge-made aggravating or mitigating factors "grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines."

Illustrations:

3. A defendant appears for sentencing in a case of fraud and embezzlement in the course of employment as the victim's financial adviser. During his professional relationship with the victim, the defendant initiated an inauthentic romantic relationship with the victim, which he used to further gain her trust in order to facilitate his crimes. The guidelines do not enumerate as an aggravating factor that a defendant has feigned emotional involvement with a victim in furtherance of an offense. Nonetheless, the trial court may rely on this factor as basis for an upward departure if the court concludes that the defendant's actions intensified the harms done to the victim, increased the offender's

blameworthiness in the commission of the crimes, or both, so long as the degree of departure is proportionate in light of those considerations, see § 1.02(2)(a)(i). The departure sentence may be appealed by the defendant, and the reasoning of the trial court may be tested, subject to the standard of review in § 7.ZZ(6).

4. A defendant appears for sentencing for residential burglary and several counts of theft. The presumptive sentence under the guidelines would be a term of incarceration. The defendant is addicted to cocaine and committed the crimes to support his drug habit. The court is presented with an assessment of the defendant's treatment needs, see § 6B.09 (to be drafted), that suggests he is a good candidate for a community-based drug-treatment program. The guidelines do not enumerate as a mitigating departure factor a defendant's amenability to drug treatment. Nonetheless, the trial court may rely on the defendant's amenability to treatment as basis for departure if the court finds that a sentence to community-based treatment would best effectuate the purpose of offender rehabilitation in § 1.02(2)(a)(ii), provided there is "realistic prospect of success" that the program will restore the defendant to a law-abiding lifestyle, see id., and provided the sentence would not be disproportionately lenient in light of the gravity of the defendant's crimes, the harms done to his victims, and his blameworthiness, see § 1.02(2)(a)(i). The departure sentence may be appealed by the government, and the reasoning of the trial court tested, subject to the standard of review in § 7.ZZ(6).

Subsection (2)(b) sets out the only substantive constraint placed upon a trial court's guideline departure authority that originates in § 7.XX itself. The provision excludes

departures premised on bare disagreement with the commission's judgment concerning an appropriate penalty for an "ordinary case" under the guidelines. As explained in § 6B.04, Comment *c*, the revised Code views the commission, due to the credibility of the collective judgment of its membership, as uniquely situated to set down a framework of appropriate sentences for typical cases. When departing from this framework, a judge must conclude that an individual case presents one or more substantial circumstances, grounded in the purposes of punishment, that render the ordinary penalty less appropriate than the departure sentence.

Subsection (2)(c) contemplates further potential limitations on judicial sentencing discretion. None may be authored by the commission, however, see § 6B.02(7). The two most important categories of prohibition or limitation are those mandated by constitutional law or controlling judicial precedent. To large degree, these can be seen as constraints the judicial branch sees fit to impose upon itself, through constitutional interpretation or the courts' judgment about the best governance of the sentencing system, see § 6B.06(1) and Comment *b*. Subsection (2)(c) also recognizes that the legislature may enact its own limitations upon judicial sentencing discretion. Under the scheme of the revised Code, however, this legislative power should be exercised only in narrow circumstances, see § 6B.06, Comment *a*.

Subsection (2)(c) is broader than subsections (2)(a), (2)(b), and (2)(d) in that (2)(c) embraces "any decision affecting sentence," including departures. The other subsections speak only to departures.

Subsection (2)(d) sets out the further rule that, not only are the courts the prime arbiters of those factors that may support guideline departures, they should also control

the impact that departure factors will have on resulting penalties. See § 6B.04(4) ("The commission may not quantify the effect given to specific aggravating and mitigating factors") and § 6B.04, Comment *e*. The general authority stated in subsection (2)(d) is of course subject to the authoritative limitation recognized in subsection (2)(c). Moreover, subsection (3)(a), this provision, places a statutory limitation on extreme departures from the guidelines in some cases, see Comment *d* below.

d. Extraordinary departures. Subsection (3) creates a mechanism for a second tier of regulation beyond the general guideline departure standard, where heightened constraints may be placed on judicial sentencing discretion. Borrowing from experience in American guidelines systems, this more restrictive approach is meant to be employed sparingly. Only two applications are given in subsection (3), and the revised Code contains a third application in § 6B.08(2) (heavy presumptions available as limitations upon consecutive sentences in defined circumstances). The device allowed in subsection (3) must be policed carefully so that its use does not subvert the fundamental policy choice, reflected throughout the revised Code, that the judiciary should hold the lion's share of authority within the sentencing structure. Accordingly, the first sentence of subsection (3) states that only the legislature or the judiciary itself may set down a heavy presumption subject to the extraordinary-departure standard, see also § 6B.01(5).

Subsection (3)(a) articulates a stringent legal standard for especially dramatic departures from presumptive sentences. The provision is intended to reinforce the proportionality of incarceration sentences by guarding against outlier penalties. Subsection (3)(a) creates a "heavy presumption" that prison or jail sentences may not exceed a term

twice that of the maximum presumptive penalty in the guidelines. In order to overcome the heavy presumption, a trial court must make findings that satisfy the "extraordinary departure" standard, rather than the substantial-circumstances standard generally applicable to guideline departures. In order to justify an extraordinary departure, there must be "extraordinary and compelling circumstances" in a particular case that a sentence in conformity with the heavy presumption would be unreasonable in light of the purposes in § 1.02(2)(a). Sentencing decisions that fall under the heading of extraordinary departures are subject to de novo review on appeal, and not the deferential standard of review applied to departures generally, see § 7.ZZ(6)(e), Comment *g*.

Subsection (3)(a) is but one of several devices in the revised Code's sentencing scheme to safeguard the principle of proportionality in sentencing, and it works chiefly at the edges of the problem. The provision polices only confinement terms that are extremely divergent from the commission's collective judgment of appropriate penalties, yet allows room for the possibility that such dramatic deviations may be proportionate and justifiable when the purposes of sentencing so demand.

Without subsection (3)(a), upward departures from presumptive penalties would be permitted under a unitary "substantial circumstances" standard, and subject to a deferential standard of appellate review, limited only by the statutory maximum penalties for the offenses of conviction, see subsection (6). A departure increment of many years would encounter no greater burden of explanation than an increment of several months. Borrowing from examples in state guidelines systems, subsection (3)(a) places the applicable legal standards on a gradient. Once the extremity of a

departure becomes sufficiently great, the controls upon judicial discretion tighten. Subsection (3)(a) is not meant to replace the principle mechanisms for the pursuit of proportionate sentencing, however, which are the trial and appellate courts' responsibilities to work toward punishments in every case that best effectuate the purposes in § 1.02(2)(a), including the overarching proportionality rule in § 1.02(2)-(a)(i).

Subsection (3)(b) also uses the extraordinary-departure mechanism to enhance judicial discretion in most American jurisdictions. The provision creates a limited judicial departure power applicable to otherwise mandatory penalty provisions. It is borrowed from precedent in a small handful of states, where similar departure powers have existed for categories of mandatory penalties or specific penalties. Although the revised Code recommends that a provision modeled on subsection (3)(b) should be given general applicability throughout the criminal code, a legislature wishing to apply it selectively might choose to enumerate those mandatory provisions affected by the departure power, or those not affected.

The 1962 Code took the view that mandatory sentences should not be enacted by a legislature for any offense. The revised Code continues that blanket recommendation. See § 6B.05 and Comment (to be drafted). Still, the revised Code would ignore reality were it not to recognize that mandatory-penalty provisions now exist in every American jurisdiction, and they have proliferated greatly since the 1962 Code. Subsection (3)(b) therefore addresses jurisdictions that have not followed the Institute's policy position, and suggests a vehicle for introducing judicial discretion into the domain of mandatory sentencing, targeted to reach those cases in which a discretionary outlet is most

needed. If, in some future era, there are American legal systems with no mandatory punishments, subsection (3)(b) will be harmless surplusage.

Subsection (3)(b) employs the extraordinary-departure standard as a restriction upon most deviations from mandatory-penalty provisions—but one that grants courts discretion to avoid egregious applications of mandatory punishments. These are defined as cases in which, in light of the purposes of sentencing, mandatory penalties would result in unreasonable sentences. A trial judge must cite "extraordinary and compelling circumstances" in the individual case to support such a conclusion, and the trial court's decision will be subject to appellate review under § 7.ZZ(6)(e).

Subsection (3)(b) is aimed at the worst injustices arising under mandatory-entencing laws. It does not fully effectuate the Institute's longstanding objection to mandatory penalties. Rather, it is intended as a substantial improvement in the law of jurisdictions that persist in the use of mandatory provisions.

Illustration:

5. Defendant appears for sentencing for the current offense of theft of three golf clubs worth $1200. He has earlier convictions of robbery and burglary, entered seven years before commission of the current crime. Under the terms of a state statute, defendant's current offense plus his prior convictions trigger a mandatory minimum penalty of 25 years in prison. The trial court has discretion to depart from the mandatory minimum term, and impose a lesser term, if the court finds that extraordinary and compelling circumstances exist in the case such that imposition of the mandatory

penalty would result in an unreasonable sentence in light of the purposes of sentencing in § 1.02(2)(a). One possible ground for departure is that the 25-year sentence would be unreasonably disproportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender, see § 1.02(2)-(a)(i). Such a departure must be based on a full examination of the facts of the case and must be explained by the court on the record, including an explanation of the sentence chosen in lieu of the mandatory penalty. The extraordinary-departure sentence may be appealed by the government and is subject to the stringent standard of review in § 7.ZZ(6)(e).

e. Explanations of reasons for departure. Subsection (4), following virtually every American guidelines jurisdiction, requires that a trial judge provide a full statement of reasons on the record whenever the judge renders a sentence that is a departure or, in the revised Code's terminology, an extraordinary departure. The explanation must identify the circumstances of the individual case cited as grounds for the departure, together with an explanation of the degree of the departure away from the presumptive penalty. In other words, the court's explanation must address why the presumptive sentence was not appropriate, and why the departure sentence is appropriate. Both subjects must be framed in terms of the purposes of sentencing and corrections, see subsections (2)(a) and (2)(d).

The statement of reasons required in subsection (4) serves a number of purposes within the sentencing system. First, it pushes sentencing judges to engage in the disciplining process of articulated justification. Many flaws in reasoning, or insights otherwise hidden, come to light only through the effort of explanation. This commonplace of

professional observation motivates much of judicial practice in realms other than sentencing. Subsection (4) does not push the rationale to its fullest possible extension, however. Penalties that align with guideline presumptions (or statutory presumptions) are assumed to rest upon the reasoning of the commission (or legislature) in propounding recommendations for ordinary cases.

Second, the requirement serves the goal of communication of each judge's reasoning process to other judges, and others in the sentencing system. If judges are to contribute meaningfully to the evolution of the sentencing system, the intellectual work product of their labors in individual cases must be transparent and accessible. An innovative turn in departure jurisprudence may gain precedential value, for example, especially if approved by an appellate court. Moreover, the sentencing commission under the revised Code is charged with ongoing review of judicial decisionmaking, and must regularly consider amendments to the guidelines so that they better comport with the sentencing practices of judges, see § 6A.05(5)(d). Collaborative interactions between the judiciary and the commission, as envisioned in § 6A.01(2)(b), require routinized feedback.

Third, subsection (4) is an absolute prerequisite of meaningful appellate review of departure decisions, see § 7.ZZ. Without a statement of the sentencing court's findings of fact and legal analysis in selecting punishment in a given case, the appeals process is unmoored. The disablement of appellate review prevents the judiciary from contributing substantively to the development of a common law of sentencing, and also forecloses meaningful enforcement of those principles of sentencing law that are binding upon judges, see, e.g., §§ 1.02(2), 6B.06, 7.XX(2)(b).

Apart from considerations of reviewability, subsection (4) imposes marginal reinforcement of guideline presumptions as a practical matter. The extra effort required of a judge when departing from the guidelines encourages judges to reflect before rendering such decisions.

Finally, the requirement of a statement of reasons is intended to enhance the legitimacy of the sentencing process in the eyes of the offender, the victim, and the public. The selection of a particular punishment within an expansive statutory range can appear a mystifying process, and may appear an illegitimate process to a skeptical onlooker. In a guidelines system, presumptive sentences are a significant narrowing of statutory ranges, see § 6B.04(3)(a) (alternative versions). When a presumptive sentence is imposed, the offender, the victim, and other observers are given the assurance that the case has been treated as an ordinary one, and the punishment is consistent with that given in the majority of cases of its kind. Further, the appropriate penalty has not been chosen arbitrarily by a single judge (whose opinion may differ from the judge in the courtroom next door), but reflects the collective judgment of a sentencing commission composed of members with wide experience and differing perspectives on the criminal-justice system.

When a judge imposes a sentence outside of the presumptive sentencing range, however, whether more lenient or severe than the guideline penalty, a burden of explanation to all those affected by the decisions is justly imposed. The court's statement of reasons provides reassurance that the departure has not resulted from idiosyncrasy on the part of the judge. All onlookers deserve to know that departure analysis is not purely discretionary, but is guided by principles of general application, and is subject to review. Although a departure sentence may not be "uniform" in the

sense that it is a cookie-cutter replica of penalties given other defendants, it is "uniform" in its neutral application of the purposes of sentencing, see § 1.02(2)(b)(ii).

f. Sentencing for offenses not covered by guidelines. Subsection (5) governs the sentencing process for offenses not included in the guidelines, see § 6B.10. In these cases, there is no express starting point for the trial court's analysis of an appropriate penalty as would be given in a presumptive guideline recommendation. Typically, the only authoritative guidance a court will have in such cases is the full expanse of the statutory range of available penalties. Subsection (5) imports a consistent reasoning process to a task that might otherwise be one of unstructured discretion. The provision requires, first, that judges consult the purposes of sentencing in individual cases when selecting punishments in such cases. Second, judges should consult the guidelines as a framework for proportionality in punishment, by looking to the guidelines' treatment of analogous offenses, or offenses that are somewhat more or less serious than the instant crime. This replicates the evaluative process that the commission performs for categories of cases included in the guidelines, but has not done in the instant case. Third, the judge should look to any express guideline provisions that may have been authored by the commission to give further guidance in such cases.

