Submitted by the Council to the Members of
The American Law Institute
for Discussion at the Eighty-Eighth Annual Meeting on May 16, 17, and 18, 2011

Model Penal Code: Sentencing

Tentative Draft No. 2

(March 25, 2011)

SUBJECTS COVERED

PART I General Provisions
ARTICLE 6 Authorized Disposition of Offenders (§§ 6.01, 6.06, 6.11A)
ARTICLE 6B Sentencing Guidelines (§ 6B.09)
PART III Treatment and Correction
ARTICLE 305 Prison Release and Postrelease Supervision (§§ 305.1, 305.6, 305.7)
APPENDIX A. Proposed Deletions of Provisions (§§ 6.07, 6.09, 6.11-6.13, 7.03-7.05, 7.08)
APPENDIX B. Reporter's Study: The Question of Parole-Release Authority
APPENDIX C. Black Letter of Tentative Draft No. 2

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Tentative Draft No. 2

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The Council approved the start of the project in 1999. Tentative Draft No. 1 on the authority of sentencing commissions, presumptive sentencing guidelines, and the authority of courts in sentencing was approved by the membership at the 2007 Annual Meeting. Tentative Draft No. 2, containing material on authorized disposition of offenders, sentencing guidelines, and prison release and postrelease supervision, will be considered at the 2011 Annual Meeting.

Earlier versions of some of the material contained in this Draft are contained in Council Draft No. 3 (2010), Discussion Draft No. 3 (2010), and Preliminary Draft No. 7 (2009).

The project's Reporter may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects; and copies of Reporters' written disclosures are available from the Institute upon request; however, only disclosures provided after July 1, 2010, will be made available and, for confidentiality reasons, parts of the disclosures may be redacted or withheld.

Foreword

No subject we take up this year compares in social importance to Model Penal Code: Sentencing. Many in the U.S. know that the vast increase in prison populations over the past 40 years and the sad racial disparity of those populations are not evidence of social health. Institutionally, we seem unable to address these issues, although the need to cut state budgets may lead to statutory and administrative changes. Intelligent and balanced recommendations from the Institute will be helpful. Our work is led by Reporter Kevin Reitz of the University of Minnesota, one of the nation's most important scholars of sentencing and of corrections law generally.

In 2007 the Annual Meeting approved the first portion of MPC: Sentencing. The Institute recommended a state sentencing commission, set forth the appropriate authority for a commission, urged presumptive sentencing guidelines, and described the place of court discretion in the sentencing process. Before you is Tentative Draft No. 2, addressing central policies of sentencing: how a state should determine the statutory lengths of prison sentences for particular crimes; when life sentences without the possibility of parole should be allowed; mandatory-minimum sentences (the draft opposes them); a procedure for later reconsideration of prison sentences longer than 15 years; and questions at both ends of the age spectrum: juvenile sentences on the one hand and compassionate release as a possibility for elderly prisoners on the other.

This year's draft also includes the vitally important and difficult Appendix B, a Reporter's Study by Professor Reitz on the subject of Parole-Release Authority. Kevin writes that the MPC's sentencing system should be determinate and thus should remove the parole board's authority to fix prison-release dates. But the determinate sentencing structure should not be absolute. Good-time credits should be available for most prisoners and the exceptions to absolute sentences listed above should be part of the law. "With these exceptions, however," Kevin concludes, "it is a cornerstone philosophy of the revised Code that sentencing courts should have discretion to individualize penalties in specific cases, and should know to a reasonable approximation what the severity of their chosen sentences will be."

In this draft Professor Reitz makes major contributions to the national debate about our state criminal justice systems. The draft is long, challenging, and disturbing. Kevin takes strong positions on some subjects and on others offers difficult policy choices, analyzing the arguments for competing legal rules. Earlier versions of the draft were debated at meetings of the Advisers, the Members Consultative Group, and the Council. Our Advisers and our active members include real experts on criminal law and on sentencing. The Reporter has learned from them and has responded to many but not all of their recommendations. So far, our process on MPC Sentencing has been as good and as valuable as I have seen in any project. I have no doubt that our San Francisco meeting will be educational for every ALI member and will provide additional guidance as Kevin's work moves forward. When completed, this project will be a major contribution to a necessary national debate.

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March 18, 2011

Model Penal Code: Sentencing
Tentative Draft No. 2

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REPORTER'S INTRODUCTORY MEMORANDUM

Kevin R. Reitz[†]

Reporter

March 7, 2011

This Tentative Draft concentrates on the subject of prison sentences in American law. The issues it addresses include:

- The statutory limits to be placed on authorized prison sanctions for different grades of offenses.
- The close restrictions that should exist on the use of life prison terms with no prospect of release (often called "life without parole").
- The Institute's strong disapproval of the enactment of mandatory-minimum prison terms for any offense.
- The question of whether the sentencing system should include a parole-release agency with discretion to fix the actual lengths of prison stays.
- The use of recidivism risk assessments in judicial sentencing proceedings, especially as a prison-diversion tool.
- The framework for good-time and earned-time laws for the award of credits against prison terms.
- A new judicial sentence-modification process for exceptionally long prison sentences—one that engages only after 15 years of time served.

[†] James Annenberg La Vea Professor, University of Minnesota Law School. The Reporter is grateful for extensive comments on early versions of proposed § 6.11A supplied by Delbert Elliott, Barry Feld, Michael Tonry, and Franklin Zimring. Richard Frase provided close comments on the draft as a whole. I am also indebted to Margaret Love, who supplied useful drafting suggestions for § 305.1, and organized an American Bar Association conference on mechanisms for a "second look" at long prison sentences in late 2008. The conference yielded papers and recommendations relevant to the formulation of §§ 305.1, 305.6, and 305.7. See ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter); Margaret Colgate Love, Guest Editor, ABA Roundtable on "Second Look" Reforms, 21 Fed. Sent. Rptr. 149-225 (2009). Christopher Slobogin organized a law-review symposium issue dedicated to ongoing issues in the Model Penal Code revision project, and many of the contributions proved helpful to the preparation of this Tentative Draft, see Model Penal Code Symposium, 61 Fla. L. Rev. 665-826 (2009). University of Minnesota law students Ann Entwistle, Catherine London, David Morine, and Tyler Olson provided much of the state-by-state research for this draft, building upon the earlier research assistance of Steven Barrett, Jared Butcher, David de Ruig, and Carrie Ryan Gallia.

- The multi-faceted topic of "compassionate release," which allows for the modification of prison terms because of the prisoner's advanced age or physical or mental infirmity, exceptional family circumstances, or other compelling reasons.
- A new provision that charts a specialized course for the sentencing of juvenile offenders (those under 18 at the time of their offenses) in the adult criminal courts.

Questions of criminal confinement in U.S. law have never been of greater urgency. By most historical lights, the penitentiary was the invention of this country in the early 19th century, forged by the confidence of the Enlightenment,[1] yet prison populations remained relatively modest through the 19th and most of the 20th centuries. Starting in the early 1970s, however, an unbroken march of prison and jail expansion began that would continue nearly 40 years. Incarceration rates, corrected for population, nearly quintupled during this period, with the most explosive growth occurring in the 1980s and 1990s. While the nation's prisons and jails held an estimated 357,000 inmates on any given day in 1970, this figure grew to more than 2,380,000 in 2009.[2] As a proportion of its population, the United States in 2009 confined 5 times more people than the United Kingdom and Luxembourg (which have Western Europe's highest incarceration rates), 6.5 times more than Canada, 9 times more than Germany, 10 times more than Norway and Sweden, and 12 times more than Japan, Denmark, and Finland.[3]

The U.S. incarceration explosion of the last 40 years is unmatched by any other society in any historical era. The phenomenon has been termed "mass imprisonment" by David Garland.[4] Other than sheer scale, its most salient feature is the heavy racial and ethnic imbalances among those incarcerated. Roughly 60 percent of the nation's prisoners are either

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[1] See David J. Rothman, The Discovery of The Asylum: Social Order and Disorder in the New Republic (1971); Gustave de Beaumont and Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application to France (1833). For an argument that the penitentiary had important roots in European criminal law, see Adam Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America (1992).

[2] Margaret Werner Cahalan, U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Corrections Statistics in the United States, 1850-1984 (1986) , at 79 tab1e 4-4; U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010); U.S. Dept. of Justice, Bureau of Justice Statistics, Jail Inmates at Midyear 2009—Statistical Tables (2010).

[3] Roy Walmsley, World Prison Population List, 8th ed. (International Centre for Prison Studies, 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8 (last visited Mar. 9, 2011).

[4] David Garland, Introduction: The Meaning of Mass Imprisonment, in David Garland ed., Mass Imprisonment: Social Causes and Consequences (2001), at 2 (the term is meant to capture the sharp departure from historic norms in the scale of imprisonment, and also a confinement policy of such magnitude as to result in the "systematic imprisonment of whole groups of the population").

African American or Hispanic. The current black-male imprisonment rate stands at nearly 7 times the rate for white males, while the Latino rate is about 2.5 times the white rate.[5] Today, 1 of every 100 adults is held in prison on any given day, including 1 of every 15 black males between the ages of 20 and 50.[6] The U.S. Justice Department estimated that the lifetime likelihood of serving a state or federal prison term for a white male child born in 2001 was 6.6 percent, while for a black male child it was a staggering 32.2 percent.[7] If Winston Churchill was correct to claim that "[t]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country,"[8] then Americans of today have reason to be apprehensive about the judgment of future generations.

The extraordinary prison growth of the past 40 years has been slowing and may be coming to a halt. From 2007 to 2009, excluding the growing federal prison system from the counts, state imprisonment rates have fallen into slight decline. In 2009, 28 states saw drops in their per capita use of prison beds, while 18 states and the federal system experienced growth.[9] Projecting forward from these statistics (always a perilous venture), the United States may have arrived at a new plateau of incarceration levels for the early 21st century. This should not be taken as a pendulum swing in the criminal law, however. Even if a trend of flattening or slowly-declining inmate populations were to take hold, it would not signal a return to standing incarceration rates of the 1960s, 1970s, or 1980s. The *persistence* of historically high confinement rates is itself an aggressive criminal-justice policy to import into the future.

Figure 1 below illustrates the point. Prison and jail statistics are almost always reported in cross-sectional, one-day counts, and trend lines are drawn from year to year by comparing one snapshot to another. Yet Thoreau wrote that "the cost of a thing is the amount of . . . life which is required to be exchanged for it."[10] When trying to grasp the ongoing effects of a prison policy, it is instructive to ask how much time it subtracts from the life of the free community. Figure 1 estimates the number of "person-years" of confinement meted

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[5] U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), tables 12-16; Michael Tonry, Punishing Race: A Continuing American Dilemma (2010), at 34; Richard S. Frase, What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 38 (2009).

[6] The Pew Center on the States, One in 31: The Long Reach of American Corrections (2009), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=49398 (last visited Mar. 9, 2011); U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), app. table 15.

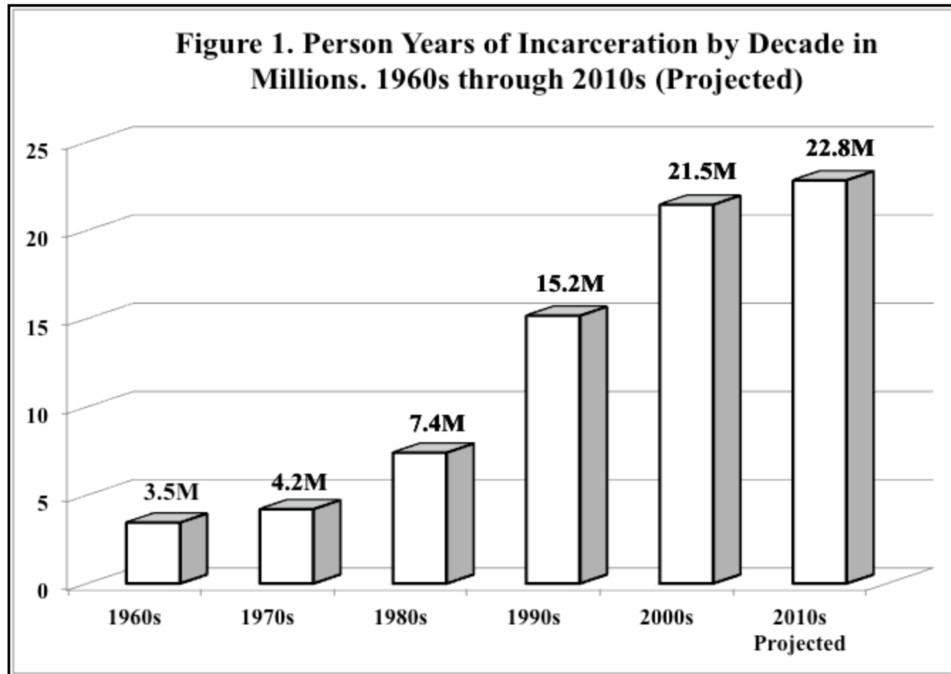
[7] U.S. Dept. of Justice, Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974–2001 (2003). With rising prison rates after 2003, this probability has only increased.

[8] Winston Churchill, Home Secretary, House of Commons, July 20th, 1910.

[9] U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), at 3.

[10] Henry David Thoreau, Walden (1854), J. Lyndon Shanley ed., (1971 edition), at 31.

out by decade in U.S. prisons and jails since the 1960s. The last bar in the figure projects the number of person-years that will be served across the decade 2010-2019, on the assumption that nationwide incarceration rates will hold stable at 2009 levels. It forecasts that 2010-2019 will be among the most punitive decades in U.S. history—or *the* most punitive—unless



incarceration populations were to fall into significant decline.

Sources: U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Adults on Probation, in Jail or Prison, and on Parole, United States, 1980-2009 (2011), table 6.1.2009; Margaret Werner Cahalan, U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Corrections Statistics in the United States, 1850-1984 (1986), table 4-l.

These aggregate numbers are produced by local practices. There is no American sentencing system as such; rather, there are 51 separate jurisdictions that differ widely in their approaches to crime and punishment. At the end of 2009, for example, state prison rates varied across the United States from a high in Louisiana of 881 per 100,000 general population to a low in Maine of 150 per 100,000.[11]

It is not the Institute's role to declare what each state's imprisonment rate should be, or to say that it may be never be more than *X* amount. What the Institute does advocate is that prison policy be made through rational decisionmaking processes at the systemic and case-specific levels, and that intelligent use be made of available criminological knowledge.

[11] U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), app. table 9.

Empirical research can work powerful effects on criminal-justice policy, yet it has been consulted unevenly in the past several decades. In the 1970s, rehabilitation-based corrections policies were heavily damaged when researchers found that most programs had few positive effects on their participants.[12] In the ensuing decades, new scrutiny has been focused on rehabilitative programming, and advocates of "evidence-based" sentencing have argued that credible proof of success should be required before criminal-justice systems invest in such interventions.[13] We now have a growing body of hard-won knowledge about "what works" in offender rehabilitation—but also a chastened perspective of how difficult these gains are to achieve.[14]

In contrast, with respect to the use of the prison sanction, there have been few calls for rigorous testing. For example, we have embarrassingly little knowledge on the question of whether prison stays reduce or increase offenders' propensities to reoffend after release.[15] Also, there have been few serious efforts to audit standing prison populations to determine whether all inmates would in fact pose meaningful dangers to public safety if released. One study of the New York, Arizona, and New Mexico prison systems found that "it appears that the value of incarcerating the least 'costly' half of inmates (least costly in terms of the social-costs of their offenses) is quite low," and that the confinement of persons guilty of only drug

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[12] See Robert Martinson, What Works? Questions and Answers About Prison Reform, 35 The Public Interest 22 (1974); Lee Sechrest, Susan O.White, and Elizabeth D. Brown eds., The Rehabilitation of Criminal Offenders: Problems and Prospects (National Academy of Sciences, 1979).

[13] See Lawrence W. Sherman, Denise Gottfredson, Doris MacKenzie, John Eck, Paul Reuter, and Shawn Bushway, Preventing Crime: What Works, What Doesn't , What's Promising (U.S. Dept. of Justice, National Institute of Corrections, 1997).

[14] See generally Francis T. Cullen and Cheryl Lero Jonson, Rehabilitation and Treatment Programs, in James Q. Wilson and Joan Petersilia eds., Crime and Public Policy (2011); Mark W. Lipsey and Francis T. Cullen, The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews, 3 Annual Rev. of Law and Social Science 297 (2007); Gerard G. Gaes, Timothy J. Flanagan, Laurence I. Moriuk, and Lynn Stewart, Adult Correctional Treatment, in Michael Tonry and Joan Petersilia eds., Crime and Justice: A Review of Research, vol. 26 (1999).

[15] See Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Jonson, Imprisonment and Reoffending, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 38 (2009). The authors summarized their findings as follows:

> Remarkably little is known about the effects of imprisonment on reoffending. The existing research is limited in size, in quality, in its insights into why a prison term might be criminogenic or preventative, and in its capacity to explain why imprisonment might have differential effects depending on offenders' personal and social characteristics. Compared with noncustodial sanctions, incarceration appears to have a null or mildly criminogenic effect on future criminal behavior. This conclusion is not sufficiently firm to guide policy generally, though it casts doubt on claims that imprisonment has strong specific deterrent effects.

crimes was almost never cost effective.[16] Over the past 40 years, the nation's prison populations have been allowed to mushroom with shallow empirical justification.