The final sentence of subsection (5) requires trial courts to provide statements of reasons on the record for imposing a sentence of incarceration in cases covered by the subsection. In such cases, there is no presumptive penalty that carries automatic credibility as the product of the commission's best collective judgment. In all cases under subsection (5), therefore, the rationales rehearsed in Comment *e*, supportive of the requirement of a statement of reasons in *departure* cases, are again applicable. Subsection (5) in-

cludes an arbitrary threshold provision that explanation on the record is required only when a term of incarceration is imposed on the defendant. Individual jurisdictions may decide to modify this threshold, for example, to include only felony sentences, or to include all non-guideline sentences without qualification.

g. Factfinding by judge or jury. Most of the factfinding contemplated under this provision is to be performed by the court during sentencing proceedings. For a limited category of factual issues, however, the Sixth Amendment mandates jury determination under the reasonable-doubt standard. Sections 7.07A and 7.07B, which are explicitly cross-referenced in § 7.XX(6), speak to the division of labor between court and jury for resolution of factual issues at sentencing. Because the revised Code views the trial court as the most important decisionmaker in the sentencing process, see § 1.02, Comment *h*, the scope of factfinding responsibility committed to the jury is the bare minimum required by the Constitution. All conclusions of law that follow upon the making of a factual record are reserved to the sentencing court, see § 7.07A(2).

h. Statutory maximum penalties as ultimate limits on sentencing discretion. Subsection (6) rehearses the revised Code's elementary understanding that all sentencing in a guidelines structure must take place within the ultimate boundaries of the maximum authorized penalties for any offenses of conviction, see also § 6B.02(8) (parallel limitation upon commission's authority to create presumptive sentences). This is a structural feature of nearly every American guidelines system, and has become a pillar of federal constitutional law.

i. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to

employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider amendments to subsections (2) and (5), as follows:

> **(2) In sentencing an individual offender, sentencing courts ~~may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a)~~ shall give full consideration to all sentencing guidelines applicable to the case. Sentencing courts shall assess the weight to be given the guidelines' recommendations in light of the purposes stated in § 1.02(2).**
>
> > **(a) ~~A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.~~ Sentencing courts should be especially cognizant of the legislative goal of encouraging sentences that are uniform in their neutral application of the general purposes of sentencing and correction of individual offenders, and should consult the guide-**

lines as useful benchmarks in the pursuit of that goal.

~~(b) A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.~~

~~(c)~~ (b) A sentencing court may not base any decision affecting a sentence upon a factor prohibited by statute, constitutional law, or controlling judicial decision, and may not violate a limitation imposed by the same authorities.

~~(d) The degree of a departure from the guidelines in an individual case shall be determined by the sentencing court in light of the purposes of § 1.02(2)(a).~~ . . .

(5) Sentences of individual offenders for offenses not covered by the guidelines shall be rendered by sentencing courts consistent with the purposes of § 1.02(2)(a). The sentencing court shall consult the guidelines for their treatment of analogous offenses, if any, as benchmarks for proportionate punishment, and for any ~~presumptive provisions~~ recommendations applicable to offenses not covered by the guidelines. For all sentences that include a term of incarceration under this subsection, the sentencing court shall provide an explanation on the record of its reasons for the sentence imposed.

The reworking of § 7.XX(2) is an especially important matter for jurisdictions that opt to use advisory rather than

presumptive guidelines. Advisory guidelines by definition do not carry force of law and, indeed, cannot do so if it is an important legislative objective to adopt a guidelines system that escapes Sixth Amendment jury-factfinding requirements at sentencing. Even so, the institutional benefits of a sentencing commission and guidelines structure would largely be lost if trial courts routinely disregarded the commission's recommendations as expressed in advisory guidelines. It is therefore desirable, in a well-designed advisory guidelines system, to create procedural requirements that encourage rigorous consultation of guidelines provisions, while drawing short of investing them with direct enforceability.

Section 7.XX together with § 7.ZZ (Appellate Review of Sentences) can impose structure upon the sentencing process even within an advisory regime. Section 7.XX must play its role, however, without reference to trial courts' "departure power" as an explicit legal standard. Within a presumptive guidelines framework, the unaltered subsection (2) relies upon the departure-power mechanism, allowing a sentencing court to deviate from a guidelines presumption only when the court finds that "substantial circumstances exist that the presumptive sentence or provision will not best effectuate the purposes in § 1.02(2)(a)." Subsections (2)(a) through (2)(d) give additional content to the standard. The courts' departure power cannot be exercised, as a matter of law, in the absence of sufficient factual findings and legal analysis to satisfy the "substantial circumstances" standard.

In an advisory system, the best alternative to a formal departure power is imposition of procedural requirements that trial courts must (1) consult the sentencing guidelines carefully and accurately, (2) analyze the guidelines' applicability to a particular case with reference to the general purposes of sentencing, and (3) articulate their factual and legal

reasoning on the record when departing from the guidelines. The suggested amendments to subsection (2), together with the unamended subsection (4), lay down this multistep process. All of these steps can then be made subject to meaningful appellate review, see § 7.ZZ, Comment *l*.

Subsection (2)(a) directs trial courts—and appellate courts performing their review function—toward special solicitude to one among the several legislative purposes of the sentencing system. The legislature has declared it an important aspiration to "encourage sentences that are uniform in their neutral application of the general purposes of sentencing and correction of individual offenders," see § 1.02(2)(b)(ii) (as amended for an advisory guidelines system). Uniformity, conceived as consistency of thought process, is the systemic value most placed at risk in a jurisdiction that chooses to adopt advisory rather than presumptive sentencing guidelines. Subsection (2)(a) in effect acknowledges that the legislature and sentencing commission cannot effectively promote this core objective in an advisory structure unless judges throughout the state, at all levels of the court system, internalize the value of uniformity and exert their own powers to preserve it.

Subsection (2)(b) must be deleted in an advisory guidelines system. It assumes that guidelines presumptions are enforceable in the absence of legally sufficient reasons for departure, and identifies one rationale for departure that is never by itself sufficient. The substantive premise of subsection (2)(b) is no longer operative under advisory guidelines.

Even so, the interaction of amended §§ 7.XX and 7.ZZ in the Code's advisory structure would not allow a trial court's departure from a guidelines recommendation to stand if premised on "mere disagreement" with the guide-

lines. Subsection 7.XX(4) requires courts to supply a written explanation of reasons for a departure from the guidelines, and subsection (2) insists that this explanation must follow "full consideration" of guidelines recommendations in light of the purposes of sentencing and corrections. In the Code's advisory guidelines system, therefore, a trial court may indeed depart based on personal disagreement with the guidelines, but the basis for disagreement must be laid out in writing, reflect a full consideration of applicable guidelines, and be grounded in the purposes of sentencing and correction set forth in § 1.02(2). The resulting sentence and the trial court's analysis may then be tested on appellate review, see § 7.ZZ, Comment *l* (as amended for an advisory guidelines system).

In an advisory system, the procedures described above are not designed exclusively to work as constraints upon judicial sentencing discretion. In order for advisory guidelines to function optimally, they must earn and maintain the respect of judges across the state. The sentencing commission, accordingly, has a continuous need for information about cases in which existing guidelines have met with the disapproval of sentencing courts—especially when appellate courts have concurred in the lower courts' views. Under § 6A.05(5)(d), this feedback allows the commission to perform its ongoing duty to "study the need for revisions to guidelines to better comport with judicial sentencing practices and appellate case law." When an appellate court has upheld a trial court's sentence based on well-reasoned disagreement with a guidelines recommendation, the judiciary sends a strong message to the commission that the guideline in question should be reassessed.

Subsection (2)(c) is not affected by the shift from presumptive to voluntary guidelines. The prohibitions and limitations referenced in the subsection are not creatures of guidelines.

Subsection (2)(d) must be deleted in an advisory system for the same reasons that subsection (2)(b) must go. If the guidelines have no presumptive legal force, the "degree of departure" cannot be regulated in any explicit, legally enforceable way.

Subsection (3), concerning "extraordinary departures," remains intact in the Code's advisory guidelines system. Extraordinary departures do not use the commission's guidelines as a reference point, but are sentences that deviate from a heavy presumption established by the legislature or the appellate courts. See § 6B.01, Comment *b*.

The single amendment in subsection (5) merely reflects the necessity of replacing all terminology of "presumptions" with "recommendations" in an advisory system. See § 6B.01, Comment *b*.

REPORTER'S NOTE

c. Departure authority. In existing guidelines systems, the most common formulation of the departure standard is that there must be a "substantial and compelling" reason or circumstance to justify a departure sentence. This language was first used in Minnesota. See Minnesota Sentencing Guidelines and Commentary § II.D (2006) ("the judge shall pronounce a sentence within the applicable [guidelines] range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids"). See also Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.1; Kan. Stat. § 21-4716 (2006); Mich. Comp. Laws § 769.34(3); Or. Admin. R. 213-008-0001 (2007); Rev. Code Wash. § 9.94A.535 (2006).

The revised Code adopts a less stringent "substantial circumstances" departure standard, see § 7.XX(3). See also ABA, Standards

for Criminal Justice, Sentencing, Third Edition, Standard 18-4.4(b)(iv) (1994) (recommending "substantial reasons" standard). A requirement of "compelling" reasons suggests that few departure penalties should be affirmed on appeal, which is contrary to the intent of the revised Code. No state guidelines system has produced high rates of reversal of sentences on appeal. One survey of appellate-court decisions under state sentencing guidelines observed that trial-court departures are generally upheld on the basis of "substantial" reasons, even when "substantial and compelling" reasons are required by the literal terms of the state's guidelines. See Kevin R. Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Northwestern L. Rev. 1441 (1997).

Some states encourage or require judges to select or explain departure sentences in light of the underlying purposes of sentencing. See District of Columbia Sentencing Commission, 2006 Practice Manual, § 5.2.4; Kan. Stat. § 21-4719 (2006); Minnesota Sentencing Guidelines and Commentary § II.D (2006).

d. Extraordinary departures. Several jurisdictions have adopted provisions that forbid, limit in especially strong terms, or discourage extreme departures—even in cases where some degree of departure is justified. See Delaware Sentencing Accountability Commission Benchbook 2006, at 23; Kan. Stat. § 21-4719(b) (2006); State v. Spain, 590 N.W.2d 85 (Minn. 1999); Or. Admin. R. 213-008-0003(2) (2007). The rules in Kansas, Minnesota, and Oregon, like subsection (3)(a), all attach to sentences that exceed twice the presumptive maximum guidelines penalty. The revised Code, in deference to judicial sentencing discretion, does not forbid extreme departures. Rather, it subjects them to especially strict legal requirements associated with "extraordinary departures."

The extraordinary-departure mechanism was inspired in part by Minnesota case law. See Neal v. State, 658 N.W.2d 536, 544 (Minn. 2003) (in "an unusually compelling case . . . where severe aggravating circumstances exist," a departure of more than twice the presumptive maximum is allowed; this standard is stricter than the "substantial and compelling circumstances" normally used to justify departures). It is also based on proposals of the Massachusetts Sentencing Commission. See Francis J.

Carney, Jr., Developing Sentencing Guidelines in Massachusetts: A Work in Progress, 20 Law & Policy 247, 270 (1998) (commission recommended a departure standard for "going below the mandatory minimum term" [for drug offenses] that would be "more stringent than the ordinary standard for departure from a guideline range").

It has been the longstanding policy of The American Law Institute that no American jurisdiction should adopt mandatory minimum punishments for any offense. Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), Comment to § 6.06 and Alternative § 6.06 at 124-125. The revised Model Penal Code continues this firm policy position. However, the drafters of the revised Code also recognize that mandatory-penalty laws have proliferated in the United States and exist today in all jurisdictions. A survey in the mid-1990s found that all American jurisdictions had at least some mandatory-minimum prison penalties in their criminal codes, although the numbers and terms of such laws differed widely from state to state. Bureau of Justice Assistance, National Assessment of Structured Sentencing (1996), at 20-23 and table 3-1. To avoid turning a blind eye to this reality, the revised Code creates a broad statutory mechanism to soften the rigid application of mandatory penalties, wherever they exist.

A handful of jurisdictions have granted discretion to sentencing courts to deviate from specified mandatory penalties. A proposal to create a broad departure power similar to that in subsection (3)(b) was also included in the Massachusetts Sentencing Commission's recommendations for a new state sentencing structure. See Kan. Stat. § 21-4720(9) (2006); State v. Olson, 325 N.W.2d 13 (Minn. 1982); State v. Feinstein, 338 N.W.2d 244 (Minn. 1983); Minnesota Sentencing Guidelines and Commentary § II.E & Comment II.E.03 (2006); Francis J. Carney, Jr., Developing Sentencing Guidelines in Massachusetts: A Work in Progress, 20 Law & Policy 247, 270-272 (1998). In federal law, there are limited exceptions to the strict application of some mandatory minimum penalties. See 18 U.S.C. § 3553(e),(f) (2006) (known as the "safety valve" provision).

Illustration 5 is adapted from the facts of Ewing v. California, 538 U.S. 11 (2003). The *Ewing* Court held that a mandatory sentence of 25 years to life imposed under California's three-strikes law, for the current

offense of theft of golf clubs worth $1200, was not grossly disproportionate under the Eighth Amendment's Cruel and Unusual Punishment Clause. Subsection (3)(b) grants courts statutory authority, in an appropriately extreme case, to deviate from the terms of the mandatory punishment.

e. Explanation of reasons for departure. In most American guidelines jurisdictions, a statement of the court's reasons for departure must be made on the record or in writing. See Delaware Sentencing Accountability Commission Benchbook 2006, at 94; District of Columbia Sentencing Commission, 2006 Practice Manual, § 1.1; Kan. Stat. § 21-4718(a)(4) (2006); Md. Code Regs. 14.22.01.05(A) (2007); Mich. Comp. Laws § 769.34(3) (2006); Minn. Stat. § 244.10 subd. 2 (2006); N.C. Gen. Stat. § 15A-1340.16(c) (2006); Or. Rev. Stat. § 137.671(2) (2005); Or. Admin. R. 213-013-0001(3)(i) (2007); 204 Pa. Code § 303.13(c) (2005); Tenn. Code § 40-35-210 (2006); Va. Code § 19.2-298.01(B) (2006); Rev. Code Wash. § 9.94A.535 (2006); Wis. Stat. Ann. § 973.017(10m) (2006). See also ABA, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (2004), at 29 (recommending that "jurisdictions explicitly require sentencing courts to explain increases or decreases in sentence from any presumptive or guideline starting point"). Trial courts must also submit sentence reports to the sentencing commission for each case, and these generally require that reasons for departure decisions be given. See §§ 6A.08(4) and Comment *d*; § 6A.05(5)(a) and Comment *e*.

In a small number of advisory sentencing-guidelines systems, no judicial explanation of reasons for departure from guidelines presumptions is required by law. See Ark. Code § 16-90-804(a) (2006); State v. Foster, 845 N.E.2d 470, 497 (Ohio 2006); Utah Sentencing Comm'n, Adult Sentencing and Release Guidelines (2006), at 2.

i. States choosing an advisory guidelines system. In an advisory sentencing-guidelines system there is no formal, legally enforceable departure standard such as those catalogued in the Reporter's Note to Comment *c*, above. Other devices must be used to encourage judicial compliance with sentencing guidelines. See § 6B.04, Reporter's Note to Comment *f*. Subsections (2) and (4), as adapted to an advisory guidelines system, mandate "full consideration" of the guidelines by trial

courts—even though the guidelines' recommendations are advisory—and place a burden of explanation on courts when they deviate from the guidelines.