The revised Code insists upon a more deliberative process at every stage of the complex sentencing system, in the faith that a better superstructure for decisionmaking will produce greater utilitarian benefits overall, and fewer injustices in individual cases. Throughout the recommendations of this Tentative Draft, specific and enforceable mechanisms are set out to ensure that disproportionate punishments may not be dispensed, and that the utilitarian engines of prison sentences must have reasonable groundings in fact—and not in hopeful conjecture. While the Institute has no target number of persons who should be incarcerated across the United States, it is confident that a sensible prioritization of use of incarceration will result in a significantly smaller national prison population, and that few law-reform goals of the early 21st century are more worthy of effort.

* * * * * * *

[16] Anne Morrison Piehl, Bert Useem, and John DiIulio, Jr., Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States (Manhattan Institute, 1999), at 12-13. The authors noted that:

> All three states imprison large numbers of drug-only offenders. The main effect of imprisoning drug sellers, we believe, is merely to open the market for another seller. Numerous students of drug policy attest to the existence of this "replacement process."

PART I. GENERAL PROVISIONS

***

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

§ 6.01. Grading of Felonies and Misdemeanors.

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

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree;

(d) felonies of the fourth degree;

(e) felonies of the fifth degree.

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

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

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

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

(a) misdemeanors; and

(b) petty misdemeanors.

Comment:

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

The use of bracketed language in subsection (1) is intended to convey a similar message of flexibility, due to the absence of clear policy imperatives that would help determine the precise number of felony grades a legislature should select. Further, the revised Code is meant

to provide workable sentencing provisions for many different substantive criminal codes. No matter how many felony classifications a state has chosen to create, the Code's new Articles may be fitted to that state's grading framework. The bracketed language also allows the revised Code to dovetail with the original Code, through substitution of three felony grades instead of five. In this variation, the provision would interlock with the offense-by-offense grading assignments in Part II of the 1962 Code.

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

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

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

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

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

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

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

10

11 **REPORTER'S NOTE**

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

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

21 A minority of states with general grading schemes partition the bulk of felonies into three degrees, although
22 nearly all of these states add further grading levels for the most serious offenses. See, e.g., Ala. Code § 13A-5-3;
23 Alaska Stat. § 11.81.250 (3 levels of felonies; offenses falling outside the three-tier grading scheme include
24 "murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the
25 first degree, conspiracy to commit murder in the first degree, murder of an unborn child, sexual assault in the
26 first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first
27 degree, and kidnapping"); Fla. Stat. § 775.081 (3 degrees plus "life felonies" and "capital felonies"); Haw. Stat.
28 § 701-107 (3 degrees plus 4 penalty levels for grades of murder and attempted murder); N.H. Rev. Stat. § 625:9
29 (2 classes of felonies plus murder); Or. Rev. Stat. § 161.535 (3 degrees plus murder); 18 Pa. Cons. Stat. § 106 (3
30 degrees plus 3 degrees of murder); Utah Code § 76-3-103 (3 degrees plus capital felonies); Wash. Rev. Code
31 § 9A.20.010.

32 Most states have created more than three degrees of felony offenses. See, e.g., Ariz. Rev. Stat. § 13-601 (6
33 degrees); Ark. Code § 5-1-106 (5 degrees); Colo. Rev. Stat. § 18-1-104 (6 degrees); Conn. Gen. Stat. § 53a-25 (4
34 degrees plus "capital felonies"); 11 Del. Code § 4201 (7 degrees); Ill. Stat. c. 730 § 5/5-5-1 (5 degrees plus
35 "murder one"); Ind. Code §§ 35-50-2-3 through 35-50-2-7 (4 degrees plus "murder"); Iowa Code § 701.7 (4
36 degrees); Kan. Stat. § 21-4704; Kansas Sentencing Comm'n, Kansas Sentencing Guidelines: Desk Reference
37 Manual, Appendix G (10 statutory severity levels under sentencing guidelines for "nondrug" offenses; 4
38 statutory severity levels for drug offenses; all exclusive of capital crimes); Ky. Rev. Stat.
39 § 532.010 (4 degrees plus "capital felonies"); Me. Rev. Stat. 17 § 4 (5 degrees plus "murder"); Mo. Rev. Stat.
40 § 557.016 (4 degrees plus capital murder); Neb. Rev. Stat. § 28-105 (9 degrees); Nev. Rev. Stat. §§ 193.120 &
41 193.130 (5 degrees); N.J. Rev. Stat. §§ 2C:1-4 & 2C:43-1 (4 degrees not including capital crimes); N.M. Stat.
42 §§ 30-1-5 & 30-1-7 (4 degrees plus "capital felonies"); N.Y. Penal Law §§ 55.05 & 55.10 (6 degrees); N.C. Gen.
43 Stat. § 164-41 (10 degrees as classified under sentencing guidelines); N.D. Code § 12.1-32-01 (4 degrees); Oh.
44 Rev. Code § 2901.02 (5 degrees plus "murder"); S.C. Code § 16-1-10 (6 degrees exclusive of capital cases); S.D.
45 Codified Laws § 22-6-1 (9 degrees); Tenn. Code Ann. § 40-35-110 (5 degrees); Tex. Penal Code § 12.04 (4
46 degrees plus capital felonies); Va. Code § 18.2-9 (6 degrees exclusive of capital offenses); Wis. Stat. § 939.50 (9
47 degrees).

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

ORIGINAL PROVISION

§ 6.01. Degrees of Felonies.

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

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree.

A felony is of the first or second degree when it is so designated by the Code. A crime declared to be a felony, without specification of degree, is of the third degree.

(2) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code shall constitute, for the purpose of sentence, a felony of the third degree.

[*End of original provision*]

———————————

§ 6.06. Sentence of Imprisonment.

(1) A person who has been convicted of a felony may be sentenced by the court, subject to Articles 6B and 7, to a prison term within the following maximum authorized terms:

(a) in the case of a felony of the first degree, the prison term shall not exceed life imprisonment;

(b) in the case of a felony of the second degree, the prison term shall not exceed [20] years;

(c) in the case of a felony of the third degree, the prison term shall not exceed [10] years;

1 **(d) in the case of a felony of the fourth degree, the prison term shall not exceed**
2 **[five] years;**

3 **(e) in the case of a felony of the fifth degree, the prison term shall not exceed**
4 **[three] years.**

5 [*The number and gradations of maximum authorized prison terms will depend on the*
6 *number of felony grades created in § 6.01*.]

7 **(2) A person who has been convicted of a misdemeanor or petty misdemeanor**
8 **may be sentenced by the court, subject to Articles 6B and 7, to a prison term within the**
9 **following maximum authorized terms:**

10 **(a) in the case of misdemeanor, the prison term shall not exceed [one year];**

11 **(b) in the case of petty misdemeanor, the prison term shall not exceed [six**
12 **months].**

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

15 **(4) Offenders sentenced to a term of imprisonment shall be released after serving**
16 **the prison term imposed by the sentencing court reduced by credits for time served and**
17 **good behavior as provided in §§ 6.06A and 305.1, unless sentence is modified under**
18 **§§ 305.6 and 305.7.**

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

22

23 **Comment:**

24 *a. Scope.* Subsection (1) is a revision of § 6.06 of the 1962 Model Penal Code, which
25 originally was presented in two alternative forms, and interlocked with § 6.08 (misdemeanor
26 penalties) and §§ 6.07 and 6.09 (providing "extended terms" for felonies and misdemeanors
27 under certain circumstances). See Original Provisions (below); Appendix A, Proposed
28 Deletions of Provisions (this draft). The amended § 6.06 is reworked both to establish the
29 determinate sentencing structure of the revised Code, and to fit within such a system.

30 The original version of § 6.06 was designed for an indeterminate system, in which parole
31 boards and corrections officials held the lion's share of discretion to determine the lengths of
32 prison terms. Trial courts were empowered only to set broad limits upon the discretionary
33 decisions of those later-in-time actors, expressed in widely-separated "minimum" and
34 "maximum" terms for each prisoner. Much of the complexity, and the need for alternative
35 mechanisms, in original §§ 6.06, 6.08, and 6.09 stemmed from the effort to define and

coordinate the operation of both minimum and maximum penalties in specific classes of cases. Under the original Code, a judicially pronounced prison sentence was "indeterminate" or "indefinite" in the sense that it bore no predictable relation to the time that would actually be served by the defendant. The revised provision creates a much different framework. In most prison cases under the new Code, sentencing courts will impose "determinate" sentences that are closely and predictably related to actual confinement terms.

Subsection (2), on the subject of misdemeanor penalties, revises § 6.08 of the 1962 Code, and consolidates it as part of § 6.06.

Subsection (3) is a new provision based on the Institute's longstanding position—joined by two Presidential crime commissions, the American Bar Association, the Federal Judicial Conference, and the United States Sentencing Commission—that no mandatory-minimum prison sentence should be enacted for any offense. For the first time, this policy is voiced in express statutory language. In the original Code, the Institute's strong objection to such laws was implicit in the absence of any required minimum penalty throughout the black-letter provisions cataloguing authorized punishments. Blanket disapproval was stated affirmatively in an Official Comment, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-127.

With the passage of 50 years since the original Code, there are good reasons for the Institute to take a more aggressive posture in the articulation of its blanket policy on mandatory-minimum penalties—and to augment that policy in separate, more targeted, provisions throughout the revised Code. Since 1962, authorized mandatory minimums have proliferated in every American jurisdiction, with few exceptions, and contributed to the enormous growth in the nation's prison populations in the late 20th and early 21st centuries. During this time, concerns over the role of prosecutors in the sentencing process have greatly intensified—and there is no department of the criminal law more damaging to judicial sentencing discretion, or more egregious in its bald transfer of sentencing power to prosecutors, than the mandatory-minimum penalty.

During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and the society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitative objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more than those in leadership roles, provoke nullification of the law

1 by lawyers, judges, and jurors, and engender public perceptions in some communities that the
2 criminal law lacks moral legitimacy.

3 Despite the amassed evidence, this remains an area of law in which knowledge and
4 experience have had little impact on the lawmaking process. Privately, many legislators and
5 other elected officials confide that the short-term political rewards associated with the
6 enactment of new mandatory penalties, and the high perceived costs of opposing such
7 penalties, make it difficult to act on their personal views that such laws are ineffective,
8 wasteful, and needlessly severe. With nearly two decades of dropping crime rates, however,
9 the political milieu may be changing. In recent years, some state legislatures have trimmed the
10 scope of their mandatory-penalty laws—almost always in response to circumstances of
11 budgetary emergency. Most of these actions must be characterized as incremental, not
12 sweeping in scope, but they supply evidence that a retreat from mandatory sentencing policies
13 is politically possible when broader costs and benefits are taken clearly in view.

14 The revised Code attacks the institution of mandatory-minimum sentences in the
15 broadest terms, and also in numerous targeted provisions. For the first time, the issue is
16 addressed expressly in black-letter statutory language. Subsection (3) stops short of a
17 "constitution-like" command that vainly forbids the future enactment of mandatory-minimum
18 penalties. The Code is not a model constitution, and none of its provisions can have binding
19 effect on future legislative action. Even so, the revised Code offers a forceful declaration of
20 policy in the present tense. It states categorically that a sentencing court "is not required to
21 impose a minimum term of imprisonment for any offense under this Code." In jurisdictions
22 that have enacted mandatory penalties, subsection (3) makes clear that the intent of the
23 legislature is to supersede all such preexisting laws. As with all of the Code's
24 recommendations, the desirability of the rule in subsection (3) is meant to project forward in
25 time. While the provision cannot legally foreclose future legislation, and the adoption of
26 mandatory penalties in contravention of its terms, it embodies a policy that is meant to be of
27 lasting persuasive value.

28 The Institute recognizes that no criminal code in any U.S. jurisdiction is in conformity
29 with the categorical prescription of subsection (3). Even in the best of scenarios, it could be
30 many years before mandatory penalties are eradicated from the nation's criminal laws. To
31 address this reality, the Code includes an array of new provisions, dispersed throughout the
32 sentencing articles, that are intended to mute or bypass the effects of mandatory-minimum
33 sentences in particularized settings. See Comment *c* (below); § 6.11A(f) (this draft);
34 § 6B.03(6) (Tentative Draft No. 1, 2007); § 6B.09(3) (this draft); § 7.XX(3)(b) (Tentative
35 Draft No. 1, 2007); § 7.ZZ(6)(b) (id.) (provision not yet approved; submitted for information
36 purposes only); § 305.1(3) (this draft); § 305.6(5) (this draft); § 305.7(8) (this draft).
37 Additional measures of this kind will almost certainly be included in future drafting cycles of
38 the revised Code. For legislatures that choose not to repeal their mandatory-penalty laws

immediately or en masse, these targeted provisions offer intermediate steps that can effect significant incremental improvements.

Subsections (4) and (5) are new provisions that express the Institute's preference for a determinate sentencing system over a system in which parole boards hold substantial authority to set actual lengths of prison terms. The new Code's recommendation of removal of parole *release* discretion casts no doubt on the desirability of postrelease *supervision* programs for releasees. On the contrary, the Code advocates the infusion of increased resources into postrelease or "reentry" programming, and has identified the "reintegration of offenders into the law-abiding community" as a central purpose of the sentencing system, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007). Determinacy is not at war with these goals; some corrections experts have even suggested that planning for post-incarceration services is made easier when prisoners' release dates are foreseeable long in advance.

The elimination of parole-release authority is a fundamental decision about the design and operation of a sentencing system as a whole. For prison cases, it represents a major reapportionment of sentencing discretion from the parole board to sentencing courts. To a large degree, the policy choice turns on analysis of the relative competencies of these two decisionmakers to fix the severity of prison sanctions.

The Institute's recommendation on this question follows extensive study and debate. Much relevant background information is contained in Appendix B, Reporter's Study: The Question of Parole-Release Authority (this draft). The principle reasons for favoring a determinate rather than an indeterminate structure may be summarized as follows:

(1) A parole board is more poorly positioned than a sentencing court to determine proportionate lengths of prison terms in specific cases in light of offense gravity, harm to victims, or offender blameworthiness. Judicial determinations of proportionality, especially when aided by sentencing guidelines and subject to appellate review, should not be supplanted by a parole board's different view.

(2) There is no credible evidence that a parole board can better effectuate the utilitarian goals of the sentencing system than a sentencing court. In particular, there is no persuasive evidence that parole boards can separate those inmates who have been rehabilitated from those who have not. Likewise, there is no persuasive evidence that parole boards can assess the risk of future offending in individual cases with any greater accuracy than sentencing courts on the day of original sentencing.

(3) The procedural protections available to prisoners in the parole-release context are unacceptably poor when compared to those attending the judicial sentencing process. The parole process lacks transparency, employs no enforceable decision rules, often generates little or no record of proceedings,

1 generally requires only that boilerplate reasons—or none at all—be given for
2 decisions, includes no guarantee of appointed counsel, and provides no
3 meaningful prospect of appeal. Even if all else were equal, considerations of
4 fairness and regularity would favor the placement of decisionmaking authority
5 in the courts.

6 (4) Research, historical inquiry, and the firsthand experience of
7 participants in the drafting process support the judgment that parole boards,
8 when acting as prison-release authorities, are failed institutions. During the
9 drafting of the revised Code, no one has documented an example in
10 contemporary practice, or from any historical era, of a parole-release system
11 that has performed reasonably well in discharging its goals, and would provide
12 a salutary real-world basis for model legislation.

13 (5) In the last three decades, parole boards have shown themselves to be
14 highly susceptible to political pressure. There are many instances in which the
15 parole-release policy of a jurisdiction has changed overnight in response to a
16 single high-profile crime.

17 (6) Parole-release discretion cannot be sponsored as an ostensible check
18 on prison population growth. Over the past 30 years, the leading prison-growth
19 states in the United States have been those operating with indeterminate
20 sentencing systems. In contrast, two-thirds of the states that have adopted
21 determinate structures have experienced below-average prison growth when
22 compared with other states. Every state that has operated with sentencing
23 guidelines, while also eliminating the release authority of the parole board (the
24 proposed sentencing structure of the revised Code), has experienced below-
25 average prison growth.

26 Although there are fundamental differences between sentencing systems with and
27 without parole-release mechanisms, no sentencing structure can be absolutely determinate.
28 All existing American sentencing systems, even those that have long ago eliminated parole
29 release, make room for a number of later-in-time official decisions—some of them after
30 judicial imposition of sentence—that may alter the durations of prison stays. Subsection (4)
31 cross-references the most important of these in the revised Code: § 6.06A ("Credit for Time
32 of Detention Prior to Sentence") (slated for future drafting), § 305.1 ("Reductions of Prison
33 Terms for Good Behavior") (this draft), § 305.6 ("Modification of Long-Term Prison
34 Sentences; Principles for Legislation") (this draft), and § 305.7 ("Modification of Prison
35 Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family
36 Circumstances, or Other Compelling Reasons") (this draft). As explained later in this draft,
37 however, provisions of this kind must be framed carefully. It is important that they be crafted

1 to advance their underlying purposes without upsetting the Code's preference for a
2 determinate system in which judges are the primary sentencing authorities.