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

(1) Following a defendant's conviction of a felony or misdemeanor, the court shall impose sentence within a reasonable time. 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.

Comment:

a. Scope. This provision and § 7.07B address factfinding procedures at judicial sentencing hearings, the court's obligation to apply relevant legal standards, and the necessity of making a record of the reasons for the court's decisions. The provisions are responsive to considerations of fairness, rationality, transparency, and constitutional mandate. They are also driven by the fundamental policy goal to preserve judicial sentencing discretion to individualize sentences within a framework of law, see § 1.02(2)(b)(i).

Sections 7.07A and 7.07B do not encompass a host of subjects best addressed in the rules of criminal procedure, such as the assignment of a judge to sentence proceedings, the exact timing of a sentencing hearing, discovery, procedures for the presentation of evidence, the defendant's right of allocution, the possibility of consolidation of multiple outstanding cases in a single sentencing proceeding, and victims' participation in sentencing proceedings.

b. Reference to rules of criminal procedure. Subsection (1) signals that the bulk of procedural regulations applicable to sentencing proceedings are the proper subject for procedural rule rather than statute. Only the most fundamental matters, required for basic fairness or by constitutional command, are addressed in §§ 7.07A and 7.07B.

c. Facts established prior to sentencing proceedings. In all cases that proceed to sentencing, some factual issues will be resolved in advance, and need not be relitigated. Subsection (2) specifies the categories of factual information that meet this description, including facts necessary to the underlying conviction and facts admitted by the defendant before sentencing.

d. General principle of court-determined sentences. Subsection (3) states a general rule, subject only to exceptions under § 7.07B, that the trial court at sentencing proceedings shall make all findings of fact and conclusions of law necessary for the imposition of sentence. This provision reflects the Code's philosophy that the judiciary should be the most important institutional agency in the sentencing process. The exceptions in § 7.07B, which creates a mechanism for limited jury factfinding at sentencing, are confined to those required by the Constitution.

Under current constitutional law, there is no question that sentencing judges may be empowered to make all *legal* findings predicate to criminal punishment, including determinations of applicable law and the application of legal rules to the facts of a particular case. The general rule in subsection (3) concerning conclusions of law is not subject to exceptions under § 7.07B.

Most findings of fact at sentencing remain the province of the trial court, even following the Supreme Court's landmark cases on the Sixth Amendment jury-trial right at sentencing. Trial courts may still determine all facts in mitigation of sentence, and there is no constitutional rule that requires a jurisdiction to impose any particular burden of proof on these factual questions. Most, but not all, facts in aggravation of sentence may likewise be determined by courts at sentencing under current Sixth Amendment law. Sentencing judges may make findings of aggravating circumstances used to select penalties within presumptive ranges or other presumptive rules laid out in guidelines or statutes. They may find aggravating facts used to raise a minimum sentence within a preexisting penalty ceiling. They may find aggravating facts used to select between concurrent and consecutive sen-

tences following a defendant's convictions of multiple crimes. They may make findings concerning the existence of a defendant's prior convictions. Only "penalty-ceiling enhancement facts," as defined in § 7.07B(1), fall outside the court's fact-finding jurisdiction at sentencing, and must, in the absence of waiver by the defendant, be determined by juries under the reasonable-doubt standard.

e. General burden of proof at sentencing. With the exception of penalty-ceiling enhancement facts as defined in § 7.07B, the Constitution requires no burden of proof for the resolution of factual issues at sentencing. A jurisdiction, consistent with existing federal constitutional law, may select any burden it wishes, or may designate no formal burden at all, leaving the issue to the discretion of sentencing courts.

Subsection (4) adopts the policy choice on this issue of the overwhelming majority of states that have adopted presumptive sentencing systems similar to the one recommended in the revised Code. These states have specified a general burden of proof of a preponderance of the evidence at sentencing proceedings.

The propriety of this burden must be evaluated in light of the factual considerations that are eligible for resolution at sentencing. Under the Code, alleged criminal acts other than those for which convictions have been obtained may not be urged by the government in sentencing proceedings, see § 6B.06(2)(b). Thus, factfinding at sentencing is "interstitial"—it cannot stray from the formal conviction to unconvicted criminal conduct, but must work within the parameters of the current conviction along with the defendant's prior convictions.

f. Findings of fact and conclusions of law. In a sentencing system committed to a rational process for the rendering of criminal punishment, it is essential that the court's reasons for imposition of a particular sentence be transparent and reviewable. Subsections (5) and (6) ensure that this will occur in all instances where the court's reasoning might otherwise be opaque. Subsection (5) requires the court to make findings of fact and conclusions of law on the record concerning contested issues submitted by the parties during sentencing proceedings. Subsection (6) requires findings of fact and conclusions of law on the record whenever the court departs from presumptive rules in the sentencing guidelines.

Section 7.07A does not require findings of fact and conclusions of law when a court imposes a sentence consistent with the presumptive provisions of sentencing guidelines. In such instances, it is assumed that the court has ratified the legal and policy analysis of the sentencing commission in crafting guidelines applicable to the case at bar. The commission's analysis, in turn, is available for inspection within the body of the guidelines and commentary, see § 6B.02(5).

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b. Reference to rules of criminal procedure. Consistent with subsection (1), many jurisdictions set out detailed procedures for sentencing in court rule rather than in statute. See Ala. R. Crim. P. 26 (2006); Md. R. 4-341-343 (2006); Mich. R. Crim. P. 6.425(E) (2006); Minn. R. Crim P. 27.03 (2006); Ohio Ct. R. Crim. P. 32; Pa. R. Crim. P. 700-06 (2005); Tenn. R. Crim. P., Rule 32 (2006); Utah R. Crim. P. 22 (2007).

e. General burden of proof at sentencing. Except for factfinding subject to the Sixth Amendment jury-trial guarantee at sentencing, see § 7.07B, many states impose the preponderance-of-the-evidence standard for factual determinations at sentencing hearings. See Alaska Stat.

§ 12.55.025(i) (2006); Ariz. Rev. Stat. § 13-702(D)(5) (2006); N.C. Gen. Stat. § 15A-1340.16(a) (2006); Pa. Sentencing Guidelines Standards (2005), at 67; Rev. Code. Wash. § 9.94A.530(2) (2006). See also ABA, Criminal Justice Standards, Sentencing, Third Edition, Standard 18-5.18(a)(i) (1994) (recommending preponderance standard).

f. Findings of fact and conclusions of law. American jurisdictions sometimes require that the court's resolution of issues presented during sentencing proceedings must be explained in writing, but it is more common to allow the court the option of stating its reasoning on the record. See Kan. Stat. § 21-4718(a)(2) (2006); Minn. Stat. § 244.10 subd. 1 (2006) ("written findings of fact and conclusions of law" required); 204 Pa. Code § 303.1(d); Rev. Code Wash. § 9.94A.500(1) (2006) ("written findings of fact and conclusions of law" required); Wis. Stat. Ann. § 973.017(10m) (2006).

§ 7.07B. Sentencing Proceedings; Jury Factfinding

(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.

Comment:

a. Scope. This provision appends a procedure for jury factfinding at sentencing onto the general procedural rules stated in § 7.07A, while preserving judicial discretion in all cases to fix punishment based on the factual record. The jury factfinding process is limited to those instances where it is required by the Constitution.

Section 7.07B further speaks to the defendant's ability to waive the limited right to jury factfinding at sentencing, and includes mechanisms for preemptive judicial action in cases where jury factfinding would not affect the court's ultimate exercise of discretion in pronouncing sentence.

b. Factfinding covered by this provision. Most factfinding at sentencing, and all legal analysis predicate to imposition of punishment, is best performed by the sentencing court. Sixth Amendment case law has carved out a single exception to this general rule: Whenever the government, following conviction, is legally required to prove a sentencing fact in order to expose the defendant to a greater penalty for a single offense than would otherwise be permitted in

statute, sentencing guidelines, or other limitation in state law, the defendant has the right to have that sentencing fact submitted to a jury under the standard of proof beyond a reasonable doubt. The Supreme Court has exempted proof of a defendant's prior convictions from this Sixth Amendment rule.

Subsection (1) propounds a new term, "jury-sentencing facts," intended to capture facts that fall within the current Sixth Amendment rules summarized above—but also defined so that § 7.07B's coverage will remain coextensive with the breadth of Sixth Amendment doctrine, even if future rulings from the Court add or subtract from the categories of facts that must be tried to a jury at sentencing. Subsection (2) provides that jury-sentencing facts must be tried to a jury under the reasonable-doubt standard, unless the facts are admitted by the defendant or the right to a jury trial is waived.

Under current Sixth Amendment law, the factual basis for an aggravated departure from a presumptive sentence or other presumptive rule contained in sentencing guidelines will often qualify as a jury-sentencing fact, see § 7.XX(2)(a). Likewise the factfinding prerequisites for an extraordinary departure from a heavy presumption created by the legislature or courts will often be governed by this provision, if the effect of the departure is to impose a penalty greater than the presumptive ceiling upon severity, see § 7.XX(3)(a). If either kind of departure is based on the defendant's criminal history, however—barring a change in the Sixth Amendment treatment of prior criminal record, factual inquiry into the existence of prior convictions is governed by § 7.07A.

c. Notice to the defendant. Subsection (3) does not require that jury-sentencing facts must be alleged in an original charging document. The Supreme Court has held that jury-sentencing facts are the "functional equivalent" of elements of offenses for purposes of the Sixth Amendment jury-trial guarantee, but the Court has never held that they are elements of offenses for other purposes. Consistent with all state legislation on the subject, § 7.07B does not treat jury-sentencing facts as elements of offenses. The provision does assume, however, that Due Process guarantees in federal and state law will require that the defendant receive timely notice of any alleged jury-sentencing fact in the case, and must be given adequate opportunity to prepare to challenge the existence of the fact in a jury proceeding.

The government seldom concludes its investigation of a criminal case with the filing of charges, but generally completes its inquiry in advance of trial. While it would impose heavy new burdens on prosecutors, particularly in state systems, to allege jury-sentencing facts in original charging documents, it is not unduly onerous, as a general rule, to require written notice of such facts within a reasonable interval before the trial. Subsection (3), in bracketed language, suggests 20 days before trial as a feasible deadline for all parties in most cases.

Subsection (3)(a) further recognizes that the general deadline for notice will not be workable in all cases. In some instances, the government may become aware of important sentencing considerations shortly before trial, during the trial, or shortly afterward. Subsection (3)(a) grants the courts leeway, upon a showing of good cause for delay, to permit notice of jury-sentencing facts later than normally envisioned in the subsection. Good cause should be held

not to exist whenever the government knew, or should have known, of the jury-sentencing fact at an earlier time.

The final sentence of subsection (3)(a) imposes a critical limitation upon the permissible delay: The timing of notice must in all cases allow the defendant reasonable time to prepare for the proceeding at which the existence of a jury-sentencing fact will be determined. In some instances, this may necessitate a continuance of the trial date, an order of a bifurcated-jury sentencing proceeding not originally contemplated by the court, or the continuation of a bifurcated proceeding.

d. Nonenumerated penalty-ceiling enhancement facts. The Code's sentencing scheme envisions that some aggravating factors at sentencing will be enumerated by the sentencing commission, while others will be developed on a case-by-case basis to best effectuate the underlying purposes of sentencing and corrections as set out in § 1.02(2), see §§ 6B.04(4); 7.XX(2)(a). Subsection (3)(b) explicitly extends this philosophy to jury-sentencing facts subject to the Sixth Amendment jury-trial guarantee. A foundational purpose of the Code's sentencing system is "to preserve judicial discretion to individualize sentences within a framework of law," see § 1.02(2)(b)(i). The goal of individualized punishment in particular cases would be artificially truncated if sentencing courts were permitted to consider only a preordained list of aggravating sentencing factors.

e. Preemptive orders by the court. There is no reason to engage in a jury factfinding process at sentencing where it would be an idle exercise. Subsections (3)(b) and (3)(c) give the court authority to cut short proceedings on allegations of jury-sentencing facts in two circumstances. First, when the government alleges a nonenumerated jury-sentencing

fact, the court must test that allegation for legal sufficiency in light of the purposes of sentencing and corrections in § 1.02(2). If the court concludes that the alleged fact has no proper grounding in the principles of § 1.02(2), there is no justification to try the factual issue to a jury.

Alternatively, the court may conclude that an alleged jury-sentencing fact, even if proven by the government, would have no influence on the final sentencing determination in the case. Perhaps the alleged fact is trivial; perhaps there are overwhelming mitigating circumstances in the case that outweigh the alleged aggravating factor; perhaps there are independent aggravating factors that have already been admitted by the defendant or that do not require jury factfinding at sentencing. In instances like these, if the court concludes that the existence of the alleged fact would not change the result, there is no reason to convene jury factfinding proceedings at trial or in a bifurcated hearing.

f. Unitary versus bifurcated proceedings. Evidence concerning a jury-sentencing fact may be closely knit with the prosecutor's case in chief on the elements of the offense at trial. Alternatively, the evidence may take the jury far afield from the threshold question of guilt or innocence, may be unduly complex or confusing, or may be prejudicial to the defendant or the government. Subsection (4) grants trial courts significant flexibility, with little hard guidance, to submit jury-sentencing facts to the jury as part of a unitary trial that includes the determination of guilt, or to convene a separate bifurcated proceeding following conviction.

The drafters of subsection (4) endorse a general preference for unitary proceedings, but find it unnecessary to build a strong bias toward unitary trials into statutory language. Subsection (4) assumes that jury-sentencing facts will

usually be litigated at trial, for the simple reason that this will ordinarily be the most expeditious procedure. Trial courts will prefer a unitary trial unless there is a good reason to do otherwise, and it will often be in the interest of the parties not to multiply factfinding proceedings. The subsection requires bifurcated jury factfinding "when consideration of a jury-sentencing fact at trial would be unfairly prejudicial to the defendant or the government." Otherwise the question is left to the judge's discretion "in the interest of justice."

Section 7.07B would also allow for bifurcated jury deliberations following trial, first on the issue of guilt, and second on the question of jury-sentencing facts. No new evidence need be received prior to the jury's second deliberation, see subsection (4)(b). Bifurcated deliberations may be desirable to avoid over-long instructions at either stage, to head off the possibility that "sentencing instructions" may convey to the trial jury that the defendant's guilt has been assumed in advance, and to avoid placing the defendant in the uncomfortable position of contesting guilt at trial while, in the alternative, arguing that he committed the crime in a manner that does not justify an enhanced penalty.

g. Jury procedures borrowed from trial practice. Section 7.07B relies on familiar jury procedures, and imports preexisting rules into the sentencing factfinding context. Indeed, for most cases tried before a jury, § 7.07B borrows the trial jury itself to serve as sentencing factfinder. In most instances, the trial jury will perform this function at a unitary trial or, under subsection (4)(b), at a bifurcated sentencing proceeding held "as soon as practicable" after the return of a verdict of guilt.

Whether in a unitary or bifurcated proceeding, under subsection (4)(a), the jury shall be instructed as to the jury-

sentencing facts it is asked to determine, and required to return a special verdict as to each alleged fact.

The second sentence of subsection (4)(b) recognizes that, where a bifurcated proceeding follows a jury trial, much or all of the evidence relevant to the existence of a jury-sentencing fact may already have been received at trial. Therefore, the jury is permitted to consider relevant evidence they have already heard, together with any additional evidence the parties choose to present at the bifurcated hearing. In some cases, this will allow for brief presentations of evidence at the bifurcated proceeding. It will sometimes be the case that no new evidence need be presented at all. In such instances, the bifurcated proceeding will consist of new instructions to the jury, and a second round of deliberations for the resolution of jury-sentencing facts.

Subsection (4)(c) recognizes that it may be necessary on occasion to impanel a wholly new jury for sentencing factfinding proceedings. It authorizes trial courts to do so, and imports the rules otherwise applicable for the selection of jurors for the trial of criminal cases.

h. Trial rules borrowed for bifurcated sentencing proceedings. Subsection (5) ensures that constitutional and subconstitutional trial protections for criminal cases will apply with equal force to a bifurcated sentencing proceeding. The drafters intend subsection (5) to embrace constitutional trial safeguards, statutory law of trial procedure, rules of criminal procedure, and rules of evidence.

i. Preserving judicial sentencing discretion. Subsection (6) makes clear that the jury's role at sentencing extends only to factfinding that is minimally required by the Constitution, and does not intrude upon the court's ultimate discretion to determine an appropriate penalty based on the factual record. A sentencing court's discretion can be exer-

cised only in the context of applicable legal standards. For example, a jury finding of the existence of an aggravating factor may be a legal prerequisite for the imposition of an aggravated sentence, but the jury's finding does not oblige the judge to impose an aggravated penalty. Under the Code's sentencing scheme, an aggravating factor supplies a basis for an upward departure from the guidelines only when it is a "substantial circumstance," measured against the purposes of sentencing and corrections in § 1.02(2), that takes the case "outside the realm of an ordinary case within the class of cases defined in the guidelines." See § 7.XX(2) and (2)(a). It remains the judge's province to apply all relevant legal analyses to the facts of each case.

Further, the determination of jury-sentencing facts is only one small part of the total factfinding at sentencing proceedings. In a typical case, most of this factfinding will be performed by the judge under § 7.07A, including all mitigating factors present in the case, and all aggravating factors that do not trigger Sixth Amendment protections. The jury's resolution of a subset of factual controversies at sentencing can play only a fractional role in the total process.

Finally, and most importantly, a driving philosophy of the Model Penal Code: Sentencing revision is that the judiciary should be the central and most powerful institution within the multilevel, multi-actor system for criminal sentencing. Sentencing discretion is better entrusted to judges than other actors in the system, including legislatures, commissions, prosecutors, probation officers, corrections officials, and parole boards—and ultimate discretion is certainly better entrusted to judges than juries.

j. Judge-initiated jury factfinding at sentencing. Before the Supreme Court's cases creating Sixth Amendment rights

in the sentencing process, all American states allowed trial courts to respond to aggravating factors at sentencing beyond those formally urged by the government. Some have thought this an important check on prosecutorial power in the sentencing process. Without judicial authority to initiate consideration of an aggravated penalty, the relevant gatekeeping decisions devolve solely to prosecutors.

The mandate of jury factfinding at sentencing could work as an intrusion upon judges' authority to consider aggravating circumstances not raised by the government. The requirement of advance notice to the defendant of an alleged jury-sentencing fact, which ordinarily must occur before trial, see subsection (3), cannot in most cases be satisfied by the court. Indeed, the trial court is most likely to develop an independent theory of aggravation only after hearing the evidence in the case, receiving a guilty-plea colloquy, or studying a presentence report or victim impact statement. In all of these instances, a fixed requirement of pretrial notice to the parties of the court's intention to consider an aggravating circumstance would preclude the court's consideration altogether.

Subsection (7) preserves the sentencing court's authority to initiate the departure process, and retains as closely as possible the status quo before *Blakely*. The subsection provides an open-ended timeline in which the court may notify the parties of the court's intention to consider the existence of one or more jury-sentencing facts not raised by the parties. Subsection (7) includes the same functional limitation as imposed upon the latest possible governmental notice under subsection (3): The timing of the court's notice must allow the parties reasonable time to prepare for the proceeding at which the existence of a jury-sentencing fact will

be determined. Given the realities of judicial participation in the process, a court-initiated determination of a jury-sentencing fact will usually occur at a bifurcated factfinding proceeding, and may in some cases necessitate a continuance of sentencing proceedings.

Subsection (7) allows the court on its own motion to raise any factual issue that the government could have raised under subsection (3). This includes factors in aggravation of sentence that are enumerated in sentencing guidelines, and nonenumerated factors deemed legally sufficient by the court under the overarching purposes of § 1.02(2).

Under subsection (7), the court can do no more than invite the parties to present evidence concerning a jury-sentencing fact identified by the court. It cannot force the government to put on a case—and the presentation of an unenthusiastic prosecutor may fall short with a sentencing jury. Indeed, in some cases the government may feel constrained against putting on evidence by the terms of a plea agreement. All of these considerations, however, existed in presumptive sentencing systems before the advent of new Sixth Amendment requirements. They did not then, and do not now, extinguish the prospect of substantial judicial participation in the factfinding process.

First, a judge-initiated proceeding for the determination of a jury-sentencing fact may be grounded in evidence the jury has already heard at trial. In such a case, the court's invitation to the parties under subsection (7) would extend to any additional evidence they may wish to bring forward. Even in the absence of supplemental submissions by the parties, the evidence at trial may be sufficient to support an instruction to the jury under subsection (4)(a). In cases where the defendant has waived the right to a jury at sentencing, see subsection (8), the judge-initiated process, lead-

ing to a finding under subsection (4)(a), may be based in facts already developed at trial, in guilty-plea proceedings, or a presentence report, see § 7.07A(2).

Second, prosecutors will often be willing to present additional evidence at the court's invitation. In many instances, the court's notice under subsection (7) will be a welcome event from the government's perspective.

k. Waiver. Just as the overwhelming majority of criminal defendants waive their right to a jury on the issue of guilt or innocence, most can be expected to waive their Sixth Amendment right to jury resolution of jury-sentencing facts. Subsection (8) recognizes this reality, and provides a procedural framework for Sixth Amendment waivers at sentencing that borrows from the rules applicable to Sixth Amendment waivers at trial.

A defendant's choice to waive Sixth Amendment rights at trial is a separate matter from the waiver decision at sentencing. Subsection (8) does nothing to link the two forms of waiver. Under the revised Code, it is possible for a defendant to waive a jury at trial, or to plead guilty, while preserving the right of jury resolution of facts at sentencing. It is likewise possible for a defendant to insist upon a jury trial on the issue of guilt, while waiving the jury or admitting to jury-sentencing facts for purposes of sentencing proceedings.

Subsection (8) allows for two degrees of waiver. A defendant may waive the right to jury determination of factual issues without admitting the existence of those facts. In such a case, jury-sentencing facts may be determined by the court under the reasonable-doubt standard. The court's factual determinations may be made in unitary or bifurcated proceedings pursuant to subsection (4), and must be made

under the reasonable-doubt standard. Alternatively, a defendant may admit the existence of jury-sentencing facts, but may do so only as part of a knowing and intelligent waiver consistent with subsection (8).

Under subsection (8), a defendant may elect to waive Sixth Amendment rights at sentencing with respect to some jury-sentencing facts but not others.

l. States choosing an advisory guidelines system. Under the current Sixth Amendment jurisprudence, factfinding under advisory sentencing guidelines does not raise Sixth Amendment jury-trial concerns at sentencing. Even so, states choosing to adopt advisory guidelines have good reason to adopt this provision. First, the Supreme Court's Sixth Amendment doctrine, which changed substantially over a brief period in the early 2000s, may someday enlarge to impose jury-trial requirements on some categories of factfinding in advisory systems that now appear to be exempt. Second, some states may have statutory or common-law sentence enhancements—independent of their advisory guidelines—that trigger the Sixth Amendment jury-trial guarantee. This provision operates as a safety net whenever a legislature has not foreseen a specific area of Sixth Amendment difficulty. At the same time, the generic, and mutable, definition of "jury-trial facts" in subsection (1) ensures that the provision will lie dormant in the absence of constitutional imperative.

REPORTER'S NOTE

a. Scope. The Supreme Court has recognized a Sixth Amendment guarantee of jury factfinding at sentencing applicable to certain categories of facts under presumptive sentencing guidelines or presumptive statutory sentencing schemes. See Blakely v. Washington, 542 U.S. 296 (2004) (under Washington sentencing guidelines, defendant has right to jury determination of aggravating fact beyond reasonable doubt if

establishment of the fact is legally required before judge may impose a penalty above the presumptive guidelines range); United States v. Booker, 543 U.S. 220 (2005) (under federal sentencing guidelines, defendant has right to jury determination of facts beyond reasonable doubt if the establishment of those facts is legally required before judge may impose increased penalties under the guidelines); and Cunningham v. California, 127 S. Ct. 856 (2007) (under California statutory sentencing scheme, defendant has right to jury determination of aggravating circumstance beyond reasonable doubt if establishment of the circumstance is legally required before judge may impose a penalty above the statutory presumptive penalty).

The constitution requirement of jury factfinding at sentencing has many exceptions: (1) Proof at sentencing of the fact of a defendant's prior conviction is exempt from the Sixth Amendment jury-trial requirement. See *Blakely*, 542 U.S. at 301; Almendarez-Torres v. United States, 523 U.S. 224 (1998). (2) Judicial factfinding at sentencing that triggers a mandatory minimum penalty falls outside the Sixth Amendment guarantee, so long as the mandatory punishment does not exceed the available maximum sentence. United States v. Harris, 536 U.S. 545 (2002), reaffirming McMillan v. Pennsylvania, 477 U.S. 79 (1986). (3) Factfinding at sentencing required for imposition of a mitigated punishment is outside the Sixth Amendment. See *Blakely*, 542 U.S. at 301; Patterson v. New York, 432 U.S. 197 (1977). (4) Judicial factfinding at sentencing raises no Sixth Amendment issues when used to fix penalty within the broad statutory ranges typically found in indeterminate sentencing systems. See *Blakely*, 542 U.S. at 304-305; Williams v. New York, 337 U.S. 241 (1949). (5) An otherwise sharply divided Court in *Booker* was in unanimous agreement that the Sixth Amendment jury-trial guarantee did not apply to judicial factfinding at sentencing under advisory sentencing guidelines. *Booker*, 543 U.S. at 233 (2005) (Stevens, J., opinion of the Court); id. at 259 (Breyer, J., opinion of the Court).

The *Blakely* decision in 2004 prompted many states to conclude that their sentencing systems ran afoul of new Sixth Amendment requirements. See Jon Wool and Don Stemen, Vera Institute of Justice, Aggravated Sentencing: *Blakely v. Washington*: Practical Implications for State Sentencing Systems (2004), at 3 (reporting 14 state sentencing

systems "fundamentally affected by Blakely" and 8 "possibly affected by Blakely"). A number of states responded with legislation that created jury factfinding procedures for determination beyond a reasonable doubt of facts that increase the maximum penalty to which a defendant is exposed. See Alaska Stat. §§ 12.55.155(f) (2006); Ariz. Rev. Stat. § 13-702.01 (2006); Kan. Stat. §§ 21-4716(b), 21-4718(b) (2006); Minn. Stat. § 244.10, subd. 5 (2006); Minn. R. Crim. P. 27.03 (2006); N.C. Gen. Stat. § 15A-1340.16(a1) (2006); Ore. Sess. Laws, ch. 463, §§ 3(1), 4(1) (2006); Wash. Rev. Code §§ 9.94A.535, 9.94A.537 (2006). Colorado has achieved a similar result through judicial ruling, see Lopez v. People, 113 P.3d 713, 716 (Colo. 2005).

The states that have created a jury factfinding mechanism for sentencing decisions have designed the new process to apply only when it is constitutionally required. In most of these states, very few cases are affected. Shortly after *Blakely* was decided in 2004, sentencing commissions across the country produced data on the numbers of sentence proceedings potentially subject to the new requirement of jury factfinding. David Boerner, Chair of the Washington Sentencing Commission (and an Adviser to the Model Penal Code revision) reported the following for Washington State: In the year prior to *Blakely*, there had been only 628 aggravated departures among the 27,000 felony cases sentenced in the state. A mere 101 of those were contested cases that might have called for a factfinding jury at sentencing. See Laurie P. Cohen and Gary Fields, Court Ruling Causes Tumult in Sentencings, Wall St. J., June 28, 2004, at B1 (quoting Boerner). Sentencing commissions in other states likewise concluded that only tiny percentages of sentences would fall within the new Sixth Amendment requirements. See Minn. Sentencing Guidelines Comm'n, The Impact of *Blakely v. Washington* on Sentencing in Minnesota: Long Term Recommendations (2004); N.C. Sentencing and Policy Advisory Comm'n, *Blakely* Subcommittee, Draft Final Report (2004).

These findings comported with actual experience in Kansas, where a Sixth Amendment jury factfinding procedure had been mandated by a state-supreme-court decision that accurately anticipated *Blakely* three years before the Supreme Court's ruling. See State v. Gould, 23 P.3d 801 (Kan. 2001). Kansas legislation, enacted in 2002, created a limited jury factfinding process when constitutionally required at

sentencing. Kan. Stat. §§ 21-4716(b), 21-4718(b) (2006). In the ensuing years, the Kansas sentencing system suffered little disruption from the new jury factfinding procedure. Only a small minority of all criminal cases were affected, most of these were resolved in plea bargaining, and the few cases that actually used the new procedures were resolved with little added time and effort. See Adam Liptak, Justices' Sentencing Ruling May Have Model in Kansas, N.Y. Times, July 13, 2004, at A12; Brief of Kansas Appellate Defender Office as Amicus Curiae in Support of Petitioner at 6-7, Blakely v. Washington, 124 S. Ct. 2531 (2004) (No. 02-1632). In July 2004, the Reporter and Judge Richard Walker, a Kansas trial-court judge, former Chair of the Kansas Sentencing Commission, and an Adviser to the Model Penal Code revision, undertook an informal investigation of the Kansas experience. In telephone interviews with judges, prosecutors, and defense counsel across the state, we did not find anyone who believed that the post-*Gould* statutory changes had had appreciable effect on the operation of the Kansas sentencing system.