3 *b. Maximum authorized terms for felony offenses.* The revised Code does not offer exact
4 guidance on the maximum prison terms that should be attached to different grades of felony
5 offenses. Instead, maximum authorized terms are stated in brackets. In part this is because the
6 Code is agnostic as to the number of felony grades that should exist in a criminal code, see
7 § 6.01(1) and Comments *a* through *c* (this draft). Maximum penalties necessarily will be
8 arranged in finer increments if a code creates ten levels of felony offenses, for instance, rather
9 than five.

10 Further, the revised Code for the most part draws short of recommendations concerning
11 the severity of sanctions that ought to attend particular crimes. These are fundamental policy
12 questions that must be confronted by responsible officials within each state. They are also
13 questions with answers that change over time. The development of new rehabilitative
14 treatment programs for an identifiable group of offenders, for example, may change the
15 sentencing outcomes thought most appropriate for that group. Community values about
16 discrete forms of criminality are also constantly evolving. Acquaintance rape and marital
17 rape, as one illustration, are offenses regarded as much more serious today than 40 years ago.
18 Some behaviors commonly criminalized in American codes in the mid-20th century, even at
19 the felony level (and even in the original Model Penal Code), are no longer criminal offenses
20 at all. The revised Code would impeach its own credibility were it to pretend Olympian
21 knowledge of condign punishments.

22 Instead, the Code confronts problems of prison-sentence severity through numerous other
23 means, including the adoption of a sound institutional structure for the creation and
24 application of rational sentencing policies, with a judiciary statutorily empowered at both the
25 trial and appellate levels to combat disproportionality in punishment. On this subject, much
26 weight is borne by other Sections of the Code. In the 1962 Code, the statutory ceilings in
27 § 6.06 were the sole enforceable limitations upon sentence severity for the majority of prison
28 cases. Under the revised Code's sentencing system, severity is regulated primarily through
29 sentencing guidelines, the courts' departure power under guidelines, meaningful appellate
30 sentence review, and invigorated statutory mechanisms (beyond the historically weak
31 constitutional protections under the Eighth Amendment) for subconstitutional proportionality
32 review of excessively harsh penalties.

33 (1) *Most severe available penalty.* Even given § 6.06's open-textured approach, it is
34 possible to bring sharp focus to questions of statutory maximum penalties in three locations of
35 the grading scheme: for the most serious of all offenses, for the grade of felonies immediately
36 below the most serious class, and for the least serious felony classification. All jurisdictions
37 face comparable questions of law and policy in establishing these benchmarks.

The most severe authorized penalty in a criminal-punishment scheme (the "absolute maximum") does much to define the scaling of penalties beneath it. It is an anchor point that marks the sentence to be meted out for the most serious of offenses, committed under the least mitigated circumstances. For somewhat less serious crimes, the law's "penultimate" maximum sentence is chosen with the absolute maximum penalty as one reference point. Arguably, the entire scale of authorized sanctions has some tendency to be stretched upward, or compressed downward, depending on where the absolute maximum is located.

The question of the absolute maximum sentence is especially pressing in this country, and was the subject of extensive debate during preparation of the revised Code. Compared with other Western democracies, the United States employs harsher penalties at the upper tier of the punishment scale, and dispenses sanctions from the upper tier more often. In most U.S. jurisdictions, the absolute maximum sentence remains the death penalty, which has been abolished throughout Western Europe and all British Commonwealth nations. In our country, fierce controversy has long surrounded the issue, has distracted attention from the formulation of a coherent prison policy, and has contributed to the over-severity of prison sentences.

The Model Penal Code itself has had a complex relationship to the death penalty—both in its 1962 and present-day iterations. The original Code took no position on the abolition or retention of capital punishment, but included detailed statutory recommendations addressed to states that chose to retain the penalty, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.6 (1980). This provision was influential in state legislatures, and helped some states devise capital-punishment laws that survived the constitutional challenges of the 1970s. In part because of this history, the Institute undertook a reexamination of its policy in the 2000s. The results of that process are easily summarized: The new Code will contain no death penalty, and the capital-punishment provision in the 1962 Code has been formally withdrawn by the Institute. See Message from ALI Director Lance Liebman (October 23, 2009) (reporting adoption of resolution that "the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."); see also Report to the ALI Concerning Capital Punishment: Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law) (2008), reprinted in Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (2009).

In light of these developments, it might appear that the revised § 6.06 speaks only to death-penalty-abolition states. That is not the case. The provision is addressed to all American jurisdictions on the premise that the policy questions surrounding maximum prison sentences are largely similar in death-penalty and non-death-penalty states. Put differently, death-penalty states should resist the pressure to distend their full-punishment scale toward greater severity because of the presence of a capital-sentencing provision, while non-death-penalty

states cannot wholly ignore the existence of capital punishment when defining their subcapital-penalty scales. The Institute recognizes that its decision to excise the death penalty from the Model Penal Code does not remove it from policy debate.

The equivalencies between capital and noncapital systems run in two directions. In a majority of death-penalty jurisdictions, the penalty is rarely or never used. In all but a handful of American states, nearly 100 percent of convicted offenders receive sentences from the continuum of subcapital-sentencing options. Without denying the great symbolic and ethical significance of capital punishment, the actual operation of American criminal-justice systems, with only a few exceptions, is effectively the same across the death-penalty divide: Long prison sentences are the most severe sanctions actually used. There is a further and more subtle similarity: Non-death-penalty states make criminal-justice policy in the shadow of the constitutional availability of capital punishment, and the prospect of its future enactment. Legislative sentencing discretion extends to the death penalty even if the state's current statutory law does not—and this sometimes influences debate over the subcapital-sentencing scale. Section 6.06 has been framed to take account of the death penalty's continuing presence in American law, and its direct and indirect effects on prison policy.

(2) *Life sentences.* With one narrow exception, the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner's natural death. In a departure from the Institute's previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release—the equivalent of "life without parole" in some systems—but only when this sanction is the sole alternative to a death sentence. It is thus fair to say that the absolute maximum penalty under the Code, for the overwhelming majority of cases, even at the highest reaches of offense seriousness, is an "ordinary" life prison term—one with the prospect of release—yet this ceiling may occasionally be raised to respond to the unique realities of capital punishment in American law.

Subsection (1)(a) states that, "in the case of a felony of the first degree, the prison term shall not exceed life imprisonment." In the normal course, all life sentences imposed under this Section will be reconsidered at a much later date. Subsection (4) allows for reduction of this maximum term under either § 305.6 or § 305.7 (both in this draft). Section 305.6 creates a sentence-modification power, to be exercised by a judicial panel or other judicial decisionmaker, for prison sentences that result in time served of more than 15 years, including life sentences under subsection (1)(a). Section 305.7 responds to exceptional circumstances, including the prisoner's advanced age or physical or mental infirmity, exigent family circumstances, or other compelling reasons that justify a modified penalty in light of the purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007). These are meaningful, but not remarkably generous, release provisions. Taking both sentence-modification mechanisms

into account, the prospects of freedom for prisoners serving life sentences under subsection (1) are significantly reduced from those under the original Model Penal Code.

For jurisdictions with no death penalty, the absolute maximum sentence in the 1962 Code was an indeterminate life sentence, with the actual length of term left largely to the discretion of the parole board. Under original § 6.06(1), Alternative § 6.06(1), and § 6.07(1), an offender sentenced to a maximum of life imprisonment would become parole eligible after serving a minimum term never longer than 10 years—and as short as 1 year. Moreover, the original Code included a presumption in favor of release at first eligibility. See 1962 Code § 305.9(1) ("Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release," unless the Board "is of the opinion" that one of four enumerated factors is present and justifies deferral of the prisoner's release). There were no exceptions to this highly indeterminate approach. Even in capital cases, the 1962 Code rejected the "flat life" sentence as an alternative to the death penalty.

The original Code's view that the absolute maximum prison sentence should be an indeterminate life term has not had lasting influence. Short of the death penalty, in nearly every American jurisdiction in the early 21st century, a life term of imprisonment *without the possibility of release* is now the most severe punishment authorized in the criminal code. Varying terminology has been used to denote a "natural life," "true life," or "whole life" sentence. "Life without parole," abbreviated as "LWOP," is the most popular usage in the United States—even in jurisdictions that have discontinued parole release as a regular feature of their criminal-justice systems. Unlike the death penalty, LWOP has come to be frequently employed. Nationwide, the number of prisoners serving natural-life sentences was vanishingly small through the 1960s, but the use of the sanction began to lift in the mid-1970s and has grown dramatically ever since. In 2009 more than 41,000 persons nationwide were serving LWOP sentences. In some states, they currently make up more than five percent of the total prison populations.

The increasing use of whole-life sentences in this country has been driven largely by their role in the death-penalty debate. In many jurisdictions, life without parole serves as the chief alternative to capital punishment for the most aggravated homicides. As a matter of statutory law, sentencing juries in most capital-punishment jurisdictions are instructed whenever life without parole is an alternative to a death sentence in the case before them, and such an instruction is often constitutionally required. In states without capital punishment, legislative authorization of natural-life sentences is sometimes thought essential to public acceptance of a system with no death penalty. In opinion surveys over the past 15 years, public support for capital punishment has been shown to drop markedly when survey respondents are told that life without parole may be substituted for execution. Thus, the political momentum of proposed death-penalty legislation may be offset if the credible alternative of a whole-life tariff is brought forward.

The Institute's new position has been forged with reluctance. Viewed as an independent policy question, that is, if capital punishment were not part of the nation's legal landscape, the Institute would not endorse penalties of life imprisonment with no chance of release. Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time—even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable. See § 305.6 and Comment *b* (this draft) (creating a process for reassessment and possible modification of exceptionally long prison sentences after a period of 15 years).

Despite these concerns, the Institute recognizes the advisability of the penalty of life imprisonment with no chance of release when it is the only alternative to the death penalty. In this circumstance, it is defensible for a legislature to authorize a life prison term that is not subject to later sentence modification under § 305.6. The Institute's position on this score should be understood as a concession to the broader landscape that includes capital sentences, not as a free-standing endorsement of natural-life prison sentences. Because of the death penalty's unmatched severity, it exerts a gravitational pull on other sanctions, both in specific cases and in the legislative process.

In states that make use of the death penalty, it is sound policy to give capital-sentencing juries the option of natural-life sentences in lieu of a death sentence, or to inform juries that the trial court will impose a penalty of life without possibility of release if they do not vote in favor of execution. Such an instruction is often constitutionally required, but is good policy apart from any constitutional mandate. In order to make the jury charge possible, a natural-life sentence must be among the authorized penalties for death-eligible offenses. The revised Code contemplates that this be done, but in the most circumscribed manner. Life without parole is not included in the general framework of statutory maximum penalties in § 6.06, and would not exist under the strictures of subsections (1) and (4). When appropriate under the principles discussed in this Comment, the sanction should be attached to specific crimes, or especially aggravated instances of those crimes, that are defined elsewhere in the Code. The present Code revision countenances but does not attempt that task.

In states without capital punishment, the death penalty's gravitational pull stems from the prospect that it *could be* enacted into law. So long as the death penalty is constitutionally permissible, and within reach of majoritarian support, legislators may at times be faced with only two politically viable options: enactment of a new death-penalty provision or the substitution of life without parole. In such instances, the Institute views the natural-life sentence as a justified policy choice. Once again, however, the LWOP penalty should be adopted only for discrete offenses, or subdivisions of those offenses, and should not be normalized as a part of the general felony-punishment scale.

1 It is important to emphasize that the Institute does not approve of the "creep" of life
2 sentences without parole to offenses beyond those that would otherwise be eligible for the
3 death penalty. Whole-life sentences are justified only for offenses of sufficient gravity that the
4 federal and state constitutions would allow the imposition of capital punishment, and only for
5 offenders who could, consistent with constitutional law, be recipients of death sentences.
6 Application of this principle requires reference to the evolving jurisprudence of the Eighth
7 Amendment, the Due Process Clause, and other relevant provisions under the U.S. and state
8 constitutions. Federal constitutional law, for example, has never upheld the use of the death
9 penalty for crimes other than murder, has struck down its use for offenses as serious as the
10 rape of a child, and holds that capital sentences may not be imposed when the defendant is
11 mentally retarded or was under 18 at the time of the offense. Over time, these constitutional
12 rules of exclusion have changed, and have generally broadened in scope.

13 In addition to limitations by substantive offense and the personal characteristics of the
14 offender, the death penalty is constitutionally allowable only after adequate procedures have
15 been followed in the individual case to insure that the sentencing jury's discretion has been
16 guided, yet not unduly restricted, on the question of ultimate punishment. For example, the
17 Eighth Amendment forbids the imposition of capital punishment for all first-degree murders,
18 and requires that procedures exist to allow sentencing juries to select especially aggravated
19 cases in which to dispense a death sentence. The U.S. Supreme Court has upheld only death-
20 penalty schemes that bifurcate trial proceedings into guilt and penalty phases, with
21 aggravating facts at the penalty phase to be proven beyond a reasonable doubt. While these
22 rulings have not been extended to subcapital cases, state legislatures should consider the
23 adoption of comparable procedural protections before LWOP penalties may be imposed.

24 Outside the small category of death-penalty-eligible crimes, the absolute maximum
25 penalty prescribed in the new Code is a life sentence *with* the possibility of release, or an
26 "ordinary" life term. The most important release mechanism for offenders serving such
27 penalties is the sentence-modification process created in § 305.6. This is the only release
28 provision of general application to all prisoners who have served a substantial portion of long
29 prison terms. In some instances the "compassionate release" criteria in § 305.7 may also
30 warrant a sentence reduction for life prisoners.

31 It is important to recognize that the ordinary life sentence in the Code's scheme is a
32 punishment of tremendous magnitude, and is not dramatically more lenient than an LWOP
33 sentence. In assessing the sanction's proportionality as a response to serious victimizations, in
34 both the policymaking or adjudicative settings, its true gravity should not be undervalued. It is
35 a punishment to be used with solemnity and restraint, and crime victims should not devalue its
36 retributive force. Objectively, it is a more severe form of the ordinary life sentence than exists
37 in many systems. Compared with the 1962 Code, for example, the revised Code cuts far back
38 on the realistic chances that a prisoner serving a simple life term will ever be released. Instead
39 of first-release eligibility after 1 to 10 years, with reconsideration in each successive year for

those denied, the Code now institutes a minimum term of 15 years, with recurring eligibility at intervals as long as 10 years. Further, the revised Code installs no statutory presumption of release at first eligibility, or at any point in a long prison term, and instead reposes sentence-modification discretion in a judicial authority, aided by sentencing guidelines. See § 305.6 (this draft). In short, the extant vehicles for sentence reduction in the new Code do not approach the free-ranging release discretion granted to paroling agencies in indeterminate sentencing systems. Many offenders who receive simple life prison terms under the Code will never regain their freedom.

The Institute considered a proposal to soften the force of ordinary life sentences under subsections (1)(a) and (4) through the injection of a presumption in favor of release at a very distant remove such as 25 or 35 years. The main argument in support of the suggestion was that the release provisions of §§ 305.6 and 305.7 are too limited, and are unproven in application, so there is a significant danger that many or most ordinary life terms under the revised Code will be the functional equivalent of LWOP sentences. Indeed, an illusory prospect of later sentence modification might make it all too easy to impose ordinary life terms at the front end of the sentencing process, in reliance upon back-end release practices that will never materialize. This reasoning was not found sufficient to change the broad statutory parameters of § 6.06, however. Acknowledging the full weight of the concerns expressed, they cannot be addressed with the requisite precision, in light of distinctions that arise from the facts of individual cases, in the relatively mechanical statutory provision that creates the basic superstructure for authorized prison sentences. Instead, questions of presumptive release dates for some or all offenders with life sentences—as well as others serving terms of 20 years, 30 years, or more—are reposed with the sentencing commission in the promulgation of sentence-modification guidelines under §§ 305.6(9) and 305.7(10), and in the judicial branch, which is entrusted to develop a common law of sentence modification under §§ 305.6(8) and 305.7(6)(e).

(3) *Penultimate maximum penalties.* All States with comprehensive grading schemes must fix maximum sentence severity at the "penultimate" level of felonies, one tier below those offenses justifying a life prison sentence. This problem is taken up in subsection (1)(b). Although the revised Code is intended to be adaptable to many state criminal codes, and assumes that there will be many variations in crime definitions across jurisdictions, the offenses involved will probably include the most serious forms of manslaughter, some lower degrees of murder where they exist, many classes of aggravated assaults, sexual assaults, and robberies, and the most serious of economic crimes. The question posed is what penalty should be available for the worst cases, on their individual facts, in this group. The original Code, with only three degrees of felonies, placed the penultimate maximum at 20 years under § 6.07(2), which set out the longest "extended term" prison sentence available for second-degree felonies. This same statutory ceiling is carried forward in the revised § 6.06(1)(b), albeit in bracketed language. It also reflects the legislative judgments reflected in many

contemporary criminal codes, albeit in the low range of current practice. Prison terms for single offenses in excess of 20 years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes, see § 1.02(2)(a) (Tentative Draft No. 1, 2007).