Three years after *Blakely*, most state sentencing systems have adapted comfortably to new Sixth Amendment requirements at sentencing. Nearly all states with systems similar in structure to the recommendations in the revised Model Penal Code have enacted legislation similar to § 7.07B. (The exception is Ohio, where the sentencing commission took the position that *Blakely* did not apply to the state's presumptive guidelines system. On this premise, no post-*Blakely* legislation has yet been adopted in Ohio.) The near-consensus in legislative response reflects the view that the benefits of a well-designed sentencing system outweigh the small and manageable costs of a limited jury factfinding procedure at sentencing.

b. Factfinding covered by this provision. The definition of "jury-sentencing fact" is adapted from Oregon law. See Ore. Sess. Laws, ch. 463, § 1(1) (2006) ("'Enhancement fact' means a fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime"). The Code's definition is stated in more open-ended terms than the Oregon example, to allow for the possibility that future Supreme Court decisions may extend the right to jury trial at sentencing beyond facts necessary "to increase the sentence that may be imposed" following conviction.

Other state legislation speaks to categories of sentencing factfinding believed to fall within *Blakely* requirements, with no reference to constitutional mandates. See Kan. Stat. § 21-4716(b) (2006) ("any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt"); Minn. Stat. § 244.10, subd. 5 (2006) (jury-trial sentencing procedure created for cases "in cases where state intends to seek an aggravated departure" from presumptive guidelines sentence); Wash. Rev. Code § 9.94A.537(1), (2) (2006) (facts subject to new jury-trial procedure are "aggravating circumstances" necessary to support "a sentence above the standard range" in the guidelines).

The drafters considered an alternative version of subsection (1), which would have defined the facts subject to § 7.07B as "facts determined at sentencing that expose the defendant to a greater punishment for an offense than would otherwise be legally permissible," excluding "[t]he existence of a defendant's prior conviction." See Model Penal Code: Sentencing § 7.07B(1) (Discussion Draft, 2006). This formulation would have restated current Supreme Court precedent. See Comment *a* above. The Institute ultimately rejected this approach out of concern that future Supreme Court rulings might expand or contract the categories of sentencing facts that must be tried to a jury. The final version of subsection (1) was designed to preserve the closest possible fit between statutory and constitutional definitions of jury-sentencing facts.

c. Notice to the defendant. No jurisdiction has treated jury-sentencing facts as full-blown "elements" of offenses that must be set out in the underlying charging documents. In some post-*Blakely* legislation, this is explicit. See Alaska Stat. § 12.40.100(c) (2006) ("An indictment that complies with this section and with applicable rules adopted by the supreme court is valid and need not specify aggravating factors set out in AS 12.55.155"); N.C. Gen. Stat. § 15A-1340.16(a4) (2006) ("Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument").

Instead, consistent with subsection (3)(a), many jurisdictions have adopted procedures outside of the charging instrument to ensure that the government gives adequate notice to the defendant that a jury-sentencing fact will been raised. See Minn. Stat. § 244.10, subd. 5 (2006) (prosecutor must provide "reasonable notice" of intent to seek aggra-

vated sentence through proof of jury-sentencing fact); N.C. Gen. Stat. § 15A-1340.16(a6) (2006) ("The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial or the entry of a guilty or no contest plea"). See also Alaska Stat. § 12.55.155(f)(2)(A), (C) (2006); Kan. Stat. § 21-4718(b)(1) (2006); Ore. Sess. Laws, ch. 463, § 2(2) (2006); Wash. Rev. Code § 9.94A.537(1) (2006).

d. Nonenumerated penalty-ceiling enhancement facts. Most state sentencing guidelines enumerate aggravating factors that may be considered by a sentencing court, but nearly all of these lists are nonexclusive in order to allow for factual scenarios not anticipated by the commission. See § 6B.04, Reporter's Note to Comment *e*. Subsection (3)(b) draws on Minn. Stat. § 244.10, subd. 4 (2006) ("In bringing a motion for an aggravated sentence, the state is not limited to factors specified in the Sentencing Guidelines provided the state provides reasonable notice to the defendant and the district court prior to sentencing of the factors on which the state intends to rely"). Compare Rev. Code Wash. § 9.94A.535(2), (3) (2006) (providing "exclusive list" of aggravating circumstances that can support a sentence above the standard guidelines range).

f. Unitary versus bifurcated proceedings. For examples of provisions setting out the alternatives of unitary or bifurcated proceedings for the determination of jury-sentencing facts, see Kan. Stat. § 21-4718(b)(2), (4) (2006); Minn. Stat. § 244.10, subd. 5(b) (2006); N.C. Gen. Stat. § 15A-1340.16(a)(1) (2006); Ore. Sess. Laws, ch. 463, § 3(1), (4) (2006); Wash. Rev. Code § 9.94A.537(3), (4) (2006). Subsection (4) draws most closely from the Minnesota and Oregon examples. The option of bifurcated jury deliberations—when no new evidence is taken at the second factfinding proceeding—is explicitly recognized in Minn. Stat. § 244.10, subd. 5(b)(2) (2006).

A special verdict is generally required for the jury's determination of a Sixth Amendment sentencing fact. See Kan. Stat. § 21-4718(b)(7) (2006); Minn. Stat. § 244.10, subd. 5(b)(2) (2006); Wash. Rev. Code § 9.94A.537(2) (2006).

g. Jury procedures borrowed from trial practice. For the rare instances in which a new sentencing jury must be impaneled, state law typically provides that jury selection take place under the rules for jury

selection at trial. See Kan. Stat. § 21-4718(b)(4) (2006); N.C. Gen. Stat. § 15A-1340.16(a1) (2006).

h. Trial rules borrowed for bifurcated sentencing proceedings. Most post-*Blakely* legislation does not speak to this question. Given that the trial of jury-sentencing facts may take place during guilt proceedings—indeed, there is a presumption in favor of this procedure—it would be anomalous to employ different safeguards in a bifurcated proceeding. At least one code provides limited guidance concerning the equivalence between trial rules and those applicable at a bifurcated sentencing proceeding. See Kan. Stat. § 21-4718(b)(5) (2006) ("Only such evidence as the state has made known to the defendant prior to the upward durational departure sentence proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible").

i. Preserving judicial sentencing discretion. A jury finding of fact that renders an aggravated penalty legally permissible should not bind the sentencing court to impose the aggravated sentence. Post-*Blakely* legislation and guidelines uniformly preserve judicial discretion to weigh the significance of a jury-sentencing fact, against the factual record as a whole, before imposing sentence. See Ariz. Rev. Stat. § 13-702(C) (2006); Kan. Stat. § 21-4718(b)(7) (2006); Minnesota Sentencing Guidelines and Commentary § II.D (2006); N.C. Gen. Stat. § 15A-1340.16(a), (b) (2006); Ore. Sess. Laws, ch. 463, § 7(5) (2006); Wash. Rev. Code § 9.94A.537(5) (2006).

j. Judge-initiated jury factfinding at sentencing. Most post-*Blakely* legislation is silent on this question. Kansas follows the approach recommended in subsection (7). See Kan. Stat. § 21-4718(a)(3) (2006) ("If the court decides to depart on its own volition, without a motion from the state or the defendant, the court must notify all parties of its intent and allow reasonable time for either party to respond if requested. The notice shall state the type of departure intended by the court and the reasons and factors relied upon"); id. § 21-4717(a)(2) ("In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement"); Kansas State Sentencing Guidelines Desk Reference Manual 79 (2006) ("Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines.").

k. Waiver. Procedures for waiver of Sixth Amendment jury-trial rights at sentencing have been specified in every state that has created a jury factfinding procedure at sentencing. Normally, these borrow from or incorporate the procedures for waiver of the right to a jury trial on the issue of guilt. See Kan. Stat. § 21-4718(b)(4) (2006); Minn. Stat. § 244.10, subd. 7 (2006); Minn. R. Crim. P. 15.01, subd. 2 (2006); N.C. Gen. Stat. § 15A-1340.16(a1), incorporating the procedures in § 15A-1022.1 (2006); Ore. Sess. Laws, ch. 463, § 3(1)(b) (2006); Wash. Rev. Code § 9.94A.537(2) (2006).

A waiver of the right to jury determination of facts at sentencing is independent of the decision whether to waive the right to a jury at trial. Although implicit in subsection (8), this disjunction is sometimes underscored through explicit language in state codes. See N.C. Gen. Stat. § 15A-1340.16(a2), (a3) (2006) (providing for possibilities of jury trial on question of guilt even if sentencing facts admitted, and for jury trial at sentencing even in cases where defendant pleads guilty to underlying offense). But see Ore. Sess. Laws, ch. 463, § 5(1)(b) (2006) ("When a defendant waives the right to a jury trial on the issue of guilt or innocence, the waiver constitutes a written waiver of the right to a jury trial on all enhancement facts whether related to the offense or the defendant").

l. States choosing an advisory guidelines system. Under current constitutional law, a system of advisory sentencing guidelines does not raise Sixth Amendment jury-trial concerns at sentencing—even if sentencing judges in an advisory system base penalties on the same factual considerations that would trigger Sixth Amendment safeguards in a presumptive guidelines system. See *Booker*, 543 U.S. at 233 (2005) (Stevens, J., opinion of the Court); id. at 259 (Breyer, J., opinion of the Court).

A handful of jurisdictions have responded to recently established Sixth Amendment requirements at sentencing through legislation, court decision, or amendments to sentencing guidelines that have changed formerly enforceable guidelines or statutory sentencing presumptions into advisory prescriptions, thus avoiding the Sixth Amendment jury-trial guarantee. See Ind. Code § 35-50-2-1.3 (2006) (formerly presumptive statutory sentences now advisory); Tenn. Code § 40-35-210(c) (formerly presumptive statutory sentencing guidelines now advisory); United States v. Booker, 543 U.S. 220 (2005) (declaring the federal sen-

tencing guidelines advisory); State v. Foster, 845 N.E.2d 470 (Ohio 2006) (declaring formerly presumptive statutory sentencing guidelines now advisory).

The following provision is not submitted for approval as part of Tentative Draft No. 1. It is presented for informational purposes only.

§ 7.ZZ. Appellate Review of Sentences.

(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that preserves substantial judicial discretion to individualize sentences within a framework of law.

(2) An appeal from a sentence may be taken by the defendant or the government on grounds that a sentence is unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of the purposes stated in § 1.02(2)(a)(i).

(3) The right to a first appeal from a sentence that is a departure or an extraordinary departure as defined in §§ 6B.01 and 7.XX(3), or for an offense for which there is no sentencing guideline, shall be as of right on the same terms as a first appeal from a criminal conviction.

(4) The right to appeal from a sentence consistent with a presumptive sentence in guidelines or statute shall be discretionary and subject to rules of procedure promulgated by the courts.

(5) A sentence consistent with the recommendation of either the defendant or the government may not be appealed by the party that made the recommendation.

(6) The standard of review of sentencing decisions in individual cases shall be as follows:

(a) The appellate courts shall exercise de novo review of claims that a sentence is unlawful or was imposed in an unlawful manner.

(b) Notwithstanding any other provision of this Code, the appellate courts shall have the authority to vacate or modify sentences on the ground that they are overly severe if the court finds that the sentences are not [reasonably] [substantially] proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.

(c) The appellate courts shall accept findings of facts made by the sentencing court or a jury at sentencing proceedings unless clearly erroneous.

(d) Except as provided in subsection (e), the appellate courts shall afford deference to sentencing courts' applications of law to the facts of individual cases, including decisions to depart from presumptive guidelines provi-

sions, decisions concerning the appropriate degree of guidelines departures, and sentencing decisions following convictions of offenses for which there are no guidelines. Sentencing-court decisions embraced in this subsection shall be upheld when there is a substantial basis for the rulings.

(e) The appellate courts shall employ heightened scrutiny when reviewing extraordinary departures as defined in §§ 6B.01 and 7.XX(3). Such decisions shall be upheld only when the appellate court is in agreement with the sentencing court's ruling after exercise of the appellate court's independent judgment.

(f) The appellate courts may reverse and remand any sentence not supported by an explanation of the sentencing court's reasoning as required in § 7.XX(4) or (5).

(7) An appellate court may affirm or reverse a sentence pronounced by a sentencing court, remand a case for resentencing, or order that the sentencing court fix sentence as directed by the appellate court.

(8) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed, remanded, or modified by the appellate court. The appellate court should issue a written opinion in any other case in which the court believes that a written opinion will provide needed guidance to sentencing judges, the sentencing commission, or others in the sentencing and corrections system. The appellate courts may provide by rule for summary disposition of cases

arising under this Section when no substantial question is presented by the appeal.

(9) Pending review of a sentence, the sentencing court or appellate court may order the defendant placed on conditional release.

Comment:

a. Scope. This Section is one of three cornerstone provisions that define the relative powers of the sentencing commission, the trial courts, and the appellate judiciary within the revised Code's sentencing structure. The other key provisions are § 6B.04 (defining the legal force of sentencing guidelines promulgated by the commission) and § 7.XX (defining trial-court discretion to depart from guidelines and other sentencing provisions). All three Sections must be read together in order to appreciate the interrelationships of authority envisioned in the revised Code. The Code's underlying philosophy is that there should be collaboration and dialogue between the commission and the judiciary in the continuous development of a common law of sentencing, but the judiciary should hold ultimate dispositive power over most issues, see § 6B.04, Comment *b*.

The role of the appellate courts is addressed in a cursory way in existing legislation in many American guidelines systems. This has led to a wide divergence in appellate practice in jurisdictions with seemingly similar sentencing structures. At one extreme, the appellate courts may conceive their role primarily as enforcers of the literal terms of the guidelines. On this view, there is little room for trial-court discretion or for any substantive contribution to a common law of sentencing that originates from the trial or appellate bench. The guidelines thus become a relatively fixed code of sentencing, and the judiciary is reduced to technocratic application and enforcement of the guidelines' terms. At the oppo-

site extreme, an appellate judiciary may take a "hands-off" approach to sentence appeals, thus depriving the guidelines of all legal force—even the relatively modest "presumptive" force outlined in § 6B.04. This approach allows for considerable judicial lawmaking and policymaking at the atomistic level of each case, yet deprives the jurisdiction of the coordinating process of appellate review. In a hands-off regime, individual trial courts develop idiosyncratic jurisprudences of sentencing, the accrual of meaningful precedent in the field is all but foreclosed, there is no unifying voice on behalf of the judiciary to communicate needed changes in guidelines to the commission, and the appellate bench plays no creative role in fostering a common law of sentencing.