The maximum term in subsection (1)(b) is intended for use in the most extreme cases at the penultimate tier of crime seriousness. Great care should be taken by the sentencing commission when recommending punishments at this level, and by sentencing courts when considering their use in individual cases. It should be kept in mind that a 20-year sentence, when imposed in the new Code's determinate sentencing scheme, will often be a more severe penalty than the identical pronounced sentence in an indeterminate system. Under the original Code, offenders sentenced to a 20-year maximum term would be eligible for presumptive release by the parole board after no more than 4 years, assuming the usual award of good-time credits, see original §§ 6.07(2), 305.1, 305.9. In the revised Code, a 20-year sentence yields a presumptive release date after 14 years, assuming the prisoner earns all available good-time credits, see § 305.1 (this draft). The very worst among offenders may serve the full 20-year maximum in either system. Still, under a determinate scheme with sentencing guidelines, and meaningful appellate sentence review, pronounced sentences with a 20-year maximum should be imposed less frequently under the approach of the revised Code than under the 1962 Code. In the Code's new sentencing structure, judgments about which offenders are deserving of this degree of punishment are concentrated at the "front end" of the system rather than the "back end."

(4) *Least serious felonies.* There are some crimes that are seen by legislatures as deserving of the opprobrium of classification as "felonies," yet do not justify imposition of substantial incarceration terms. Sometimes new felony legislation is enacted in part for symbolic purposes, even though the conduct involved is not meaningfully distinguishable from the most serious misdemeanors. Accordingly, most American jurisdictions with comprehensive grading schemes have felt the need for at least one gradation of felony offenses subject to a maximum sentence of no more than several years. Subsection 6.06(1)(e) recommends, in brackets, a ceiling of three years for the lowest felony classification, no matter how many other gradations of felony a jurisdiction has chosen to create. The ceiling in subsection (1)(e) also serves as the default maximum sentence for unclassified felonies, see § 6.01(3) (this draft). Although the Institute is confident that the bracketed three-year ceiling is at or near its correct position, a somewhat lower maximum term would be consistent with the underlying policy of the provision.

c. Maximum authorized terms for misdemeanor offenses. While subsection (2) follows the original Code's subdivision of misdemeanor offenses into two classes, the maximum available penalties for misdemeanors and petty misdemeanors are considerably lower than those recommended in the 1962 Code. Under original § 6.09(1)(a), the maximum available penalty for a misdemeanor was three years. For a petty misdemeanor, under original § 6.09(1)(b), the maximum was two years. The maximums stated in proposed subsection (2),

albeit in brackets, follow the overwhelming practice of contemporary American jurisdictions. Only a handful of states currently authorize penalties in excess of one year of incarceration for the most serious of misdemeanor offenses.

d. Disapproval of mandatory-minimum prison sentences. The revised Code continues the "firm position of the Institute that legislatively mandated minimum sentences are unsound," as stated in the 1962 Code in an Official Comment, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-125. Subsection (3) now elevates the Institute's policy to black-letter statutory language, and states that a sentencing court "is not required to impose a minimum term of imprisonment for any offense under this Code." The subsection will have the substantive effect, in adopting jurisdictions with preexisting mandatory penalties in their criminal codes, of repealing all such provisions. Subsection (3) declares unequivocally that it "supersedes any contrary provision in the Code."

The Institute's longstanding disapproval of mandatory-minimum penalties is based on deep historical experience and an ever-enlarging research base. The drafters of the 1962 Code concluded that such provisions failed to advance their purported goals, worked injustices as applied in individual cases, and distorted the operation of the criminal-justice system. These conclusions are even more strongly supported today than they were 50 years ago.

Statutorily mandated prison terms ostensibly shift sentencing discretion from the courts to the legislature, on the theory that sentencing outcomes can be determined by legislative command without the variability of case-level decisionmaking. Even if such legislatively-directed uniformity were possible, it would be an undesirable policy goal. Throughout the revised Code, judicial discretion is viewed as the indispensable centerpiece of the criminal sentencing process see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007) (a fundamental purpose of the sentencing system is to "preserve judicial discretion to individualize sentences within a framework of law"). No legislature can envision ahead of time the particularized facts of all cases that will come before the courts. It is inherently unsound to assume that all offenses within a given category must necessarily be aggravated to the same high level of seriousness, or will be uniformly devoid of mitigating circumstances. It is equally infirm to suppose that all offenders will present identical profiles of blameworthiness, or that the harms done or risked to crime victims will in every case be equivalent. The interests of victims, and the community at large, in seeing proportionate penalties visited on criminal offenders, are frustrated by a one-size-fits-all punishment scheme.

Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and

anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.

The scope of prosecutorial sentencing power is a serious problem in American justice systems. An indispensable premise of the adversarial process is that a neutral decisionmaker will pass ultimate judgment in criminal cases, rather than one of the parties of interest. This procedural value is nowhere more basic than in the realm of sentencing. It is not necessary to romanticize the capabilities of all trial judges, or to pretend that perfect objectivity is possible for any human decisionmaker, to recognize that clear institutional and professional differences exist between the roles of judges and prosecutors. The norms and incentives of the judicial branch strive toward objectivity and the unbiased application of law. While processes for judicial selection vary widely across the nation, there is broad consensus that the qualifications for judgeship include seasoned experience and a temperament that precludes favoritism or the prejudgment of cases. Prosecutors, in contrast, are often young attorneys not long out of law school. While they have an ethical responsibility to pursue just results in individual cases, they are also combatants within an adversarial system. The incentives that prosecutors experience in daily life often push toward the obtaining of convictions and substantial punishments. Likewise, the procedural contexts for judicial and prosecutorial decisionmaking are vastly different. Whereas judicial sentencing authority is exercised in open court, structured by enforceable law, and subject to the check of appellate review, prosecutorial sentencing power is opaque, unregulated, and unreviewable.

In the preparation of the revised Code, one clear imperative has been to address, where possible, the perceived expansion in prosecutorial sentencing power that has occurred over the past several decades, and to prevent the undue enlargement of such power. See, for example, § 6A.05(3)(b) and Comment *c* (Tentative Draft No. 1, 2007); § 6B.06(6) and Comment *h* (id.); § 6B.07(4) and Reporter's Note to Comment *f* (id.); § 6B.08(1)(f) and Comment *e* (id.) (this provision submitted for informational purposes only, and not for approval); § 7.07B(6) and (7) and Comments *i* and *j* (id.). One of the most effective ways to strike a proper balance between judicial and prosecutorial power is to ensure that judges retain final discretion to set penalties in individual cases, so that judges' hands cannot be tied by the government's prior charging and bargaining decisions. See §§ 1.02(2)(b)(i) (id.); 6B.03(4) (id.); 6B.04(1) (id.); 7.XX(2) (id.). In this respect, there is no current mechanism in American law more misconceived than mandatory penalty laws. Once conviction is entered for an offense carrying a mandatory sentence, the judge has no formal authority to deviate from the minimum term—and no appellate court has freedom to hold otherwise. In many instances, other later-in-time decisionmakers in the sentencing system are likewise stripped of their customary decisional powers, such as when mandatory-penalty laws provide that offenders shall not be parolable or eligible for good-time credits. To the extent that mandatory sentencing provisions are defended for their ability to even out punishment disparities borne

of the vagaries of case-specific sentencing discretion, this is a hollow claim. Case-specific discretion is not eliminated or even reduced in its magnitude; it is merely relocated and concentrated in the office of the prosecutor.

It should be noted that steep mandatory penalties are occasionally defended as an "aid" to plea bargaining. This rationale is not always articulated openly. Whether it is the stated or covert objective of mandatory sentencing laws, however, the Institute can endorse neither the means nor the ends in question. Coercion of guilty pleas is a substantial worry in every American criminal-justice system. An intentional machinery to threaten crushing penalties in order to win jury-trial waivers is an unacceptable use of the criminal law.

When measured against the substantive purposes of the sentencing system, mandatory-minimum-penalty provisions offer few or no benefits, and manifest harms. Section 1.02(2)(a) (Tentative Draft No. 1, 2007) of the revised Code institutes a policy framework of utilitarian purposes to be effected within statutory limits of proportionality in punishment. High importance is given to the utilitarian goals of "offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community," but these objectives are never deemed sufficient to justify penalties of disproportionate severity. The determination of proportionate sentences under Code is a deontological process, not conceived as an exact science, but as an effort to identify a "range of severity" of punishments that should be allowable in particular cases without the infliction of injustice. The reference points for judgments of proportionality are set forth in the Code as: "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." See § 1.02(2)(a)(i) and (ii) (id.). Ultimately, the process is one of moral valuation, and is entrusted to multiple actors within the system, including the legislature, sentencing commission, trial courts, and appellate courts. In the revised Code's institutional structure, the judicial branch is given the statutory power to make final determinations of sentence proportionality in individual cases, and may override all other decisionmakers in the system. The statutory power of proportionality review under the Code is meant to be significantly greater than the courts' authority to declare sentences "grossly disproportionate" on constitutional grounds. See §§ 7.XX(2), (3) (Tentative Draft No. 1, 2007); 7.ZZ(6)(b) (id.) (the latter provision not yet presented for approval).

Mandatory-minimum-penalty laws are at war with the Code's tenets of proportionality in punishment. Among the cases prosecuted under an offense carrying a mandatory sentence, there will be many variations, great and small, in facts going to the anchor points of § 1.02(2)(a) (Tentative Draft No. 1, 2007), including offense gravity, the harms done or risked to victims, and the blameworthiness of the defendant. Yet—other than the prosecutor—no official in the sentencing system is permitted to respond to morally salient distinctions. The indiscriminate treatment of all cases as alike simply because they fall within the same crime

definition is a false uniformity. The result is the injustice of intra-offense disproportionality in punishment.

Mandatory penalties can also produce disproportionate—and even nonsensical—sentencing outcomes across offense types. For example, in the present federal system, the minimum prison terms mandated by Congress for some drug offenses, or offenses involving weapons possession without victim injury, can far outstrip the sentences typically imposed for more serious crimes. The problem of inter-offense disproportionality is vividly illustrated by the 2007 testimony of one U.S. District Court Judge:

> [R]ecently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison—the maximum suggested by the [U.S.] Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

The case for mandatory penalties is especially weak in a well-designed sentencing-guidelines scheme. Experience shows that greater sentence uniformity may be achieved with guidelines than with mandatory-penalty provisions, while not stripping sentencing courts of their authority to individualize sanctions in appropriate cases. The revised Code's guidelines system is carefully designed to avoid both intra- and inter-offense disproportionalities in sanctions imposed, and assumes that meaningful judicial sentencing discretion is required to realize these aspirations. The Code trusts sentencing judges both to respect guidelines presumptions in run-of-the-mill cases, and to depart from the guidelines when the circumstances of particular cases demand non-guidelines sentences. Conceived properly, judicial sentencing discretion is indispensable to the pursuit of true proportionality in punishment, measured by the diverse complexities of criminal cases in the real world, and to avoid the false uniformity of simplistically invariant punishments. Statutory mandatory penalties are not needed in a guidelines system in part because the guidelines can do a better job or, more pointedly, can succeed where mandatory sentencing provisions fail. Worse still, mandatory-minimum sentences subvert the guidelines system's goals by functioning as rigid statutory "trumps" that override the graduated policy judgments built into the guidelines structure as a whole.

A survey of the utilitarian objectives of sentencing law, see § 1.02(2)(a)(ii) (Tentative Draft No. 1), further weakens the case for mandatory-penalty laws. No one maintains that

1 mandatory sentences are directed toward the rehabilitation of offenders, their reintegration
2 into the law-abiding community, or the restoration of crime victims. And, as the drafters of
3 the original Code concluded, the use of mandatory penalties does little or nothing to further
4 goals of general deterrence or the incapacitation of dangerous criminals.

5 The overwhelming weight of criminological research suggests that the law's deterrent
6 effects can rarely be enhanced through marginal increases in the punishment severity. The
7 theory of marginal deterrence supposes that prospective offenders engage in a rational
8 analysis of the possible costs and benefits of their actions, are familiar with the penalties
9 attached to different crimes, and would be deterred by the prospect of a mandatory sentence
10 even though they would be undeterred by the felony sanctions otherwise in force. These
11 compound assumptions do not match well with the realities of most criminal behavior.
12 Indeed, for those hypothetical offenders who are fully acquainted with the criminal law and
13 rationally process its consequences, the assignment of mandatory punishments to particular
14 offenses could have the perverse effect of encouraging the commission of even more serious
15 crimes. For example, an offender who understands that his past criminal acts already subject
16 him to a long mandatory prison term may face strong temptation to intimidate or kill the
17 witnesses against him, forcibly resist arrest, or take other extreme steps to avoid the heavy
18 penalty.

19 Nor do mandatory-minimum sentences find justification on incapacitation grounds.
20 While it is true that incarcerated persons cannot commit offenses in the free community—and
21 so, in a sense, every prison sentence is 100 percent incapacitative—a successful incapacitation
22 policy requires that prisoners confined for extended terms must be persons who would have in
23 fact committed serious offenses had they been free. Sustained detention of harmless
24 individuals, apart from its heavy moral costs, is therefore a gross failure of incapacitation
25 strategy. The drafters of the original Code recognized that mandatory-penalty laws were much
26 too blunt an instrument to make individualized judgments about recidivism risk, and that
27 other, superior means could be deployed to effect such a policy. Today, the argument is even
28 stronger. While mandatory sentencing provisions remain a blunderbuss approach for selecting
29 the most dangerous offenders, actuarial-risk-assessment technology has significantly
30 improved in the last 30 years. In order to approach ethical and empirical plausibility, an
31 incapacitation program must make use of credible risk-assessment tools in support of
32 judgments about who is dangerous and who is not. Even then many mistakes are inevitable.
33 Considerations of humility and restraint, along with careful procedural safeguards, ought to be
34 in play. See § 6B.09 and Comment *e* (this draft). What is never defensible is the pursuit of a
35 selective incapacitation policy through the crude means of offense definition alone, with no
36 consideration of the relevant histories and propensities of individual defendants.

37 Finally, the case against mandatory-penalty laws includes their distorting effects upon the
38 legal system. Studies have found that such laws often result in increased trial rates and case-
39 processing times. Because they are often viewed as too harsh by actors within the system,

there are well-documented histories of the "nullification" of mandatory penalties by prosecutors, judges, and juries. The drafters of the original Code found these concerns to be substantial—and their magnitude has only grown with time. Contemporary studies of mandatory-penalty schemes in operation show widespread patterns of spotty enforcement and circumvention by courtroom actors. Judges and other observers have noted a trend of more frequent jury nullifications, especially in drug prosecutions—and there have been proposals that juries should be informed of the sentencing consequences of mandatory penalties in order to allow them to exercise their nullification power in a more knowledgeable way. These are all signals of a vastly misinformed policy.

The revised Code's approach to the subject of mandatory-minimum sentencing provisions is more forceful and comprehensive than the original Code's in two ways. First, as discussed earlier, the Institute's blanket disapproval of mandatory penalties is now given effect in express statutory language. Second, the revised Code now includes a host of targeted provisions designed to weaken the impact of mandatory penalties where they continue to exist in American criminal codes. Concededly, these are "second-best" solutions to the problem. They are recommended to state legislatures in concession to the reality that many jurisdictions will not repeal their mandatory sentencing laws in the immediate future. It may also be admitted that the targeted provisions are inconsistent, as a matter of pristine theory, with the declaration in subsection (3) that such penalties simply should not exist. If the revised Code were adopted whole cloth by a state legislature, including subsection (3), the targeted provisions would be surplusage. The adoption history of the original Code, however, teaches that state legislatures will often pick and choose among the Code's prescriptions. Taking the world of American criminal justice as it is, and as it is likely to remain for some time, the Institute concluded that it would be irresponsible to rest upon a categorical policy of condemnation of mandatory sentences, without also offering second-order recommendations for significant incremental change.

The following are examples of targeted provisions, drafted to date, that operate to mute the effects of mandatory penalties while not requiring their outright repeal:

> (1) The Code grants sentencing judges an "extraordinary departure power" to deviate from the terms of mandatory-penalty provisions. See § 7.XX(3)(b) (Tentative Draft No. 1, 2007). This resembles the courts' authority to depart from sentencing guidelines, although the legal standard for departure from a mandatory penalty is more demanding than the "substantial reasons" standard for guidelines departures. The relevant language is:
>
> > **Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the**

mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).

(2) The revised Code will create an overarching statutory power for appellate courts to overturn any sentence authorized or mandated in the criminal code on grounds of disproportionality. The statutory authority is meant to be more searching than the weak constitutional standard of "gross disproportionality" that has taken root in U.S. Supreme Court decisions. See § 7.ZZ(6)(b) (Tentative Draft No. 1, 2007) (provision included for informational purposes only, not yet approved). The proposed language to institute the power of subconstitutional proportionality review is:

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.

(3) The Code authorizes judges to deviate from a mandatory-minimum sentence in § 6B.09(3) (this draft), when an offender otherwise subject to the mandatory penalty is identified through actuarial risk assessment to pose an unusually low risk of recidivism. This subsection provides:

The [sentencing] commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

(4) The Code prohibits the sentencing commission from formulating guidelines that are based on the severity levels of mandatory-punishment statutes, and instead requires commissioners to use their own best judgment as to sentence proportionality in the guidelines. The relevant language is contained in § 6B.03(6) (Tentative Draft No. 1, 2007):

The guidelines shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission consistent with this Section.

(5) Under a new provision for the sentencing of offenders under the age of 18 at the time of their offenses, judges are not bound by otherwise applicable mandatory sentences. See § 6.11A(f) (this draft) ("The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.").

(6) Good-time credits are always to be subtracted from the minimum term of a mandated prison sentence. See § 305.1(3) (this draft) ("Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.").

(7) The new sentence-modification powers under § 305.6 (this draft) (the so-called "second-look provision," which engages after a prisoner has served 15 years) and § 305.7 (this draft) (the "compassionate release" provision for aged and infirm inmates, or for extraordinary and compelling circumstances) expressly supersede any mandatory-minimum penalty that may have been imposed at the original sentencing, see § 305.6(5) ("The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law"), § 305.7(8) ("The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law").

As of this writing, because only two Tentative Drafts in the Code revision project have been completed, it is impossible to say what additional provisions of this kind will be included in future drafting cycles. It is almost certain, however, that the list will continue to grow.

e. Elimination of parole-release authority. The most far-reaching policy choice in this Tentative Draft, expressed in subsections (4) and (5), is the recommendation that all American sentencing systems should institute "determinate" sentencing systems—defined as systems in which no parole agency holds authority to set the actual lengths of prison stays. Subsection (5) is stated in brackets because it has application only in jurisdictions that have not already eliminated the prison-release discretion of the parole board.

The recommendation in favor of a determinate sentencing structure is a major departure from the policy of the original Code, which never questioned the desirability of an indeterminate framework. In 1962, when the first Code was approved, no determinate sentencing system existed anywhere in the United States. Nationwide experimentation with these systemic reforms did not begin until the mid-1970s, and the first determinate sentencing-guidelines systems were not created until the early 1980s. In the last 30 to 35

years, an information base has built up that was wholly missing when the Institute first spoke to the question of sentencing system design.

Subsections (4) and (5) contain relatively few words, yet affect the institutional structure of the sentencing system as a whole. Their prescriptions will have profound effects on many cases, and the policymaking process itself. At the elemental level, the choice in favor of a determinate framework reflects the underlying institutional philosophy of the Code that judges should be the decisionmakers with the greatest share of power to determine criminal sentences, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007). The most important systemic consequence of subsections (4) and (5) is the reallocation of sentencing authority otherwise held by parole boards in prison cases, which is now vested in sentencing courts.

Sixteen states and the federal system have abolished the parole board's release authority, including a majority of sentencing-guidelines jurisdictions. In 1994, the American Bar Association endorsed the trend, recommending that time served in prison should be determined by sentencing judges subject to good-time reductions (all within a framework of sentencing guidelines). There is broad agreement within the Institute that American parole boards, as they now function, and as they have performed in the past, should not retain the prison-release discretion that they have historically possessed in indeterminate sentencing jurisdictions. After more than a century of demonstrated failure, it is doubtful the parole board itself can be reformed. No example has been brought to the Institute's attention of a "successful" parole-release agency—that is, one that has performed its intended functions reasonably well, that might be used as a starting point to craft model legislation. One influential consideration behind the Institute's policy is that traditional indeterminate sentencing systems have experienced more prison growth over the last 30 years than other system types, so that the states with the highest standing incarceration rates in the early 21st century are nearly all indeterminate sentencing jurisdictions.

In contrast, a number of the existing determinate sentencing systems—those that have conjoined the adoption of sentencing guidelines with the abrogation of parole release—have amassed track records of success in the implementation of desired sentencing policies, promotion of consistency in sentencing in individual cases, modest reductions in racial disparities in sentencing, inculcation of a meaningful process of appellate review, design of new information systems for monitoring actual sentencing practices, and successful development of "resource management" tools to control the growth of prison populations and other correctional populations. See Model Penal Code: Sentencing, Report (2003), at 63-125.

The considerations most important to the Institute's position in favor of a determinate sentencing system are set forth at length in Appendix B (this draft), Reporter's Study: The Question of Parole-Release Authority.

REPORTER'S NOTE

a. Scope. For discussion of the relative shares of discretion over prison terms held by sentencing courts, parole boards, and corrections officials under the indeterminate sentencing machinery recommended in the original Model Penal Code, see Model Penal Code: Sentencing, Report (2003), at 21-27. The Report calculated that, for a typical felony of the second degree governed by § 6.06, subject to a 10-year maximum, once a judge decided to impose a prison term, the legislature had already fixed 9.6 months as the minimum term, the judge had authority to add 0 to 19.2 months to that minimum, and thereafter the combined authorities of the parole board and corrections officials could add 0 to 91.2 months of time served to the minimum prison sentence pronounced by the court. Thus, in the above example, parole and corrections officials determined a share of the potential incarceration term more than four times that governed by the sentencing court; judicial sentencing discretion affected only a 16 percent segment of the possible 10-year prison term.

b. Maximum authorized terms for felony offenses.

(1) *Most severe available penalty.* On the infrequency of executions in most U.S. jurisdictions that authorize capital punishment, see Franklin E. Zimring, The Contradictions of American Capital Punishment (2003), at 6-7; U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in 2005 (2006), at 9 table 9 (reporting 1004 executions in the United States from 1977 through 2005; of the 38 death-penalty jurisdictions in America during that time, only 12 states executed more than 20 people across the entire period; 23 of 38 death-penalty jurisdictions executed fewer than 5; 10 of 38 executed no one). As of this writing, 34 states and the federal system retain the death penalty. See John Schwartz and Emma B. Fitzsimmons, Illinois Governor Signs Capital Punishment Ban, The New York Times, March 9, 2011.

(2) *Life sentences.* For the 1962 Code's rejection of the "flat life" sentence as an alternative to the death penalty, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.6, Comment 10 (1980), at 152. ("Thus, persons convicted of murder but not sentenced to death are subject to imprisonment for a maximum term of life and a minimum term of not more than ten years. This resolution reflects the judgment that supervised release after a period of confinement is altogether appropriate for some convicted murderers, even though incarceration for the prisoner's lifetime may be required in other instances.").

A sentence of life imprisonment without possibility of early release—usually termed "life without parole"—now exists in every American jurisdiction except Alaska. See Death Penalty Information Center, Life without Parole, at http://www.deathpenaltyinfo.org/life-without-parole (last visited Mar. 8, 2011) (49 states, the federal system, and the District of Columbia authorize sentences of life without parole; New Mexico adopted its LWOP law in 2009). On the infrequent use of such a penalty in the United States until recent decades, see Note, A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1840 & n.17 (2006) ("From the 1910s to the 1970s, life without parole, as we now know it, did not exist. . . . While a few states, such as Pennsylvania, did not have parole for life prisoners, there was often an unofficial parole system through gubernatorial commutations"). On the effects of the death-penalty debate on the proliferation of LWOP sentences, see Franklin E. Zimring and David Johnson, The Dark at the Top of the Stairs: Four Destructive Influences of Capital Punishment on American Criminal Justice, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011).

Since the early 1970s, the use of whole-life sentences has increased steadily and dramatically. In 1992, there were 12,453 prisoners in the United States serving sentences of life without parole. This number grew to 33,633 in 2003, and 41,095 in 2008. See U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1992 (1992), at 633 table 6.81; Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 9.

On the average duration of life sentences served in U.S. criminal-justice systems, including sentences subject to parole release, see Marc Mauer, Ryan S. King, and Malcolm C. Young, The Meaning of "Life": Long Prison Sentences in Context (Sentencing Project 2004), at 12 (reporting that prisoners admitted to life sentences in 1991 could expect to serve about 21 years; this had risen to an expected 29 years for 1997 admittees).

Elsewhere in the developed world, natural-life sentences remain rare. No such sanction exists in Canada, where the most severe criminal penalty is a life sentence with parole eligibility at 25 years. See Canada Federal Statutes, Criminal Code § 745. Many European criminal-justice systems authorize yet rarely employ such a penalty. In the United Kingdom—a nation with one-fifth the U.S. population, only 22 prisoners were serving "whole life" sentences in 2005. Per capita, the United States employs life without parole at more than 350 times the frequency as in the United Kingdom. A few nations, such as Germany, France, and Italy, have declared natural-life sentences unconstitutional. See Catherine Appleton and Brent Grover, The Pros and Cons of Life Without Parole, 47 Brit. J. Criminology 597, 603, 610 (2007). The European Court of Human Rights has taken review of the question whether lifelong imprisonment, without possibility of discretionary release, is a violation of human rights, but no decision has been handed down. See BBC, Sunday Life (archives), Lifer's Rights, www.bbc.co.uk/sundaylife/thisweek8.shtml (last visited Mar. 8, 2011) (appeal of David Bieber, convicted of murder of a British policeman); Dirk van Zyl Smit, Outlawing Irreducible Life Sentences: Europe on the Brink?, 23 Fed. Sent. Rptr. 39 (2010). In the International Criminal Court, the most severe penalty available for any crime, including war crimes and genocide, is life imprisonment reviewable by the Court after a period of 25 years. See Rome Statute of the International Criminal Court art. 111(3), July 17, 1998, 2187 U.N.T.S. 90 ("When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced.").

Arguably, a sentence of life without possibility of release is close in severity to a death sentence. See Robert Johnson and Sandra McGunigall-Smith, Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration, 88 The Prison Journal 328, 329 (2008) (arguing that "[o]ffenders sentenced to death by incarceration suffer a 'civil death.'"). Yet few checks have developed on the appropriate use of the whole-life prison term. In the early 1970s, when the constitutionality of the death penalty had been placed in doubt by Furman v. Georgia, 408 U.S. 238 (1972), a sentence of life without parole for murder survived constitutional challenge with only cursory discussion by the Court in Schick v. Reed, 419 U.S. 256, 267 (1974) (death sentence commuted to life without parole; Court held that "[t]he no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution.") (footnote omitted). Federal constitutional limits on the use of natural-life sentences based on the seriousness of the offense of conviction have not been robust. In 1991, the Supreme Court upheld a sentence of life without parole for a

1 first-time drug offender in Harmelin v. Michigan, 501 U.S. 957 (state law imposed mandatory life sentence,
2 without possibility of parole, for possession of more than 650 grams of cocaine).

3 In 2010, however, the Supreme Court upheld an Eighth Amendment challenge against the use of life
4 without parole for juvenile offenders convicted of non-homicide offenses, see Graham v. Florida, 130 S. Ct.
5 2011 (2010). The Court held that, given the exceptional severity of a natural-life sentence, surpassed only by the
6 death penalty, its use was disproportionate when applied to offenders under the age of 18 convicted of armed
7 burglary (Graham's most serious crime) or any other non-homicide offense. This was the first time the Court had
8 ever categorically struck down the use of a specific penalty other than the death penalty. While the holding in
9 *Graham* does not apply to adult offenders, the decision may represent a new stringency in the Court's
10 constitutional review of extraordinarily severe prison sentences.

11 The Supreme Court has held that, at capital sentencing proceedings when offender dangerousness is at
12 issue, the defendant has a constitutional right to a jury instruction that life without parole is an available penalty
13 if a death sentence is not imposed. Simmons v. South Carolina, 512 U.S. 154, 161 (1994). The decision supposes
14 that the state does in fact provide for such a penalty. To date, there is no constitutional rule that requires a state to
15 adopt a penalty of life without parole simply to function as an alternative to capital punishment in individual
16 cases. See generally Note, A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital
17 Punishment, 119 Harv. L. Rev. 1838, 1852 (2006); Theodore Eisenberg, Deadly Confusion: Juror Instructions In
18 Capital Cases, 79 Cornell L. Rev. 1 (1993); J. Mark Lane, "Is There Life Without Parole?": A Capital
19 Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 344 (1993).

20 (3) *Penultimate maximum penalties.* A survey of penultimate maximum prison terms in contemporary
21 American jurisdictions reveals that many states follow the original Code's recommendation to place the ceiling
22 at 20 years. A majority of states, however, have enacted higher maximum terms for this level of offense. See
23 Code of Ala. § 13A-5-6(a)(2) (20-year maximum for Class B felonies); Alaska Stat. § 12.55.125(c) (20 years for
24 most aggravated Class A felony; offenses graded above this class include homicide, sexual assault in the first
25 degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first
26 degree, and kidnapping); Ariz. Rev. Stat. § 13-604(K) (35 years for most aggravated second-degree felony); Ark.
27 Code § 5-4-401(a)(2) (30-year maximum for Class A felonies: "Class Y" is most serious felony level); Colo.
28 Rev. Stat. § 18-1.3-401(1)(a)(V), (6) (48 years for most aggravated second-degree felony); Conn. Gen. Stat.
29 § 53a-35a (25 years for most serious felony other than murder); 11 Del. Code § 4205(b)(2) (maximum of 25
30 years for Class B felonies); Fla. Stat. § 775.082(3)(b) (30-year maximum for first-degree felonies; "life felonies"
31 and "capital felonies" are eligible for more severe penalties); Haw. Stat. § 706-659 (20-year maximum for class
32 A felonies; 4 classes of homicide are eligible for more severe penalties); Ill. Stat. c. 730 § 5/5-8-1 (30-year
33 maximum for Class X felonies, one grade below first-degree murder); Ind. Code § 35-50-2-4 (50-year maximum
34 for Class A felonies, one grade below murder); Ia. Code § 902.9(2) (25-year maximum for class B felonies); Ky.
35 Rev. Stat. §§ 532.030 (capital felony); 532.060(2)(b) (20-year maximum for Class B felonies; Class A maximum
36 is life term: Capital offenses eligible for death penalty or life without parole); Me. Rev. Stat. 17-A § 1252(2)(A)
37 (30-year maximum for Class A crimes; only murder graded above this category, with a maximum life sentence);
38 Mo. Rev. Stat. § 558.011(1)(2) (15-year maximum for Class B felonies; maximum for Class A is 30 years or life
39 imprisonment; capital crimes are graded above Class A); Neb. Rev. Stat. § 28-105(1) (50-year maximum for

1 Class IC felonies; Class IB has life maximum; Class IA has life-without-parole maximum; Class I has death
2 penalty); Nev. Rev. Stat. § 193.130(2)(b) (20-year maximum for Class B felonies; maximum penalties for Class
3 A are death or life without parole); N.J. Rev. Stat. § 2C:43-6(a)(1) (20-year maximum for crimes of first degree);
4 N.M. Stat. §§ 31-18-15(A)(3) & 31-18-15.1(C) (24-year maximum for most aggravated first-degree felonies,
5 except for exceptions eligible for life imprisonment or the death penalty); N.Y. Penal Law § 70.00(2)(b) (25-year
6 maximum for Class B felonies); N.D. Code § 12.1-32-01(2) (20-year maximum for Class A felonies; maximum
7 for Class AA felonies is life without parole); Or. Rev. Stat. § 161.605(1) (20-year maximum for Class A
8 felonies; more severe penalties available for murder and aggravated murder); 18 Pa. C.S. § 1103 (20-year
9 maximum for felonies of first degree; 3 grades of murder are graded above); S.C. Code § 16-1-20(A)(1) (30-year
10 maximum for Class A felonies; punishments for murder separately graded); S.D. Codified Laws § 22-6-1(4) (50-
11 year maximum for Class 1 felonies; Classes A, B, and C, graded above, include death penalty and life prison
12 terms); Tenn. Code Ann. § 40-35-111(b)(1) (60-year maximum for Class A felonies; penalties for murder,
13 including capital punishment and life sentences, separately provided); Tex. Penal Code § 12.33(a) (20-year
14 maximum for felonies of the second degree; felonies of first degree have maximum of life imprisonment; death
15 penalty separately provided); Utah Code Ann. § 76-3-203(2) (15-year maximum for felonies of the second
16 degree; felonies of the first degree have maximum of life imprisonment; death penalty separately provided); Va.
17 Code § 18.2-10(c) (20-year maximum for Class 3 felonies: maximum for Class 2 is life imprisonment; maximum
18 for Class 1 is death); Wash. Rev. Code § 9A.20.021(b) (10-year maximum for Class B felonies; maximum for
19 Class A is life imprisonment); Wis. Stat. § 939.50(3)(b) (60-year maximum for Class B felonies; maximum for
20 Class A is life imprisonment).