Section 7.ZZ charts a middle course that avoids the diametric extremes of strict guideline enforcement and the total absence of enforcement and precedential decisionmaking. It sets in place a meaningful yet deferential standard for the appellate review of sentences. See Comment *g*, below. Section 7.ZZ devotes special care and attention to the delineation of the appellate courts' functions. It is more detailed than existing legislation on the subject and incorporates principles borrowed from case law in several states. When in doubt, the drafters of § 7.ZZ have erred in favor of more extensive rather than streamlined content in § 7.ZZ, to best clarify the provision's meaning. Instead of asking a state's appellate courts to decide for themselves what their responsibilities should be in the sentencing system, the provision embodies lessons of experience from numerous jurisdictions.

b. Appellate-court discretion in light of legislative purposes. Subsection (1) provides that the appellate bench's powers must always and self-consciously be exercised in a way consistent with the general purposes of the sentencing system as laid out in § 1.02(2). This reflects the revised

Code's broad-based effort to give greater prominence and effect to the purposes provision than in the 1962 Code, see § 1.02(2), Comment *a*. Parallel provisions are addressed to sentencing courts, see § 7.XX(1), and the commission itself, see § 6A.01(2)(e).

The second sentence of subsection (1) is a statement of legislative intent included to reinforce faithful construction of § 7.ZZ. Declarations of this kind are—and should be—used sparingly in a sentencing code. In this instance, given the importance of the subject matter to the operation of the entire system, and the dangers of miscommunication between the legislature and appellate courts (demonstrated in some American guideline jurisdictions), subsection (1) spells out the legislature's expectations with care.

First, subsection (1) stresses that the legislature desires the appellate courts to play an active role in the development of a principled common law of sentencing. This statement of intent precludes a hands-off approach by the appeals courts. It asks that they become involved in the substantive merits of sentencing claims and assume a place, along with trial courts and the commission, as collaborators in an evolutionary lawmaking enterprise. See also § 6A.01-(2)(b) (sentencing commission shall "collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework").

Second, subsection (1) admonishes the appellate bench to work to preserve substantial judicial discretion to individualize sentences within a framework of law, see § 1.02(2)(b)-(i). This statement rules out any mechanistic or literalist practice of guideline enforcement by the appellate judiciary. See also § 6B.03(4) (the commission shall recognize the importance of judicial discretion to individualize sentences in

specific cases, and shall not act to foreclose the exercise of that discretion).

c. Symmetrical rights of sentence appeal by defendant and government. Subsection (2) enacts symmetrical rights to appeal from sentence decisions belonging to the government and defendant. This follows the practice of every American guidelines jurisdiction. The right to appeal includes claims that a sentence is unlawful or was imposed in an unlawful manner, but also extends to substantive challenges to the trial court's discretionary choices within fixed parameters of law. Thus, subsection (2) adds in broad terms that a particular sentence may be appealed as too severe or too lenient, or as otherwise inappropriate in light of the purposes of sentencing in individual cases.

d. First appeal as of right. Subsections (3) through (5) impose procedural limitations on the broadly stated right to appeal in subsection (2). Under the revised Code, only a minority of all sentencing-court rulings are subject to appellate review as of right. In other cases review is discretionary or barred entirely. The goal of these provisions is to make review available in those cases where it matters most, and where the contributions of the appellate courts can be expected to add greatest value to the development of the law of sentencing. The provisions seek to screen from review the great majority of cases that could otherwise amass to overwhelm the appeals courts, and unduly divert time and attention away from those select cases that merit intensive deliberations.

Subsection (3) grants either party a first appeal as of right from a sentencing decision that is a departure from the presumptive provisions of sentencing guidelines, or is an extraordinary departure from a heavy presumption in sentencing law created by the legislature or the courts. The

right to a first-sentence appeal in these circumstances is made identical to the right to take a first appeal from conviction.

That first appeals from departures and extraordinary departures should be as of right is a function of the overall design of the revised Code's sentencing structure. The Code vests discretion in the sentencing commission, by virtue of its broad-based membership, to make authoritative expressions of fitting punishments in ordinary cases. The commission is composed in a way that gives it unique credibility to weigh concerns of proportionality and the other legislative purposes of sentencing, and to produce benchmarks for punishment that are appropriate to the majority of cases that move through the sentencing system. When a trial judge chooses to impose a guideline sentence, the court in effect ratifies the commission's judgment as applied to the specific case before the judge. Given the institutional competence of the commission and the agreement of the sentencing court, much time might be consumed but little would be gained by routine review of sentences consistent with guideline presumptions.

On the other hand, sentencing courts are given substantial discretion to depart from guideline presumptions, and the commission has no power to foreclose any ground upon which a trial judge may choose to depart from the guidelines, see §§ 6B.02(7), 6B.04(4). In departure cases, then, any principled guidance brought to bear on judicial discretion derives not from the commission, but from the legislative statement of purposes in § 1.02(2) (itself unenforceable without appellate review), from the accumulation of judicial precedent that has grown up in analogous cases, and from the prospect of appellate review. In order to inculcate a principled and consistent decisional method in departure cases, therefore, a fund of appealed cases is required.

The same considerations apply to appeals from extraordinary departures. Extraordinary departures by definition entail the exercise of trial-court discretion to override a heavy presumption in sentencing law. Heavy presumptions may not be created by the commission, but must be authored by the legislature or laid down in controlling judicial precedent, see § 6B.01(5). As with guideline departures, trial-court discretion to make extraordinary departures must be employed with reference to the purposes of sentencing, see § 7.XX(3), but this instruction lacks interpretive content and enforceability in the absence of appeals-court supervision. More so than with guidelines departures, the appellate courts have responsibility in extraordinary-departure cases to ensure that heavy presumptions of sentencing law are not lightly set aside by trial courts, see subsection (6)(d). Where trial-court discretion to depart from ordinary guidelines terms is substantial and is afforded deference on appeal, discretion to make an extraordinary departure should be regulated more closely.

e. Discretionary appeals. The revised Code does not rule out the possibility of successful challenges to a trial court's refusal to depart from the presumptive provisions of guidelines, or from a heavy sentencing presumption established in statute or judicial precedent. Most American guideline jurisdictions bar appeals of this nature, and such appeals rarely prevail even when allowed. A simple rule of nonappealability of "refusals to depart" was considered seriously by the drafters of the revised Code, on the theory that neither the parties nor the system stand to gain very much in run-of-the-mill cases by the allowance of such challenges. Subsection (4) stops short of an absolute bar, however, and provides that appeals of refusals to depart may be heard by the appellate courts on a discretionary basis subject to rulemaking by the courts.

Subsection (4) allows room for discretionary appeals chiefly because of the way in which departures from presumptive rules are conceptualized in the revised Code. Great importance throughout the Code is placed on judicial discretion to individualize sentences within a legal framework. Although the commission enjoys unique competence to set benchmarks for punishment in ordinary cases, it would be improper for a sentencing court blindly to follow the guidelines in cases that differ materially from the norm. A sentencing system must encourage departures in appropriate cases or else face the dangers of excessive (or false) uniformity. As recognized, for example, in § 6B.03(4):

> [T]he best effectuation of the purposes of sentencing will often turn upon the circumstances of individual cases. The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations.

In similar spirit, § 6A.05, Comment *g*, advises the commission to define sentences that are "in compliance with the guidelines" to include any sentence that is "consistent with an applicable presumptive sentence, rule, or standard set forth in the guidelines, or a departure from any presumptive provision of the guidelines that is grounded in the purposes of § 1.02(2)(a)." This practice signals that departures in appropriate circumstances are welcomed within a well-ordered sentencing system. Section 7.ZZ(4) goes further to acknowledge that departures may in rare instances be *required*. Although the expected incidence is low, a vehicle for discretionary appeals grants the appellate courts power to reach those cases of refusals to depart that most cry out for review.

f. Nonappealability of sentence in accord with a party's recommendation. Subsection (5) further delimits the categories of appealable cases. Subsection (4) insulates from review presumptive sentencing decisions consistent with the normal expectations of a bilateral plea agreement. Subsection (5) extends this rule to cover instances of unilateral sentencing recommendations, and bars the party making a recommendation from challenging a penalty imposed in accordance with that recommendation.

g. Standard of appellate review. Consistent with the statutory law and case law in most guidelines jurisdictions, subsection (6) lays out a multitiered standard for appellate sentence review that attaches with differing levels of intensity depending on the nature of the issue raised on appeal. This approach differs markedly from the generalized "abuse of discretion" (or equivalent) standard applied in a majority of American jurisdictions for appellate challenges to sentencing decisions rendered within broad statutory limits.

Subsection (6)(a) begins with the straightforward proposition, followed in all guideline jurisdictions, that questions of law are to be reviewed under a de novo standard. Some sentences may run so far afield of the purposes stated in § 1.02(2) that they are defective as a matter of law. If no reasonable sentencer could have imposed a given punishment in light of the legislative purposes, distinctions between questions of fact, law, or mixed law-and-fact become immaterial. In such instances an appellate court should have plenary power to reverse, remand, or modify the unreasonable sentence, see subsection (7).

Subsection (6)(b) extends the power of review as a matter of law still further. In cases where the penalties imposed were "not reasonably proportionate to the gravity

of offenses, the harms done to crime victims, and the blameworthiness of offenders," see § 1.02(2)(a)(i), the appellate courts may always vacate or modify such sentences. By the express terms of subsection (6)(b), this authority exists notwithstanding any other provision of the criminal code. Thus, the power to review punishment on proportionality grounds extends to sentences consistent with the terms of mandatory-penalty provisions.

The power granted here to appellate courts to override in limited circumstances the terms of mandatory penalties is consistent in spirit with the "extraordinary departure" power given to trial judges, see § 7.XX(3)(b). That provision sets in place high hurdles to the exercise of extraordinary-departure authority, which are in turn subject to searching reevaluation on appeal, see subsection (6)(e). Subsection (6)(b) is intended to reach those exceptional cases in which deviation from a mandatory penalty is required on principled grounds, but trial courts have refused to exercise their authority to do so. An appeal from such a refusal is discretionary with the appellate court, see subsection (4).

Stepping back, § 7.ZZ(6)(b) in effect creates a power of proportionality review in the appellate courts with greater bite than the forgiving standard of "gross disproportionality" that has grown up in Eighth Amendment jurisprudence. Section 7.ZZ(6)(b) provides appellate judges with a statutorily granted power of subconstitutional proportionality review that reaches miscarriages of penalty that are not "reasonably proportionate" to deserved outcomes in individual cases. Whereas federal constitutional law now incorporates a flexible proportionality analysis that responds to all legitimate retributive and utilitarian goals of punishment, subsection (6)(b), just like § 1.02(2)(a)(i), provides that proportionality must operate with reference to

the standard indices of retributive or deserved penalties: the gravity of the crimes, the harms done to victims, and the blameworthiness of offenders.

Illustration:

1. Defendant was sentenced for the current offense of theft of three golf clubs worth $1200. He had earlier convictions of robbery and burglary, entered seven years before commission of the current crime. Under the terms of a state statute, defendant's current offense plus his prior convictions triggered a mandatory minimum penalty of 25 years in prison. The trial court imposed the mandatory penalty, and denied the defendant's request to make an extraordinary departure from the mandatory provision. The appellate courts have discretionary authority to review the sentence and may reverse or modify the sentence if they find on the facts of the case that the penalty is overly severe and not reasonably proportionate to the gravity of the offense, the harm done to the crime victim, and the blameworthiness of the offender.

Subsection (6)(c) incorporates a rule generally applicable to appellate practice that findings of fact made by the trial court or jury must be accepted by an appellate tribunal unless found to be clearly erroneous. This rule recognizes the superior position of factfinders at trial to judge the weight and credibility of evidence, and the impracticality of reconstructing their first-hand perspective on appeal.

Subsection (6)(d) expresses the standard of review applicable to the vast majority of trial-court decisions that involve the application of law to the facts of specific cases. Although a small number of cases will fall under the alternative review standard in subsection (6)(e), subsection

(6)(d) is the heart of § 7.ZZ. It defines not only the appellate court's authority to scrutinize most sentencing courts' actions but, within the larger operation of the system, it is a critical mechanism for ensuring a balanced distribution of discretionary authority as between the commission, the trial courts, and the courts of appeals.

Subsection (6)(d) defines appellate sentence review as a meaningful exercise of authority. The appellate courts may not simply rubber-stamp penalties handed down within broad statutory limits. Instead, the appeals process engages on a substantive level with the application of law to the facts of individual cases, including trial courts' weighing of the purposes of sentencing in individual cases, see § 1.02(2)(a), and the consideration that trial courts must give to guideline provisions that enjoy qualified, presumptive legal authority, see § 6B.02(7).

While review under subsection (6)(d) is substantive and meaningful, it is also expressly deferential to trial-court judgment-calls. A sentencing court's decision must be upheld whenever there is a substantial basis for the ruling, even if the appellate court's independent judgment would incline otherwise. This level of deference recognizes that the individualization process can turn on qualitative and often subtle perceptions. An appellate court may police sentencing judges closely for legal errors, see subsection (6)(a). Assuming a proper grounding in law appears for the trial judge's action, however, no decisionmaker is in a position superior to that of the sentencing judge to assess the weight that should be given to subjective and sometimes conflicting considerations, cf. § 7.07B(6). Subsection (6)(d) does not provide for limitless deference, however. It authorizes review that is more searching than under an abuse-of-discretion standard. It permits reversal of outlier decisions by sentencing judges, and more. A trial court's ruling need not be

wholly unreasonable to run afoul of the standard in subsection (6)(c); it is enough if the challenged decision is not supported by substantial reasons.

Subsection (6)(d) applies to all cases of guideline departures, which, in turn, will comprise the majority of sentence appeals under subsections (3) and (4). In such cases, the deferential "substantial basis" standard reaches both the trial court's decision to make a departure and the trial court's judgment about the appropriate degree of departure. This again reflects the revised Code's philosophy that discretion to individualize punishments should be ceded in largest degree to the trial judiciary. See also § 6B.04(4) ("The commission may not quantify the effect given to specific aggravating or mitigating factors.") Note, however, that extreme departures that exceed a doubling of the presumptive sentence are defined as "extraordinary departures" under the revised Code, and trigger the heightened standard of review in subsection (6)(e), see below. See also § 7.XX(3)(a).

In short, there is a ratcheting effect in the various standards built into § 7.ZZ. For penalties consistent with guideline or other presumptions, review is discretionary and challenges can be expected to succeed only in true outlier cases. For the overwhelming majority of guideline departures, the appellate courts will employ meaningful but deferential scrutiny. Outlier cases and decisions based on less than substantial reasoning are now subject to reversal or modification. Finally, for extreme departures, basic concerns of sentence proportionality justify the "heightened scrutiny" and the "independent judgment" standard incorporated into subsection (6)(e).