21 (4) *Least serious felonies.* The penalty for the least serious gradation of felony offense varies among the
22 states with comprehensive grading schemes, but nearly all states have assigned maximum incarceration terms of
23 five years or less. See Code of Ala. § 13A-5-6(a)(3) (maximum of 10 years for least serious felony grade);
24 Alaska Stat. § 12.55.125(e) (5 years); Ariz. Rev. Stat. § 13-701(C)(5) (1 year); Ark. Code § 5-4-401(a)(5) (6
25 years); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (4)(b)(II)(6) (3 years); Conn. Gen. Stat. § 53a-35a (5 years); 11
26 Del. Code § 4205(b)(7) (2 years); Fla. Stat. § 775.082(3)(d) (5 years); Haw. Stat. § 706-660(2) (5 years); Ill. Stat.
27 c. 730 § 5/5-8-1(7) (3 years); Ind. Code § 35-50-2-7(a) (3 years); Ia. Code § 902.9(5) (5 years); Ky. Rev. Stat.
28 § 532.060(2)(d) (5 years); Me. Rev. Stat. 17-A § 1252(2)(C) (5 years for "Class C" crimes; equivalent of lowest
29 felony grade); Mo. Rev. Stat. § 558.011(1)(4) (4 years); Neb. Rev. Stat. § 28-105(1) (5 years); Nev. Rev. Stat.
30 § 193.130(2)(e) (4 years); N.H. Rev. Stat. § 625:9(III)(a)(2) (7 years); N.J. Rev. Stat. § 2C:43-6(a)(3) (5 years
31 for crimes "of the third degree"; equivalent of lowest felony grade); N.M. Stat. §§ 31-18-15(A)(10) (18 months);
32 N.Y. Penal Law § 70.00(2)(e) (4 years); N.D. Code § 12.1-32-01(4) (5 years); Or. Rev. Stat. § 161.605(3) (5
33 years); 18 Pa. C.S. § 1103(3) (7 years); S.C. Code § 16-1-20(A)(6) (5 years); S.D. Codified Laws § 22-6-1(9) (2
34 years); Tenn. Code Ann. § 40-35-111(b)(5) (6 years); Tex. Penal Code § 12.35(a) (2 years); Utah Code Ann.
35 § 76-3-203(3) (5 years); Va. Code § 18.2-10(f) (5 years); Wash. Rev. Code § 9A.20.021(c) (5 years); Wis. Stat.
36 § 939.50(3)(i) (3 years and 6 months).

37 *c. Maximum authorized terms for misdemeanor offenses.* Current criminal codes with general classification
38 schemes for misdemeanors typically place the maximum available incarceration term, for the most serious of
39 misdemeanors, at one year. See Ala. Code § 13A-5-7; Alaska Stat. § 12.55.135; Ark. Code § 5-4-401; Conn.

1 Gen. Stat. § 53a-36; 11 Del. Code § 4206; Fla. Stat. § 775.082; Haw. Stat. § 706-663; Ill. Stat. c. 730 § 5/5-8-3;
2 Ind. Code §§ 35-50-3-2 through 35-50-3-4; Iowa Code § 903.1; Ky. Rev. Stat. § 532.090; Me. Rev. Stat. 17
3 § 1252; Mo. Rev. Stat. § 558.011; Nev. Rev. Stat. §§ 193.140 & 193.150; N.H. Rev. Stat. § 651:2; N.M. Stat.
4 § 31-19-1; N.Y. Penal Law § 70.15; N.D. Code § 12.1-32-01; Or. Rev. Stat. § 161.615; S.D. Codified Laws
5 § 22-6-2; Tenn. Code Ann. § 40-35-111; Tex. Penal Code §§ 12.21 – 12.23; Utah Code § 76-3-204; Va. Code
6 § 18.2-11; Wash. Rev. Code § 9A.20.021. For the exceptions, see Ariz. Rev. Stat. § 13-707 (maximum
7 misdemeanor penalty of 6 months); Colo. Rev. Stat. § 18-1.3-501 (maximum misdemeanor penalty of 18
8 months); N.J. Rev. Stat. § 2C:43-6 (no misdemeanor category of offenses; “4th degree crimes” have maximum
9 prison term of 18 months); N.C. Gen. Stat. § 15A-1340.23 (maximum misdemeanor confinement term of 60
10 days); Oh. Rev. Code § 2929.24 (maximum jail term of 180 days); Pa. Cons. Stat. t. 18, § 1104 (maximum
11 incarceration term of 5 years for 1st-degree misdemeanors and 2 years for 2nd-degree misdemeanors); S.C. Code
12 § 16-1-20 (maximum incarceration term of 3 years for Class A misdemeanors and 2 years for Class B
13 misdemeanors); Wis. Stat. § 939.51 (maximum confinement for misdemeanors of 9 months).

14 *d. Disapproval of mandatory-minimum prison sentences.* For the 1962 Code’s position on mandatory-
15 minimum penalties, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a)
16 (1985), at 124-127 (explaining that both alternative versions of § 6.06 in original Code were “intended to
17 represent the firm position of the Institute that legislatively mandated minimum sentences are unsound”). The
18 original Code’s recommendation has been echoed by national crime commissions appointed by Presidents
19 Johnson and Nixon, the American Bar Association, the Federal Judicial Conference, the United States
20 Sentencing Commission, and numerous law-reform organizations. See President’s Commission on Law
21 Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society (1967), at 142-143;
22 National Advisory Commission on Criminal Justice Standards and Goals: Corrections (1973), at 541; American
23 Bar Association, Standards for Criminal Justice, Sentencing, Third Edition, Standard 18-3.21(b) (1994) (“[a]
24 legislature should not prescribe a minimum term of total confinement for any offense”); Judicial Conference of
25 the United States, Statement of Judge Paul G. Cassell, United States District Court, District of Utah, Before the
26 Subcommittee on Crime, Terrorism, and Homeland Security, Committee of the Judiciary, United States House
27 of Representatives, on “Mandatory Minimum Sentencing Laws—The Issues” (2007), at 34-39 (documenting that
28 “the Judicial Conference has consistently opposed mandatory minimum sentences for more than fifty years”);
29 United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the
30 Federal Criminal Justice System (1991), at iii-iv (concluding that Congressional sentencing policy is best
31 effected through a system of sentencing guidelines rather than through mandatory minimums); National Council
32 on Crime & Delinquency, Model Sentencing Act (1963), § 9. In a 1993 Gallup Poll survey, 82 percent of state
33 judges and 94 percent of federal judges disapproved of mandatory minimums, see ABA Journal, vol. 79, p. 78,
34 The Verdict Is In: Throw Out Mandatory Sentences: Introduction (1994).

35 The Comment draws on the above sources, and also the following: Eric Luna and Paul G. Cassell,
36 Mandatory Minimalism, 32 Cardozo L. Rev. 1 (2010); Michael Tonry, The Mostly Unintended Effects of
37 Mandatory Penalties: Two Centuries of Consistent Findings, in Michael Tonry ed., Crime & Justice: A Review
38 of Research, vol. 38 (2009), at 65-114; Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer,
39 Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences.” 44 J. of Rsrch. in Crime and

Delinq. 427 (2008); Anthony Kennedy, Chairman, American Bar Association Justice Kennedy Commission Report with Recommendations to the ABA House of Delegates (2004); Jack B. Weinstein, Every Day is a Good Day for a Judge to Lay Down his Professional Life for Justice, 32 Fordham Urban L.J. 131 (2004); Symposium, Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?, 18 Notre Dame J.L. Ethics & Pub. Pol'y 303 (2004); Julian V. Roberts, Public Opinion and Mandatory Sentencing: A Review of International Findings, 30 Crim. Justice and Behavior 483 (2003); Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001); David Brown, Mandatory Sentencing: A Criminological Perspective, 7 Australian J. of Human Rights 31 (2001); Nicole Crutcher, Mandatory Minimum Penalties of Imprisonment: An Historical Analysis, 44 Crim. Law Quarterly 279 (2001); Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rptr. 180 (1999); David Boerner, Sentencing Guidelines and Prosecutorial Discretion, 78 Judicature 196 (1995); Barbara S. Vincent and Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings (Federal Judicial Center, 1994); U.S. General Accounting Office, Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999–2001 (2003); Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Cal. L. Rev. 61 (1993); Robert O. Dawson, Sentencing (1969).

On marginal deterrence theory, see Anthony Doob and Cheryl Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999). On the dangers that mandatory penalties can be criminogenic of more serious crimes, see Tomislav Kovandzic, John Sloan, and Lynne Vieraitis, "Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of 'Three Strikes' in U.S. Cities (1980–1999), 1 Criminology and Public Policy 399 (2002); Thomas B. Marvell and Carlisle E. Moody, The Lethal Effects of Three Strikes Laws, 30 J. of Legal Studies 89 (2001). On the evolution of actuarial-risk-assessment tools for the prediction of offender recidivism, see § 6B.09 (this draft), Reporter's Note to Comment *a*.

e. Elimination of parole-release authority. Relevant sources are collected in Appendix B (this draft), Reporter's Study: The Question of Parole-Release Authority. For a state-by-state survey of determinate and indeterminate jurisdictions, see Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 66-67 table 3.1. For the ABA's policy recommendation in favor of a determinate sentencing structure, see American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standards 18-2.5, 18-3.21(g), and 18-4.4(c).

Existing provisions establishing determinate sentencing systems include Ariz. Rev. Stat. § 13-701(A) ("A sentence of imprisonment for a felony shall be a definite term of years . . ."); id. § 41-1406.09(I) (maintaining a system of parole "only [for] persons who commit felony offenses before January 1, 1994"); Cal. Penal Code § 2933(a) ("It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170 serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections"); Del. Code Ann. tit. 11, § 4205(a) ("A sentence of incarceration for

a felony shall be a definite sentence."); id. § 4354 ("No sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989 shall be subject to parole"); 730 Ill. Comp. Stat. § 5/3-3-3(b) ("No person sentenced under this [Act] shall be eligible for parole."); id. § 5/3-3-3(c) ("Except for those sentenced to a term of natural life imprisonment, every person sentenced to imprisonment . . . shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the mandatory supervised release provisions of paragraph (d) of Section 5-8-1 of this Code."); id. § 5/5-8-1(a) (providing that "a sentence of imprisonment for a felony shall be a determinate sentence set by the court"); Ind. Code § 35-50-6-1(a)(1) (providing for release "when a person imprisoned for a felony completes the person's fixed term of imprisonment, less the credit time the person has earned with respect to that term"); Kan. Stat. § 21-4704(e)(2) ("In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing"); id. § 21-4705(c)(2) (same); Me. Rev. Stat. § 1254 ("An imprisoned person shall be unconditionally released and discharged upon the expiration of his sentence, minus the deductions authorized under section 1253 [providing for good-time credits and credits for time served]"); Minn. Stat. § 609.11, subd. 6 ("Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law"); Miss. Code § 47-7-3(1)(g) ("No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995"; providing an exception to general parole ineligibility for "first offender[s] convicted of a nonviolent crime after January 1, 2000," who are sentenced for a year or more, have "observed the rules of the department," and have served at least one-quarter of their sentences); N.C. Gen. Stat. § 15A-1368.2(a) ("A prisoner . . . shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded"); id. § 143B-266(a) (providing that persons sentenced under the structured sentencing system . . . are not eligible for parole"); Ohio Rev. Code § 2967.021(B) (establishing that Ohio's parole, pardon, and probation provisions, revised as of July 1, 1996, "appl[y] to a person upon whom a court imposed a stated prison term for an offense committed on or after July 1, 1996"); Or. Rev. Stat. § 137.635(1) ("The convicted defendant shall serve the entire sentence imposed by the court and shall not, during the service of such a sentence, be eligible for parole or any temporary leave from custody . . . or for any reduction in sentence . . . or for any reduction in term of incarceration"); Va. Code § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."); id. § 19.2-311 (allowing for the indeterminate sentencing for a 4-year term of persons under 21 "convicted of a felony offense other than" murder or sexual assault, "considered by the judge to be capable of returning to society as a productive citizen following a reasonable amount of rehabilitation"); Wash. Rev. Code § 9.94A.728 (providing that "[n]o person serving a sentence imposed pursuant to this chapter [the Sentencing Reform Act of 1981] and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows" [allowing for sentence reductions for "earned release time"]).

ORIGINAL PROVISIONS

§ 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years.

Alternative § 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum at not more than twenty years or at life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum at not more than ten years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this Section of which the minimum is longer than one half the maximum, or, when the maximum is life imprisonment, longer than ten years.

§ 6.08. Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Ordinary Terms.

A person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the Court and

shall not exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor.

§ 6.09. Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Extended Terms.

(1) In the cases designated in Section 7.04, a person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to an extended term of imprisonment, as follows:

(a) in the case of a misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than one year and the maximum of which shall be three years;

(b) in the case of a petty misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than six months and the maximum of which shall be two years.

(2) No such sentence for an extended term shall be imposed unless:

(a) the Director of Correction has certified that there is an institution in the Department of Correction, or in a county or city [or other appropriate political subdivision of the State] that is appropriate for the detention and correctional treatment of such misdemeanants or petty misdemeanants, and that such institution is available to receive such commitments; and

(b) the [Board of Parole] [Parole Administrator] has certified that the Board of Parole is able to visit such institution and to assume responsibility for the release of such prisoners on parole and for their parole supervision.

[*End of original provisions*]

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

The following provisions shall apply to the sentencing of offenders under the age of 18 at the time of commission of their offenses:

(a) When assessing an offender's blameworthiness under § 1.02(2)(a)(i), the offender's age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.

(b) Priority shall be given to the purposes of offender rehabilitation and reintegration into the law-abiding community among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii), except as provided in subsection (c).

(c) When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious violent offending in the future, priority may be given to the goal of incapacitation among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii).

(d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

(e) The court shall impose a juvenile-court disposition in the following circumstances:

(i) The offender's conviction is for any offense other than [a felony of the first or second degree];

(ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction;

(iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or

(iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]

Comment:

a. Scope. This provision governs the sentencing of offenders under the age of 18, regardless of whether they would normally be considered "juveniles" within the ordinary jurisdiction of the state's juvenile court. Large numbers of such offenders are sentenced in the adult criminal courts each year, and there are alarming disparities by race and ethnicity among transferred youths. Under existing law in most states, youths under 18 who are convicted in the criminal courts are subject to the same penalties as older offenders. Adult sentencing codes generally lack specialized provisions for offenders at the borderline between the juvenile and adult justice systems and, where such provisions exist, they are piecemeal and fail to reflect comprehensive policy choices concerning this important age group.

Offenders under 18 reach the adult criminal courts by many different routes. There is some variation among states in the age limits for juvenile-court jurisdiction. There is also great diversity in state law and practice concerning waiver and other mechanisms to remove particular cases from the juvenile to the criminal courts. Section 6.11A is built on the policy judgment that, no matter what road is taken to the adult courtroom, special considerations attach to the sentencing and correction of offenders below the age of 18.

b. Setting the legal boundary at age 18. No fixed age boundary of the type recommended in this provision will fit every individual who comes before the courts. Research in developmental psychology, however, supports the majority view of state legislatures that offenders under the age of 18 are, as a group, distinguishable from older offenders. A defined age cutoff provides a useful benchmark for large numbers of cases, and avoids the costs of individualized psychological evaluations.

Under the revised Code's general scheme, which carefully preserves judicial sentencing discretion in individual cases, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007), a statutory age cutoff need not create a "cliff effect" that subjects offenders just above and below the age limit to radically different sentence regimes. Where offenders above the age of 18 display personal attributes of developmental immaturity, sentencing courts have discretion

to treat this as a mitigating factor under the Code's provisions for adult sentencing—whether or not the factor is expressly recognized in sentencing guidelines, see § 6B.02(7) (id.) ("The guidelines may not prohibit the consideration of any factor by sentencing courts unless the prohibition reproduces existing legislation, clearly established constitutional law, or a decision of the state's highest appellate court."). In an extraordinary case, a young adult's developmental deficits may even provide grounds for departure from any mandatory penalty affixed to the offense of conviction, or might supply the basis for a proportionality ceiling on the severity of any punishment prescribed by law. See §§ 7.XX(3)(b) (id.), 7.ZZ(6)(b) (id.) (draft provision submitted for informational purposes only).

For jurisdictions that desire greater age flexibility in the application of this Section, subsection (k), given as an option in bracketed language, would grant trial judges discretion to extend most of the substance of the provision to offenders under the age of 21 at the time of their offenses.

c. Purposes of sentencing and offenders under 18. The Code's framework of utilitarian sentences within limits of proportionality is applicable to offenders under the age of 18. See § 1.02(2)(a) and Comment *b* (Tentative Draft No. 1, 2007). Special considerations arise in cases involving young offenders, however. Subsection (a) provides that offenders under 18 should be judged less blameworthy for their criminal acts than older offenders—and age-based mitigation should increase in correspondence with the youthfulness of individual defendants.