Subsection (6)(d) applies also to challenges of sentences in cases where there are no applicable guidelines, see

§ 6B.10. Such decisions—much like departure decisions—are cut free of the structure normally provided by sentencing guidelines. Although trial judges must consult the guidelines when pronouncing non-guideline sentences, see § 7.XX(5), it is fair to say that the commission plays a distinctly attenuated role in the penalty decision. In these circumstances, a principled framework for trial-court discretion can emanate only from the basic-purposes provision in § 1.02(2)(a) (itself unenforceable without appellate review), the existence of precedent in reported decisions, and the prospect of appeal and reversal of a sentence not based on substantial reasoning. In non-guidelines cases that arise with some frequency in the courts, the accumulation of trial-court decisions and appellate precedent should form the basis for guidelines amendments that extend presumptive provisions of the guidelines to previously omitted offenses.

Subsection (6)(e) sets forth a separate standard of appellate review for sentencing-court decisions classified as "extraordinary departures" from "heavy presumptions" in sentencing law, see §§ 6B.01(5) and 7.XX(3). In a small number of designated subject areas, the Code envisions exceptions to the general principle that trial courts should hold the greatest share of authority, vis-à-vis other officials, to individualize penalties in light of the facts of specific cases.

Where strong public-policy concerns are present, the trial courts occasionally are given no authority to individualize sentences as they may otherwise choose. Judges never hold discretion to sentence outside the applicable statutory maximum penalty, for example, see § 7.XX(6). The Code further proscribes certain factual considerations from the trial courts' sentencing calculus, see § 6B.06(2) (including an offender's race, ethnicity, gender, sexual orientation or identity, national origin, religion or creed, political affiliation or

belief, and alleged crimes committed by the offender that have not resulted in convictions). The Constitution sometimes imposes limitations upon judicially selected penalties in the absence of jury factfinding at sentencing proceedings, see § 7.07B.

The conceptual device of the heavy presumption reaches a small number of subject areas touching upon trial-court discretion in which absolute prohibitions of the exercise of discretion would be inappropriate, and yet the legislature is unwilling to grant the usual quantum of substantial discretion to sentencing courts. In the revised Code, such subject areas include extreme upward departures from the guidelines, see § 7.XX(3)(a), departures from the terms of a statutory mandatory penalty, see § 7.XX(3)(b), and the imposition of consecutive sentences of disproportionate severity in light of the most serious conviction charge, see § 6B.08(2). This short list exhausts the heavy presumptions that are legislatively authorized in the Code itself, but the Code allows the judiciary to add heavy presumptions of its own, see § 7.XX(3).

Given the conceptual underpinnings of the extraordinary-departure power, it is appropriate that its exercise should be subject to more searching review on appeal than instances of "ordinary" departures. The legislature's willingness to create an extraordinary-departure power away from the terms of mandatory penalties, for example, may well be conditioned on the understanding that the appeals bench will closely monitor its use. Similarly, the legislature's concern for proportionality in punishment, and its investment in a system of sentencing guidelines as benchmarks for proportionate penalties, justifies heightened appellate scrutiny of sentences that are dramatically out of line with guidelines recommendations. In both of the examples just given, a legislature might choose to remove the discretion of sentenc-

ing courts completely, as most jurisdictions now do in the case of mandatory penalties, and as some now do in the case of extreme departures from sentencing guidelines. The vehicle of the heavy presumption allows for forceful policy statements by the legislature that do not erase all judicial discretion to respond to extraordinary circumstances.

Subsection (6)(e) provides that extraordinary-departure decisions may be upheld on appeal only if the appellate court finds itself in agreement with the sentencing judge in the exercise of the appellate court's independent judgment. In effect, the appellate court must apply the de novo legal standard for extraordinary departures set down for trial courts in § 7.XX(3). Such departures may be sustained only when "extraordinary and compelling circumstances exist 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)."

Subsection (6)(f) provides that sentences may be reversed and remanded by the appellate courts whenever the trial court is required to provide an explanation of the reasons for the sentence, see § 7.XX(4) and (5), but fails to do so. A meaningful appeals process cannot exist in the absence of reasoned decisionmaking in the lower courts.

h. Powers of appellate court. Subsection (7) grants the appellate courts authority not only to reverse, affirm, or remand a sentence under review, but also to order that a sentencing court fix sentence as directed by the appellate court. The power to order a specific modified sentence is included in the interest of judicial efficiency. In some circumstances, an appellate court may conclude that, following a reversal on the merits, nothing would be gained by remand to the trial court and the record on appeal is sufficient to support a modified sentence consistent with an order by the appellate court.

Illustration:

2. Defendant on appeal has successfully challenged an upward departure resulting in a prison sentence three times the length of the maximum presumptive sentence for the offense. The appellate court finds that adequate reasons exist on the record to support a guideline departure under the "substantial circumstances" standard, see § 7.XX(2), but the reasons do not support an extraordinary departure of more than twice the upper boundary of the presumptive range, see § 7.XX(3)(a). The appellate court may remand the case to the trial court for resentencing or may order that a sentence of twice the upper boundary of the presumptive range be imposed on the appellant.

i. When written opinions required. Subsection (8) requires written opinions by the appellate courts when they are most needed, but also provides mechanisms for lightening the courts' workload in cases where the production of opinions would serve little purpose. Whenever the judgment of a sentencing court is reversed, remanded, or modified, the appellate court must supply an opinion to explain its reasons and give guidance to other sentencing judges. However, when the sentence below is affirmed, subsection (8) works upon the assumption that the reasoning of the trial judge has been approved by the appeals court. If this is not so, and if the appellate tribunal concludes that a written opinion would provide needed guidance to sentencing judges, subsection (8) grants the appellate court discretion to produce an opinion.

Finally, subsection (8) permits the appellate courts to develop rules for summary disposition of cases when no substantial question is presented by the appeal.

j. Conditional release while appeal pending. Subsection (9) provides, consistent with the law in most jurisdictions, that either the trial court or the appellate court may order that the defendant be placed on conditional release during the pendency of the appeal.

k. States choosing an advisory guidelines system. A continuing series of Comments speaks to states that elect to employ advisory rather than presumptive sentencing guidelines. For background and a full listing of relevant Comments, see § 1.02(2), Comment *p*.

States opting to employ advisory rather than presumptive sentencing guidelines should consider the following amendments to subsections (1) and (6)(d):

> **(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that ~~preserves substantial judicial discretion to individualize sentences within a framework of law~~ encourages the imposition of sentences in the lower courts that are uniform in their neutral application of the purposes in § 1.02(2)(a). . . .**
>
> **(6) The standard of review of sentencing decisions in individual cases shall be as follows: . . .**
>
> **(d) Except as provided in subsection (e), the appellate courts shall afford modest deference to sentencing courts' applications of law to the facts of individual cases, ~~including decisions to depart from presumptive guidelines provisions, decisions concerning the appropriate degree of guidelines departures,~~**

> ~~**and sentencing decisions following convictions of offenses for which there are no guidelines**~~ **including applications of the purposes of sentencing in § 1.02(2). Sentencing-court decisions embraced in this subsection shall be upheld** ~~**when there is a substantial basis for the rulings**~~ **unless the appellate court finds a substantial and persuasive basis to prefer an alternative decision. . . .**

Changes in subsection (1) are recommended due to the dangers of excessive individualization and disparity that exist in sentencing systems with advisory guidelines. In presumptive guidelines systems, the converse danger exists: that the system will be organized to allow too little room for sentencing-court discretion in individual cases. The unaltered subsection (1), drafted for a presumptive guidelines system, seeks to head off appellate sentence review that is overly rigorous, technical, and disrespectful of trial courts' authority to individualize penalties.

These fears can be set aside under advisory guidelines. The problem instead is to prompt the appellate courts to play any meaningful role whatever in the development of a sentencing jurisprudence. No state sentencing system with advisory guidelines has yet produced effective appellate-court scrutiny of trial-court penalties. Thus, the second sentence of subsection (1) in an advisory structure must sound a different theme than in a presumptive regime. The appellate courts should be left in no doubt that they are meant to play an important role in the system. In the absence of enforceable guidelines, the appellate courts are the primary arbiters of uniformity in the analytic process of sentencing decisions throughout the jurisdiction.

The suggested amendments in subsection (6)(d) are supported by similar reasoning. State experience with advisory sentencing guidelines, conjoined with a deferential standard of appellate review, has been that no effective review of the merits of sentencing decisions occurs. Subsection (6)(d) sends the clear signal that the appeals process under advisory guidelines is not meant to be a rubber stamp of the vast majority of sentences imposed within broad statutory boundaries. While it is appropriate for an appellate tribunal to give deference to the sentencing court's applications of legal principles to the facts of the case, this deference should be "modest." In a system without enforceable guidelines, the subjects upon which an appellate court should exercise no-more-than-modest deference must specifically include analysis of the full range of sentencing purposes established in § 1.02(2). Foundational principles become more prominent in the absence of legally effective presumptions fashioned by a sentencing commission.

The attitude of "modest" deference, as opposed to some higher degree of deference, is reinforced in the last sentence of subsection (6)(d), which now authorizes appellate courts to reverse a sentencing court's application of law to the facts of the case when there is a "substantial and persuasive" basis to prefer an alternative analysis. Once again, this communicates unmistakably to appellate judges that they have real work to do in the sentencing system, and that the legislature contemplates meaningful rather than perfunctory examination of the applied reasoning of sentencing courts.

Appendix A

Black-Letter Provisions Amended to Establish a System of Advisory Sentencing Guidelines

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

§ 1.02(2). Purposes; Principles of Construction.

(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 (a)(i); and

(iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (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~~ recommended penalties;

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

ARTICLE 6A. AUTHORITY OF THE SENTENCING COMMISSION

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

(1) There is hereby established a permanent sentencing commission as an independent agency of state government.

(2) The sentencing commission shall:

(a) develop sentencing guidelines as provided in Article 6B;

(b) collaborate over time with the trial and appellate courts in the development of a common law of sentencing within the legislative framework;

(c) provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects;

(d) assemble and draw upon sources of knowledge, experience, and community values from all sectors of the criminal-justice system, from the public at large, and from other jurisdictions;

(e) perform its work and provide explanations for its actions consistent with the pur-

poses 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.

(1) The members of the sentencing commission shall include:

(a) [three] members from the state's judicial branch;

(b) [two] members from the state legislature;

(c) the director of correction;

(d) [one] prosecutor;

(e) [one] criminal defense attorney;

(f) [one] official responsible for the provision of probation or parole services;

(g) one academic with experience in criminal-justice research; and

(h) [one] member of the public.

(2) One of the [judicial] members of the commission shall serve as chair of the commission.

(3) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms.

Alternative § 6A.02. Membership of Sentencing Commission.

(1) The members of the sentencing commission shall include:

(a) the chief justice of the supreme court or another justice of the supreme court [designated by the chief justice];

[(b) one judge of the court of appeals appointed by the chief justice of the supreme court;]

(c) [three] trial-court judges [appointed by the chief justice of the supreme court];

(d) [four] members of the state legislature [, one of whom shall be appointed by the majority leader of the state senate, one of whom shall be appointed by the minority leader of the state senate, one of whom shall be appointed by the speaker of the house of representatives, and one of whom shall be appointed by the minority leader of the house of representatives];

(e) the director of correction or another representative of the department of correction [designated by the director];

(2) The sentencing commission shall also include the following members [, to be appointed by the governor]:

(a) [two] prosecutors;

(b) [two] practicing members of the criminal defense bar [including at least one public defender];

(c) [one] official responsible for the provision of probation services;

(d) [one] official responsible for the provision of parole and prisoner reentry services;

(e) one chief of police;

(f) [one representative of local government];

(g) one academic with experience in criminal-justice research;

(h) [three] members of the public [, one of whom shall be a victim of a crime defined as a felony, and one of whom shall be a rehabilitated ex-inmate of a prison in the state].

(3) One of the [judicial] members of the commission shall [be designated by the governor to] serve as chair of the commission.

(4) All members of the commission shall serve terms of [four] years, except that one-half of the initial members shall serve [two-year] terms. Members may serve successive terms without limitation.

(5) Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system.

(6) Commission members shall receive no salary for their service, but shall be reimbursed for expenses incurred in their work for the commission.

(7) Authorities empowered to make appointments to the commission should attend to the racial, ethnic, and gender diversity of the commission's membership, and should ensure representation on the commission from different geographic areas of the state.

(8) The commission shall have the power to form advisory committees, including persons who are not members of the commission, to assist the commission in its deliberations.

§ 6A.03. Staff of Sentencing Commission

(1) The commission shall employ an executive director to serve at the pleasure of the commission. The executive director's responsibilities shall include:

(a) supervision of the activities of all persons employed by the commission;

(b) ultimate responsibility for the performance of all tasks assigned to the commission;

(c) maintenance of contacts with other state agencies involved in sentencing and corrections processes and with sentencing commissions in other jurisdictions; and

(d) other duties as determined by the commission.

(2) The executive director shall select and hire a research director with research experience and expertise, together with a sufficient staff of qualified research associates.

(3) The executive director shall select and hire a director of education and training, together with a sufficient staff to perform necessary functions of education, training, and guideline implementation.

(4) The executive director shall select and hire such additional staff to be employed by the commission as are necessary to fulfill the responsibilities of the commission.

§ 6A.04. Initial Responsibilities of Sentencing Commission.

(1) In the first [two years] of its existence, the sentencing commission shall promulgate and present to the legislature one or more proposed sets of sentencing guidelines as provided in Article 6B, and shall develop a correctional-population forecasting model as provided in § 6A.07.

(2) In discharging its responsibilities under subsection (1), the commission shall:

(a) collect information on all correctional populations in the state;

(b) survey the correctional resources across state and local governments; and

(c) conduct research into crime rates, criminal cases entering the court system, sentences imposed and served for particular offenses, and sentencing patterns for the state as a whole and for geographic regions within the state.

(3) In discharging its responsibilities under subsection (1), the sentencing commission should:

(a) consult available research and data on the current effectiveness of sentences imposed and served in the jurisdiction as measured against the purposes in § 1.02(2); and

(b) study the experiences of other jurisdictions with sentencing commissions and guidelines.

(4) In conjunction with its activities under this Section, the sentencing commission may:

(a) advise the legislature of any needed reallocations or additions in correctional resources;

(b) recommend to the legislature any changes needed in the criminal code, and recommend to [the rulemaking authority] any changes needed in the rules of criminal procedure, to best effectuate the sentencing guidelines promulgated by the commission; and

(c) identify and prioritize areas where necessary data and research are lacking concerning the operation of the sentencing system, and recommend to the legislature means by which the commission or other state agencies may be empowered to address such needs.

(5) The commission shall make and publish a final report to the legislature and the public on its activities as outlined in this Section.

§ 6A.05. Ongoing Responsibilities of Sentencing Commission.

(1) This Section sets forth the continuing responsibilities of the sentencing commission following completion of its initial responsibilities under § 6A.04.

(2) The commission shall:

(a) promulgate and periodically revise sentencing guidelines as needed, subject to the provisions of Article 6B;

(b) prepare correctional-population projections for the sentencing system at least once each year, and whenever new guidelines or laws affecting sentences are proposed, as described in § 6A.07;

(c) develop computerized information systems to track criminal cases entering the court system; the effects of offense, offender, victim, and case-processing characteristics upon sentences imposed and served; sentencing patterns for the state as a whole and for geographic regions within the state; data on the incidence of and reasons for sentence revocations; and other matters found by the commission to have important bearing on the operation of the sentencing and corrections system;

(d) collect and, where necessary, conduct periodic surveys of the correctional populations and resources of the state;

(e) assemble information on the effectiveness of sentences imposed and served in meeting the purposes in § 1.02(2); and

(f) investigate the existence of discrimination or inequities in the sentencing and corrections system across population groups, including groups defined by race, ethnicity, and gender, and search for the means to eliminate such discrimination or inequities.

(3) The commission should:

(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.

(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.

(1) The Commission shall develop a correctional-population forecasting model to project future sentencing outcomes under existing or proposed legislation and sentencing guidelines. The commission shall use the model at least once each year to project sentencing outcomes under existing legislation and guidelines. The commission shall also use the model whenever new legislation affecting criminal punishment is introduced or new or amended sentencing guidelines are formally proposed, and shall generate projections of

sentencing outcomes if the proposed legislation of guidelines were to take effect. The commission shall make and publish a report to the legislature and the public with each set of projections generated under this subsection.

(2) Projections under the model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs.

(3) The model shall be designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.

(4) The commission shall refine the model as needed in light of its past performance and the best available information.

§ 6A.08. Ancillary Powers of Sentencing Commission.

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

sion, and [probation or pretrial services departments] shall provide copies of presentence reports to the commission.

(3) The commission shall take all reasonable steps to preserve the confidentiality of offenders about whom the commission receives information under this Section. Wherever possible, the commission shall retain information about specific offenders in a coded form that obscures their personal identities.

(4) Sentencing courts shall complete and supply a sentence report to the commission following the sentencing decision in every case. The form of the sentence report shall be as designed by the commission pursuant to § 6A.05(5)(a).

(5) The commission shall have the authority to enter partnerships or joint agreements with organizations and agencies from this and other jurisdictions, including academic departments, private associations, and other sentencing commissions, to perform research needed to carry out its duties.

(6) The commission shall have authority to apply for, accept, and use gifts, grants, or financial or other aid, in any form, from the federal government, the state, or other funding source including private associations, foundations, or corporations, to accomplish the duties set out in this Article.

§ 6A.09. Omnibus Review of Sentencing System.

(1) Every [10] years, the sentencing commission shall perform an omnibus review of the sentencing system, including:

(a) a long-term assessment of the operation of the state's sentencing laws and guidelines in meeting the purposes in § 1.02(2), and for their effects on the administration, efficiency, and resources of the court systems of the state;

(b) an assessment of the adequacy of correctional resources at the state and local levels to meet current and long-term needs, and recommendations to the legislature of means to address shortfalls in such resources, or to better coordinate the use of such resources as between state and local governments;

(c) an analysis of areas in which necessary data and research are lacking concerning the operation of the sentencing system and the effects of criminal sentences on offenders, victims, families, and communities, including a prioritization of data and research needs;

(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.

ARTICLE 6B. SENTENCING GUIDELINES

§ 6B.01. Definitions.

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~~ recommended sentences, ~~presumptive rules,~~ other guidelines ~~provisions~~ recommendations, and commentary;

(3) "~~presumptive~~ recommended sentence" means the penalty, range of penalties, alternative penalties, or combination of penalties indicated in the guidelines as appropriate for an ordinary case within a defined class of cases;

(4) "departure sentence" or "departure" means a sentence that deviates from a ~~presumptive~~ recommended sentence ~~or rule in the guidelines~~ or other guidelines recommendation;

(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.

§ 6B.02. Framework for Sentencing Guidelines.

(1) The sentencing guidelines shall set forth ~~presumptive~~ recommended sentences for cases in which offenders have been convicted of felonies or misdemeanors, and nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences, subject to § 6B.04.

(2) The guidelines may set forth additional ~~presumptive rules~~ recommendations applicable to sentencing decisions as determined by the commission, or when required by law.

(3) The commission shall determine the best formats for expression of ~~presumptive~~ recommended sentences and other guidelines provisions, which may include one or more guidelines grids, narrative statements, or other means of expression.

(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, eco-

nomic 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.

(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~~ recommended sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence.

(3) Within the boundaries of severity permitted in subsection (2), the commission may tailor ~~presumptive~~ recommended sentences for defined classes of cases to effectuate one or more of the utilitarian 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~~ recommendations that prioritize the purposes in § 1.02(2)(a) as applied in defined cat-

egories 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 Recommendations and Departures.

(1) The guidelines shall ~~have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX. The commission may designate specific guidelines provisions as advisory recommendations to sentencing courts~~ be advisory to sentencing courts, subject to the requirements of consultation, analysis, and articulation of the sentencing court's reasoning when imposing sentence as set forth in § 7.XX.

(2) The commission shall fashion ~~presumptive~~ recommended sentences to address ordinary cases within defined categories, based on the commission's collective judgment that the majority of cases falling within each category may appropriately receive a presumptive sentence.

(3) The guidelines shall address the selection and severity of sanctions. ~~Presumptive~~ Recommended sentences may be expressed as a single penalty, a range of penalties, alternative penalties, or a combination of penalties.

(a) For prison and jail sentences, the ~~presumptive~~ recommended sentence shall

specify a length of term or a range of sentence lengths. Ranges of incarceration terms should be sufficiently narrow to express meaningful distinctions across categories of cases on grounds of proportionality, to promote reasonable uniformity in sentences imposed and served, and to facilitate reliable projections of correctional populations using the correctional-population forecasting model in § 6A.07.

(b) The guidelines shall include ~~presumptive~~ recommended provisions for determinations of the severity of community punishments, including postrelease supervision.

(c) Where the guidelines ~~permit~~ contemplate the imposition of a combination of sanctions upon offenders, the guidelines shall include ~~presumptive provisions~~ recommendations for determining the total severity of the combined sanctions.

[(d) The guidelines shall include ~~presumptive provisions~~ recommendations for the determination of the severity of sanctions upon findings that offenders have violated conditions of community punishments.]

(4) The guidelines shall include nonexclusive lists of aggravating and mitigating factors that ~~may be used~~ sentencing courts are encouraged to consider as grounds for departure from ~~presumptive~~ recommended sentences in individual cases. ~~The commission may not quantify the effect given to specific aggravating or mitigating factors.~~

§ 6B.05. Selection Among and Use of Sanctions. [*To be drafted***]**

§ 6B.06. Eligible Sentencing Considerations.

(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.

(1) The commission shall consider whether to include the criminal histories of defendants as a factor in the determination of ~~presumptive~~ recommended sentences, as an aggravating factor enumerated as a ground for departure from a ~~presumptive~~ recommended 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~~ suggest 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~~ recommendations 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.08. Sentences Upon Convictions of Multiple Offenses; Consecutive and Concurrent Sentences.

(1) The commission shall include ~~presumptive provisions~~ recommendations in the guidelines for cases in which offenders are to be sentenced for multiple current convictions in a single proceeding, multiple current convictions in separate proceedings, or current convictions for offenses committed while offenders were serving sentences or awaiting trial for other offenses. For cases arising under this Section:

(a) The guidelines shall set forth a default ~~presumption~~ recommendation in favor of concurrent sentences in most cases. It is the legislature's judgment that a penalty of proportionate severity normally may be rendered for the most serious among multiple convictions. For the most serious offense, the commission shall include ~~presumptive provisions~~ recommendations in the guidelines concerning appropriate adjustments in sentence severity to reflect the offenders' other current convictions.

(b) For selected categories of cases, the commission may create ~~presumptions~~ recommendations in favor of consecutive sentences.

(c) ~~The sentencing courts shall have discretion to depart from the guidelines presumptions in subsections (1)(a) and (1)(b), with adequate reasons stated in writing, as provided in § 7.XX~~. Sentencing courts shall give full consideration to the recommendations in subsections (1)(a) and (1)(b). If a sentencing court deviates from those recommendations, the court shall comply with the departure procedures set forth in § 7.XX.

(d) For selected categories of cases, the commission may provide that there is no guidelines ~~presumption~~ recommendation on the question of concurrent versus consecutive sentences, leaving the matter to the discretion of sentencing courts without reference to the requirements of § 7.XX.

(e) In enumerating exceptions to the default ~~presumption~~ recommendation in subsection (1)(a), the commission shall ground its decisions on the purposes of sentencing of individual offenders in § 1.02(2)(a).

(f) The guidelines shall include ~~presumptive provisions to ensure that the recommended~~ recommendations to encourage the imposition of sentences for multiple current convictions ~~will be~~ that are the same whether the offenses were charged in a single proceeding or were charged separately.

(g) The guidelines shall include ~~presumptive provisions~~ recommendations addressing the total severity of consecutive sen-

tences, including cases where the sentences include a combination of sanctions.

(2) When consecutive sentences to incarceration are imposed, there shall be a heavy presumption in the guidelines that the total sentence length will not exceed double the maximum term of the presumptive sentence for the most serious of the offender's current convictions. Deviation from the heavy presumption by sentencing courts shall be treated as an extraordinary departure under § 7.XX(3).

§ 6B.09. Risk and Needs Assessments of Offenders. [*To be drafted***]**

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

(1) The sentencing commission shall promulgate guidelines applicable to all felony and misdemeanor offenses under state law except as provided in this Section.

(2) The commission may elect not to include offenses in guidelines if prosecutions are rarely initiated, if the offense definitions are so broad that ~~presumptive~~ recommended 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~~ recommendations for sentencing courts in cases where offenses have

inadvertently or otherwise been omitted from the guidelines.

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

(1) The sentencing commission shall promulgate its initial set of proposed sentencing guidelines no later than [date]. The proposed guidelines shall take effect [180 days later] unless disapproved by act of the legislature.

(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.

ARTICLE 7. AUTHORITY OF THE COURT IN SENTENCING

§ 7.XX. Judicial Authority to Individualize Sentences.

(1) The courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2).

(2) In sentencing an individual offender, sentencing courts ~~may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a)~~ shall give

full consideration to all sentencing guidelines applicable to the case. Sentencing courts shall assess the weight to be given the guidelines' recommendations in light of the purposes stated in § 1.02(2).

(a) ~~A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.~~ Sentencing courts should be especially cognizant of the legislative goal of encouraging sentences that are uniform in their neutral application of the general purposes of sentencing and correction of individual offenders, and should consult the guidelines as useful benchmarks in the pursuit of that goal.

~~(b) A sentencing court may not base a departure upon mere disagreement with a presumptive sentence as applied to an ordinary case.~~

~~(c)~~ (b) A sentencing court may not base any decision affecting a sentence upon a factor prohibited by statute, constitutional law, or controlling judicial decision, and may not violate a limitation imposed by the same authorities.

~~(d) The degree of a departure from the guidelines in an individual case shall be~~

~~**determined by the sentencing court in light of the purposes of § 1.02(2)(a).**~~

(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 stated 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~~ recommendations applicable to offenses not covered by the guidelines. For all sentences that include a term of incarceration under this subsection, the sentencing court shall provide an explanation on the record of its reasons for the sentence imposed.

(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

(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 defendant.

(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

(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.

§ 7.ZZ. Appellate Review of Sentences.

(1) The appellate courts shall exercise their authority under this Article consistent with the purposes stated in § 1.02(2). The legislature intends that the appellate courts participate in the development of a principled common law of sentencing that ~~preserves substantial judicial discretion to individualize sentences within a framework of law~~ encourages the imposition of sentences in the lower courts that are uniform in their neutral application of the purposes in § 1.02(2)(a).

(2) An appeal from a sentence may be taken by the defendant or the government on grounds that a sentence is unlawful, was imposed in an unlawful manner, is too severe or too lenient, or is otherwise inappropriate in light of the purposes stated in § 1.02(2)(a)(i).

(3) The right to a first appeal from a sentence that is a departure or an extraordinary departure as defined in §§ 6B.01 and 7.XX(3), or for an offense for which there is no sentencing guideline, shall be as of right on the same terms as a first appeal from a criminal conviction.

(4) The right to appeal from a sentence consistent with a presumptive sentence in guidelines or statute shall be discretionary and subject to rules of procedure promulgated by the courts.

(5) A sentence consistent with the recommendation of either the defendant or the government may not be appealed by the party that made the recommendation.

(6) The standard of review of sentencing decisions in individual cases shall be as follows:

(a) The appellate courts shall exercise de novo review of claims that a sentence is unlawful or was imposed in an unlawful manner.

(b) Notwithstanding any other provision of this Code, the appellate courts shall have the authority to vacate or modify sentences on the ground that they are overly severe if the court finds that the sentences are not [reasonably] [substantially] proportionate to

the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.

(c) The appellate courts shall accept findings of facts made by the sentencing court or a jury at sentencing proceedings unless clearly erroneous.

(d) Except as provided in subsection (e), the appellate courts shall afford <u>modest</u> deference to sentencing courts' applications of law to the facts of individual cases, ~~including decisions to depart from presumptive guidelines provisions, decisions concerning the appropriate degree of guidelines departures, and sentencing decisions following convictions of offenses for which there are no guidelines~~ <u>including applications of the purposes of sentencing in § 1.02(2)</u>. Sentencing-court decisions embraced in this subsection shall be upheld ~~when there is a substantial basis for the rulings~~ <u>unless the appellate court finds a substantial and persuasive basis to prefer an alternative decision</u>.

(e) The appellate courts shall employ heightened scrutiny when reviewing extraordinary departures as defined in §§ 6B.01 and 7.XX(3). Such decisions shall be upheld only when the appellate court is in agreement with the sentencing court's ruling after exercise of the appellate court's independent judgment.

(f) The appellate courts may reverse and remand any sentence not supported by an

explanation of the sentencing court's reasoning as required in § 7.XX(4) or (5).

(7) An appellate court may affirm or reverse a sentence pronounced by a sentencing court, remand a case for resentencing, or order that the sentencing court fix sentence as directed by the appellate court.

(8) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed, remanded, or modified by the appellate court. The appellate court should issue a written opinion in any other case in which the court believes that a written opinion will provide needed guidance to sentencing judges, the sentencing commission, or others in the sentencing and corrections system. The appellate courts may provide by rule for summary disposition of cases arising under this Section when no substantial question is presented by the appeal.

(9) Pending review of a sentence, the sentencing court or appellate court may order the defendant placed on conditional release.

[(10) Appellate review of a decision of a trial court upholding a provision of sentencing guidelines under § 7.YY shall be discretionary and subject to rules of procedure promulgated by the courts. Appellate review of a decision of a trial court invalidating or modifying a provision of sentencing guidelines under that Section shall be mandatory.]