Offender blameworthiness is one of the key indicia of proportionate penalties under § 1.02(2)(a)(i) (stating that proportionality is to be measured by "the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). Subsection (a) will therefore exert downward pressure on the ceiling of permissible sentence severity for cases under § 6.11A. This is especially important because, under the revised Code, no utilitarian sentencing goal may ever justify the imposition of a disproportionate punishment. See § 1.02(2)(a)(ii) and Comment *b*. And, under the Code, the judicial branch has final statutory authority to make proportionality determinations in individual cases, see §§ 6B.03(4) (Tentative Draft No. 1, 2007), 7.XX(2),(3)(b) (id.), 7.ZZ(6)(b) (id.) (draft provision submitted for informational purposes only). This subconstitutional power of proportionality review is designed to be considerably more exacting than the courts' infrequently exercised authority to strike down penalties as "grossly disproportionate" under the federal constitution.

The mitigating effect of subsection (a) may be offset or overridden by other circumstances in specific cases. The provision is not intended to foreclose the judge's ability to find, when supported by the facts, that an offender under 18 acted with an unusually high degree of personal blameworthiness. For instance, a sentencing judge might find an offender unusually culpable—despite his youth—if guilty of a violent offense committed only for a thrill, or for sadistic purposes, or out of racial animus. It is also important to recognize that proportionality determinations under § 1.02(2)(a)(i) are not based solely on offender

blameworthiness. The courts must also attend to "the gravity of offenses" and "the harms done to crime victims" when reaching final judgments of proportionality. The seriousness of victim injuries do not lighten when their assailants were underage.

Subsections (b) and (c) speak to the rank ordering of utilitarian objectives to be applied to the sentencing of offenders under the age of 18. Section 1.02(2)(a)(ii) embraces the utilitarian goals of "offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community," but sets forth no hierarchy among these goals that must be applied across the board, to every individual sentencing. However, the Code contemplates that, for definable classes of cases, specification of priorities among utilitarian goals will often be desirable. This task is commended to the Sentencing Commission as part of its guidelines-drafting responsibilities, see § 6B.03(5) and Comment *e* (Tentative Draft No. 1, 2007) (providing that "[t]he [sentencing] guidelines may include presumptive provisions that prioritize the purposes in § 1.02(2)(a) as applied in defined categories of cases, or that articulate principles for selection among those purposes."). It is appropriate for the legislature to perform this function, as well, when it is prepared to lay down firm policy judgments that should not be delegated to the commission and the courts. Subsections (b) and (c) state theoretical principles that are sufficiently fundamental to be enshrined in statutory language. Other examples of the statutory prioritization of utilitarian purposes may be found (in future drafting) in provisions dealing with drug courts and mental-health courts, and creating special alternative "restorative justice" sentencing procedures for selected cases.

Subsection (b) addresses the vast majority of cases that will arise under this provision, and requires that the goals of offender rehabilitation, and offender reintegration into the law-abiding community, must normally be assigned priority over all other utilitarian aims in § 1.02(2)(a)(ii). Thus, while considerations of general deterrence, incapacitation of dangerous offenders, and the restoration of crime victims and communities remain operative, they are subsidiary to the pursuit of rehabilitation and reintegration. This approach is consistent with the statutorily defined purposes of most juvenile codes in the United States.

As an exception to the general rule of subsection (b), subsection (c) recognizes that the goal of incapacitation of dangerous offenders will and should be given highest priority in some cases involving defendants under the age of 18. Based on the overall patterns of criminal behavior among juveniles, this will be true in only a small percentage of all cases. Most juvenile criminal careers last a very short time, and the typical injury done by juvenile offenders is less grave than in cases of adult offending. But the unfortunate truth is that some young offenders pose unacceptable risks of serious reoffending and, even giving great weight to the factor of their age, the countervailing moral claims of prospective crime victims rise to a compelling level.

Subsection (c) places restrictions on the incapacitation-based sentencing of offenders under 18, and is intended to regulate such reasoning more closely than existing law. The subsection erects threshold requirements that the offender must have been convicted of a serious violent offense, and there must also be a reliable basis for belief that the offender presents a high risk of serious offending in the future. The "reliable basis" standard does not pretend to be exact. It is, however, meant to rule out conjecture or intuition about an offender's future dangerousness—and this will preclude much contemporary sentencing practice across the United States today. The reliable-basis standard could be satisfied by the use of validated actuarial-risk-assessment instruments, which are consistently shown to be more reliable than professional clinical judgments in individual cases, see § 6B.09 and Comment *b* (this draft). The courts of each jurisdiction will be required to give specific content to the standard, and its application can be expected to evolve with advancing knowledge in the prediction sciences.

One notable effect of subsections (b) and (c) in combination is that the policy of general deterrence can never be treated as the primary goal in the sentencing of an offender under the age of 18. Just as such offenders are considered less blameworthy as a group, they are also viewed as less deterrable.

The policy judgments reflected in subsections (a) through (c) are based on current research in psychology and criminology. The key findings are summarized below.

(1) Blameworthiness. While normally-developing human beings possess a moral sense of morality from their early years, important capacities of abstract moral judgment, impulse control, and self-direction in the face of peer pressure, continue to solidify into early adulthood. The developmental literature suggests that offenders under 18 may be held morally accountable for their criminal actions in most cases, but assessments of the degree of personal culpability should be different than for older offenders. This principle of reduced blameworthiness has been recognized by the Supreme Court in recent decisions under the Eighth Amendment, holding that the sanction of life without parole may not be imposed on juvenile offenders for non-homicide offenses, and that the death penalty may never be imposed.

(2) Potential for rehabilitation. Many believe that adolescents are more responsive to rehabilitative sanctions than adult offenders. While the evidence for this proposition is mixed, it is clear that some rehabilitative programs are effective for some juvenile offenders. Success rates are at least comparable to those among programs tailored to adults. Moreover, natural desistance rates—uninfluenced by government intervention—are higher for youths under 18 than for young adults whose criminal careers extend into their later years. Subsection (b) takes the policy view that society has a greater moral obligation to attempt to rehabilitate and reintegrate young criminal offenders, and that the benefits of doubt concerning the efficacy of treatment should normally be resolved in favor of offenders under 18.

(3) Harm prevention. Longitudinal studies show that the great majority of offenders under 18 will voluntarily desist from criminal activity with or without the intervention of the legal system. For this large subset of youthful offenders, a primary goal of the legal system should be to avoid disruption of the normal aging progression toward desistance.

There is reason for concern that criminal-court interventions might derail an otherwise natural progression toward law-abiding adulthood for many youths. The research literature suggests that transfer of juvenile offenders to the adult courts can itself be criminogenic. There is reason for concern, therefore, that punishments meted out in pursuit of public safety may have the opposite of the intended effect—and that this danger arises in the ordinary case of an adolescent offender, not the unusual case.

(4) Small group of serious violent offenders. Pushing in the opposite direction of considerations of reduced blameworthiness and high probabilities of desistance among younger offenders, it must also be recognized that a minority of adolescents and young adults commit serious crimes at very high rates. Age-crime curves, developed to track criminal careers over the life course, show that the peak years of criminal involvement are in the late teens and early 20s. Longitudinal research has documented time and again that a small fraction of all juvenile delinquents, roughly only 6 or 8 percent, go on to become "chronic" or "persistent" offenders who commit outsized numbers of serious crimes. For this subgroup, offenders' moral claims to reduced assignment of personal culpability come into tension with the moral claims of past and prospective crime victims, whose injuries are equally serious regardless of the age of the criminal.

(5) Deterrence. Section 6.11A would in every case relegate general deterrence to a subsidiary position among the utilitarian purposes of sentencing. For offenders of any age, there is no persuasive empirical support for the proposition that increased punishment severity acts as an effective deterrent of criminal acts. The prospects of a general deterrence effect are especially remote for offenders under the age of 18. Even more than older criminals, they are unlikely to know the state of the law and the likely consequences attached to specific crimes, are more likely to engage in risk-taking behavior despite known costs and benefits, and are more vulnerable to behavior bred of impulsivity and peer pressure.

d. Availability of juvenile-court sanctions. The age group addressed in this Section falls at the uncertain borderline between the adult criminal-justice system and the juvenile courts. While the revised Code always protects the courts' discretion to tailor sentences to the facts of particular cases, § 6.11A supplies the courts with a number of specialized tools to individualize sentences for offenders under 18, greatly expanding their sentencing discretion in such cases. Subsection (d) grants sentencing judges discretion in every case to impose a juvenile-court disposition as an alternative to an adult sanction. The court may also select a juvenile-court sanction while reserving authority to impose an adult sentence if the offender

violates the conditions of the juvenile disposition. This is one form of "blended sentencing," which exists in numerous permutations across American jurisdictions.

The Code's policy choice locating blended sentencing authority in the adult criminal courts is motivated in part by the conclusion that power to impose a blended sentence should not reside in the juvenile courts. Giving juvenile-court judges the power and responsibility to pronounce adult sentences stretches and distorts the juvenile-court mission away from its traditional groundings in rehabilitation and the best interests of the child. There is much about the unique character of juvenile courts that is worth preserving. Over the last several decades, the juvenile courts have charted a remarkably different course than the adult courts in their responses to criminal conduct. Juvenile institutional populations have increased only slowly in years when the adult prisons have seen explosive growth, and in recent years those populations have declined substantially. Rates of transfer to the adult system have shown similar changes, but only a tiny fraction of juvenile cases as a whole have ever been removed to the adult courts. Indeed, the history of American juvenile justice, dating to the late 19th century, shows longstanding commitment to a less punitive, more rehabilitative, set of values than applied to adult criminals. Subsection (d) helps to preserve the unique character of the juvenile court, while conceding that some of its cases must and should be removed to the adult system.

e. Mandatory juvenile disposition. Section 6.11A does not address transfer decisions itself, which is one process that brings a juvenile offender into the adult court system, nor does it speak to the powers of the adult courts—such as "reverse waiver"—to return a case involving a young offender to the juvenile system. The provision assumes that a case involving an offender under the age of 18 has reached the stage of conviction in the adult courtroom, and speaks only to the sentencing decision that follows on the heels of such a conviction. Even so, as a matter of substantive sentencing law, the trial court should have discretion to evaluate whether societal interests are best served by the continued treatment of the offender as an adult criminal for purposes of the sanctions that will be administered. Subsection (d) gives the court two important options: First, the court may impose any sanction that would have been available in a juvenile court for the same offense. Second, the court may impose such a sanction while holding an adult sentence in reserve, to be available if the offender violates the terms of the juvenile disposition.

Subsection (e) defines several scenarios in which an adult penalty is inappropriate. In each instance, the sentencing judge must impose a juvenile-court disposition. These circumstances include, in subsection (e)(i), cases in which the conviction obtained is for a crime at the middle or low end of graded severity among felonies. Because the revised Code would allow for a number of different grading schemes, see § 6.01 and Comment *c* (this draft), the grading cut-off in subsection (e)(i) is set forth in bracketed language. A state legislature may prefer to express the cut-off descriptively, such as a limitation to cases of "a serious violent felony."

Subsection (e)(ii) applies in cases where a charge requisite to the adult court's jurisdiction has not resulted in conviction. In most states, only certain charges may support waiver to the adult system, or permit direct filing by the prosecutor in the adult courts. Consistent with the policies of those limitations, an adult punishment should no longer be available when the predicate charge has been dismissed or has resulted in an acquittal.

Subsection (e)(iii) mandates a juvenile disposition for low-risk offenders, with the exception of offenders who have committed crimes of such gravity that proportionality concerns standing alone would support an adult punishment. There must be a reliable basis for the assessment of low risk, which may be established through the use of a validated actuarial-risk-assessment instrument, see Comment *c* above. The offense or offenses to be included in subsection (e)(iii)'s proviso can be selected only by consideration and debate of contestable retributive values. The bracketed language reflects a conclusion that murder, as defined in the Model Penal Code, see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.2 (1980), is such an offense.

Finally, subsection (e)(iv) speaks to the situation in which a young offender has been convicted of a serious crime, but played only a minor and fractional role in its commission. Most serious juvenile offenses are committed in groups, much more so than with adult offenders, and the inability to resist peer pressure is one of the best-documented features of adolescence. Nonetheless, the substantive criminal law makes all accomplices equally liable for the primary offense, as though all were primary actors. For adult offenders, this crude one-size-fits-all premise is justified in part on the premise that sentencing courts will differentiate among complicitors according to their true levels of responsibility. For juvenile offenders, the same assumption should operate, but in a more formalized way. Subsection (e)(iv) leaves room for fact-specific debate, and judicial discretion, concerning what degree of participation by a juvenile accomplice should qualify as a "minor role" in a group offense. Once the court has made such a finding in good faith, however, the extraordinary measure of an adult criminal penalty for an underage offender should no longer be permitted.

f. Authority to deviate from mandatory penalties. Both the original Code and the revised Code assert the Institute's unqualified policy that no mandatory-minimum penalty should be authorized for any offense, see § 6.06 and Comment *d* (this draft). Despite this longstanding policy, however, every American jurisdiction has enacted numerous mandatory-penalty provisions. The revised Code, while continuing the Institute's categorical disapproval of such laws, also seeks to soften their scope and impact wherever possible. Within the instant provision, subsection (f) recommends that, even when a state legislature has seen fit to adopt mandatory penalties into its criminal code, it should exempt underage offenders from the rigid force of such laws. A dominant theme of § 6.11A is that an unusual degree of flexibility, and power to individualize sentences, ought to be part of adult penalty proceedings for offenders under the age of 18. No provision in law stands farther removed from this principle than a mandatory-minimum penalty.

1 *g. Cap on severity of prison sentences*. As a matter of constitutional law, the maximum
2 penalties permissible for juvenile offenders are sometimes lower than for adult offenders who
3 commit the same acts. For all non-homicide offenses, the Supreme Court has found that a
4 sentence of life without parole violates the Eighth Amendment when imposed on offenders
5 under the age of 18. The Court has also held that the death penalty may never be imposed on
6 juvenile offenders. These holdings rest in part on the strong presumption that juvenile
7 offenders are less culpable than adults, see subsection (a), and the empirical conclusion that
8 prospective juvenile offenders are less likely to be deterred by the threat of harsh punishments
9 than adults. In addition, the Court has recognized that juvenile offenders are generally seen as
10 more amenable to rehabilitation than older individuals, so that their criminal propensities may
11 change markedly during a lengthy period of incarceration.

12 As a matter of legislative policy, these principles require that lowered maximum
13 penalties should be established for youthful offenders at the highest level of the sentence-
14 severity scale, even if not—or not yet—constitutionally mandated. The Court has made it
15 clear that such judgments normally reside with state legislatures, and that the constitution
16 prohibits only the most egregious instances of disproportionality in punishment. Given the
17 fundamental values involved in the setting of juvenile crime and punishment, which command
18 a high degree of consensus in our society, a responsible legislature should aspire to
19 lawmaking that is well above the constitutional minimum standard. Subsection (g) therefore
20 recommends an approach of staggered maximum penalties for any offense, with the absolute
21 ceiling to be set according to the age group of the offender.

22 The maximum terms in subsection (g) are set out in bracketed language, to indicate
23 that no ineluctable formula has been employed to generate the ceilings specified for each age
24 group. The maximums suggested are far lower than existing penalty ceilings for juveniles
25 tried as adults in any U.S. jurisdiction. In setting these absolute limits on punishment severity,
26 it is important to consider that they will apply to the most serious offenses, including
27 homicide, and that they regulate the cumulative severity of sentences for multiple counts of
28 conviction. At the highest level of case gravity, difficult moral judgments of proportionality
29 are required: the harms to victims may be as great as for any adult offense, yet we may
30 assume in most cases a reduced level of offender blameworthiness. How those concerns
31 translate into specific absolute maximum penalties for different age groups cannot be resolved
32 in a model code for all jurisdictions. What is most important in subsection (g) is its
33 recommendation that each state should adopt some such framework of staggered maximum
34 penalties.

35 *h. Eligibility for sentence modification.* Subsection (h) accelerates eligibility for
36 sentence modification under § 305.6 (this draft) for underage offenders sentenced to
37 extremely long prison terms. First eligibility is to occur after 10 years of time served, set forth
38 in bracketed language, rather than the 15-year period in force for adult prisoners. The use of
39 brackets is meant to indicate that no mathematical calculation has been used to derive the 10-

year time period. Its length is set in reference to the adult eligibility requirements under § 305.6, and reflects a policy judgment that first eligibility should occur substantially earlier for offenders under 18 at the time of their offenses. Nor is the 10-year period written in stone, or even in indelible ink. Sentencing courts are given discretion in individual cases to order a shorter eligibility period under § 305.6.

This provision recognizes that adolescents can generally be expected to change more rapidly in the immediate post-offense years, and to a greater absolute degree, than older offenders. It also responds to the need to provide courts with maximum flexibility when sentencing underage offenders. Such cases may present a range of considerations not present in adult prosecutions. For instance, although subsection (h) does not propose staggered periods for different age groups, shorter times to § 305.6 eligibility may be justified for younger defendants.

i. Sentencing guidelines. Specially formulated sentencing guidelines are needed for the age group that falls under this provision. Subsection (i) provides that the sentencing commission will author such guidelines, governed by Article 6B of the revised Code. As with all sentencing guidelines in the revised Code, those promulgated under subsection (i) may carry no more than presumptive force, subject to a generous judicial departure power, see §§ 6B.02(7) (Tentative Draft No. 1, 2007), 7.XX(2) (id.), to ensure that the greatest share of sentencing authority always remains with the courts.

j. Prohibition on housing juveniles in adult institutions. This provision is consistent with the policy of the American Bar Association, yet states a principle that is frequently overlooked by most American jurisdictions. Over 10,000 youths under the age of 18 were housed in the adult prisons and jails on any given day in 2009. Roughly 7500 were held in adult jails in more than 40 states, and another 2800 in adult prisons. Youths are especially vulnerable to victimization in adult institutions, and are at greater risk than adult inmates of psychological harm and suicide. They are often in need of age-specific programming that is unavailable in adult institutions. Research indicates that incarceration in adult prison substantially increases the risk that a young person will reoffend in the future. Although substantial resources will be needed to fully segregate young offenders from adults in the nation's prisons and jails, there are compelling moral and instrumental reasons for doing so.

k. Selective extension of this provision to older offenders. The psychology of human development does not translate neatly into sharp age-based cut-offs such as the 18-year threshold in this provision. The sentencing structure of the revised Code gives the courts tools to avoid a "cliff" effect for offenders slightly over 18, or even for offenders into their 20s whose acts are partially explicable by their stage of development toward full adulthood. As explained in Comment *b*, many of the substantive results available to sentencing judges under § 6.11A may be reproduced in the sentencing of offenders older than 18 through use of judicial departure discretion from sentencing guidelines and mandatory-minimum-penalty

provisions. The bracketed language of subsection (k) would extend still more flexibility to sentencing courts in cases involving defendants who were under the age of 21 at the time of their offenses. It would allow the courts to render most of the provisions of § 6.11A expressly applicable to this older age group, provided there are "substantial circumstances" supportive of the conclusion that application of § 6.11A will best effectuate the purposes of sentencing in § 1.02(2)(a). Subsections (d) and (e), which authorize or mandate the imposition of a juvenile-court disposition, would not apply to the older age group.

REPORTER'S NOTE

a. Scope. The overall framework of § 6.11A, providing for specialized sentencing rules and mitigated treatment of juvenile offenders sentenced in adult courts, owes much to Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 289-290, 302-315 (proposing "an age-based 'youth discount' of sentences [in adult courts]—a sliding scale of developmental and criminal responsibility—to implement the lesser culpability of young offenders in the [adult] legal system"). Professor Feld wrote that, "Such a policy would entail both shorter sentence durations and a higher offense-seriousness threshold before a state incarcerates youths than older offenders." Id. at 315.

By one estimate, more than 250,000 youths under the age of 18 are tried each year in the criminal courts and sentenced as adults. Barry C. Feld, A Slower Form of Death: Implications of *Roper v. Simmons* for Juveniles Sentenced to Life Without Parole, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 11 (2008). See also American Bar Association, Report, Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001), at 1 (estimating "at least two hundred thousand" offenders under 18 sentenced in adult courts each year).

Many of these cases reach the adult criminal courts through a variety of mechanisms that exist in the states to remove offenders otherwise subject to juvenile-court jurisdiction. The three most common vehicles are judicial waiver (juvenile court is authorized or required to transfer certain cases), concurrent jurisdiction (prosecutor has discretion to file in juvenile or criminal court), and statutory exclusion (certain classes of cases must by statute be filed in adult criminal court). See U.S. Dept. of Justice, Office of Justice Programs, Delinquency Cases Waived to Criminal Court, 2005 (2009), at 1. There has been large year-by-year variation in the use of these transfer mechanisms. For example, the number of cases waived to criminal courts by juvenile-court judges grew from 7200 in 1985 to 13,000 in 1994, but then declined by 2005 to 6900. Id. at 2. Large racial and ethnic disparities exist in the groups selected for transfer from the juvenile to the adult system. See Neelum Arya et al., America's Invisible Children: Latino Youth and the Failure of Justice (2009) (Latino youth are "43% more likely than white youth to be waived to the adult system"); Amanda Burgess Proctor, Kendal Holtrop, and Francisco A. Villarruel, Youth Transferred to Adult Court: Racial Disparities (2008), at 9-10 (collecting studies showing that African American youths are more likely to be transferred than their white counterparts).

In most states, the juvenile court's jurisdiction over delinquency cases extends to youths under the age of 18. Twelve states, however, set the upper limit at age 16 (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas, and Wisconsin) or at age 15 (New York and North Carolina). Roughly two million 16- and 17-year-olds live in those states. See U.S. Dept. of Justice, Office of

Justice Programs, Juvenile Offenders and Victims: 2006 National Report (2006), at 103, 114; Alison Lawrence, State Sentencing and Corrections Legislation: 2007 Action, 2008 Outlook (Washington: National Conference of State Legislatures, 2008), p. 10 (Connecticut recently increased its juvenile-court age limit from 15 to 17). In these states, there is a regular flow of offenders under 18 to the criminal courts, all of whom are classified as "adults" rather than "juveniles" for purposes of state criminal law. See Juvenile Offenders and Victims: 2006 National Report, at 114 ("it is possible that more youth younger than 18 are tried in criminal court in this way than by all other transfer mechanisms combined").

c. Purposes of sentencing and offenders under 18

(1) Blameworthiness. See Roper v. Simmons, 543 U.S. 551, 569-571 (2005) (discussing reduced culpability of juveniles); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence"); Jeffrey Fagan, Adolescents, Maturity, and the Law, Why Science and Development Matter in Juvenile Justice, The American Prospect (August 14, 2005) ("[T]he new science reliably shows that adolescents think and behave differently from adults, and that the deficits of teenagers in judgment and reasoning are the result of biological immaturity in brain development. . . . Studies of brain development show that the fluidity of development is probably greatest for teenagers at 16 and 17 years old, the age group most often targeted by laws promoting adult treatment."); Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999) ("Young people's inexperience, limited judgment, and restricted opportunities to exercise self control partially excuse their criminal behavior."); Franklin E. Zimring, American Youth Violence (1998), at 75-81 (arguing for a doctrine of "diminished responsibility" for adolescents because of their still-developing cognitive abilities to comprehend and apply moral and legal rules, powers of impulse control, and abilities to resist peer pressure). Studies confirm that normal children by the age of nine have the capacity for intentional behavior and a developed moral sense of the difference between right and wrong. See James Rest, Morality, in John H. Flavell and Ellen M. Markman, Handbook of Child Psychology, vol. 3, Cognitive Development (1983). Typically, however, the full range of human capabilities continues to expand dramatically from ages 12 to 17. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (2000), at 383 ("the period from twelve to seventeen is an extremely important age range . . . [O]ther than infancy there is probably no period of human development characterized by more rapid or pervasive transformations in individual competencies, capabilities, and capacities.").

A presumption of mitigation similar to that stated in subsection (a) has been recognized in Canadian constitutional law. The Supreme Court of Canada has ruled that, under § 7 of the Canadian Charter of Rights and Freedoms, juveniles cannot be assigned the burden of showing that they should receive the benefit of Canada's youth sentencing provisions. Instead, the onus of showing that a juvenile should be tried and sentenced as an adult must always be on the government. The court grounded its ruling on the "principle of fundamental justice" that "young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment." R. v. D.B., 2008 SCC 25 (2008), Slip Op. at 3.

(2) Potential for rehabilitation. Empirical research has long shown that rehabilitative programming can succeed for some criminally-involved juveniles. See Peter W. Greenwood and Susan Turner, Juvenile Crime and Juvenile Justice, in James Q. Wilson and Joan Petersilia eds., Crime and Public Policy (2011); Mark W. Lipsey, The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analysis, 4 Victims and Offenders 124 (2009); Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001); Delbert S. Elliott series ed., Blueprints for Violence Prevention: Promoting Alternative Thinking Strategies (PATHS) (1998). There is no persuasive evidence, however, that rehabilitation success rates are higher for juveniles than adults. Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 403 ("Despite our optimistic notions about the inherent malleability of young people, or our pessimistic notions about the inability of old dogs to learn new tricks, there is no research that supports either of these contentions"). Efforts at "primary prevention," usually aimed at very young children, or even at mothers in the prenatal period, yield much larger reductions of future criminal behavior than interventions aimed at older youths who have already become involved in criminal activity. See David P. Farrington and Brandon C. Welsh, Saving Children from a Life of Crime (2007); Peter W. Greenwood, Changing Lives: Delinquency Prevention as Crime Control (2006).

(3) Harm prevention. Overall rates of criminal behavior are high, especially among males, in the teenage years, yet rates of desistance from crime are also very high as youths mature into their teens and early adulthood. Survey research indicates that 30 to 40 percent of males have committed at least one act of violence by age 18. Delbert S. Elliott, Serious Violent Offenders: Onset, Developmental Course, and Termination, 32 Criminology 1 (1994), at 9. Involvement in property offending and vandalism by this age group is still more commonplace. U.S. Dept. of Justice, Office of Justice Programs, Juvenile Offenders and Victims: 2006 National Report (2006), at 70; Lewis Yablonsky, Juvenile Delinquency: Into the Twenty-First Century (2000), at 562-566. Despite high rates of criminal involvement, most youths discontinue their criminal behavior of their own accord. Self-report research indicates that only one-quarter of juveniles who offended at ages 16 to 17 continued to offend at ages 18 to 19. See 2006 National Report at 71 ("most of the youth who reported committing an assault in the later juvenile years stopped the behavior, reporting none in the early adult years"). Another study, based on official record data, found that 46 percent of males aged 10 through 17 who had committed a crime desisted after a single offense, and, of the group who did not stop with one offense, an additional 35 percent desisted after a second offense. Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, Delinquency in a Birth Cohort (1972), at 160-163 (cohort of males born in Philadelphia in 1945). See also Paul E. Tracy, Marvin E. Wolfgang, and Robert M. Figlio, Delinquency Careers in Two Birth Cohorts (1990), at 104 table 8.3 (for later cohort of males born in Philadelphia in 1958, 42 percent of offenders 10 to 17 desisted after one offense and, among those continuing to offend, 28 percent stopped after a second offense).

On the criminogenic effects of transfer, see Angela McGowan, et al., Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Systematic Review, 32 Amer. J. Preventive Med. S7 (2007) (reporting findings of the Centers of Disease Control, Task Force on Community Preventive Services), at S15 (finding "strong evidence that juveniles transferred to the adult justice

1 system have greater rates of subsequent violence than juveniles retained in the juvenile justice system"); 2 Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 3 ("Evaluations of these programs [of waiver to adult courts] suggest that they increase future criminal behavior 4 rather than deter it, as advocates of this approach had hoped"); Donna Bishop and Charles Frazier, Consequences 5 of Transfer, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer 6 of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 261 (surveying studies 7 and concluding that "transferred youths are more likely to reoffend, and to reoffend more quickly and more 8 often, than those retained in the juvenile justice system"); Jeffrey Fagan, Separating the Men From the Boys: The 9 Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony 10 Offenders, in James C. Howell et al. eds., Sourcebook on Serious, Violent & Chronic Juvenile Offenders 238 11 (1995).

12 Franklin Zimring has argued that the dominant historical purpose of the juvenile-court system has been 13 to avoid the harms inflicted upon young offenders when they are adjudicated and sentenced in the adult criminal-14 justice system, and that this underpinning has survived during increasingly punitive eras of adult criminal-justice 15 policy. See Franklin E. Zimring, The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in 16 Margaret K. Rosenbaum, Franklin E. Zimring, David S. Tanenhaus, and Bernardine Dohrn eds., A Century of 17 Juvenile Justice (Chicago: University of Chicago Press, 2002). See also Henry Ruth and Kevin R. Reitz, The 18 Challenge of Crime: Rethinking Our Response (2003), at 262-266.

19 *(4) Small group of serious violent offenders.* On the age-crime curve, see Michael R. Gottfredson and 20 Travis Hirschi, A General Theory of Crime (Palo Alto: Stanford University Press, 1990), at 124-130 (noting that 21 "the shape or form of the [age-crime] distribution has remained virtually unchanged for about 150 years"). The 22 original Model Penal Code focused § 6.05 on the age group 17 to 21, in part because this group manifested "high 23 offense rates," "serious forms of criminality," and "high rates of recidivism, with repetition persistent over 24 extended periods of time." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.05 (1985), at 74.

25 Longitudinal research into the criminal careers of large cohorts of American males yielded the finding 26 that only a tiny fraction became serious, repeat offenders. See Marvin E. Wolfgang, Robert M. Figlio, and 27 Thorsten Sellin, Delinquency in a Birth Cohort (Chicago: University of Chicago Press, 1972), at 89 tables 6.1 28 and 6.2 (finding that a small group of chronic offenders, who made up 6.3 percent of the total cohort of 14,313 29 males born in Philadelphia in 1945, and 18 percent of cohort offenders, committed 52 percent of the offenses 30 committed by the entire cohort from ages 10 through 17); Paul E. Tracy, Marvin E. Wolfgang, and Robert M. 31 Figlio, Delinquency Careers in Two Birth Cohorts (New York: Plenum Press, 1990), at 15 (reporting that 32 "chronics [6.3 percent of the 1945 birth cohort] had committed 63% of the Uniform Crime Report (UCR) index 33 offenses, including 71% of the homicides, 73% of the rapes, 82% of the robberies, and 69% of the aggravated 34 assaults"), id. at 83, 90 (among a second cohort of males born in Philadelphia in 1958, 7.5 percent of the total 35 cohort, and 23 percent of those ever adjudged delinquent, were chronic offenders; this group committed "68% of 36 the index offenses, 60% of the murders, 75% of the rapes, 73% of the robberies, [and] 65% of the assaults" 37 committed by the entire cohort from ages 10 through 17).

(5) Deterrence. See Roper v. Simmons, 543 U.S. 551 (2005) (discussing reduced deterrent efficacy of penalties aimed at juvenile offending); Graham v. Florida, 130 S. Ct. 2011 (2010) (same). See also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Developmental Psychol. 257 (2001). The efficacy of general deterrence strategies that turn on the severity of criminal penalties, rather than their probability of being imposed, is in grave doubt even for adult offenders. See Cheryl Marie Webster and Anthony N. Doob, Searching for Sasquatch: Deterrence of Crime Through Sentence Severity, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research. (1999). On the known propensity of adolescents to engage in risk-taking behaviors, see Barry C. Feld, Bad Kids: Race and the Transformation of the Juvenile Court (1999), at 310-312 ("Youths' developmentally influenced cost-benefit calculus may induce them to weigh benefits and consequences differently and to discount negative future consequences in ways that may systematically skew the quality of their choices.").

d. Availability of juvenile-court sanctions. Seventeen states give adult sentencing courts a blended sentencing option for transferred juveniles. This allows the court to impose a sanction that would ordinarily be available only in the juvenile court. Often the juvenile sanction is conditional, however, and is accompanied by an adult suspended sentence. See National Center for Juvenile Justice, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term); Patrick Griffin, State Juvenile Justice Profiles, National Overviews: Which States Try Juveniles as Adults and Use Blended Sentencing?, National Center for Juvenile Justice (2011), available at http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp (last visited Mar. 11, 2011) (current through 2009 legislative term).

e. Mandatory juvenile disposition. Numerous states give adult sentencing courts discretion to impose a juvenile disposition as an alternative to an adult criminal penalty. Subsections (e)(i) through (iv) would go further to make imposition of a juvenile disposition mandatory in some circumstances. Subsection (e)(ii) addressing cases in which the offender's presence in the adult courtroom was predicated on the existence of one or more serious felony charges, yet those charges did not result in conviction in the adult court, was inspired by Barry C. Feld, Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 112 (advocating transfer back to the juvenile court in such cases).

f. Authority to deviate from mandatory penalties. Washington State bars the application of mandatory-minimum penalties to juvenile offenders in adult courts. Wash. Rev. Code § 9.94A.540(3). Montana and Oregon exempt juveniles in adult criminal courts from mandatory penalties in some instances. Mont. Code §46-18-222; Or. Rev. Stat. §161.620.

g. Cap on severity of prison sentences. The numbers of young offenders receiving extremely long prison sentences has been increasing in recent decades. See Ashley Nellis and Ryan S. King, No Exit: The

Expanding Use of Life Sentences in America (The Sentencing Project, 2009), at 16 ("There are currently 6,907 individuals serving life sentences for crimes committed when they were a juvenile. Among these, 1,755 have a sentence of life without parole."). More than two-thirds of juvenile offenders serving life sentences are African American or Hispanic. Id. at 21, 23.

j. Prohibition on housing juveniles in adult institutions. See Department of Health and Human Services, Youth Violence: A Report of the Surgeon General (2001), at 118 ("Results from a series of reports indicate that young people placed in adult correctional institutions, compared to those placed in institutions designed for youth, are eight times as likely to commit suicide, five times as likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent as likely to be attacked with a weapon."). Some state laws speak to age limitation in adult institutions, but no state has passed legislation in full compliance with subsection (j). See, e.g., Cal. Penal Code § 1170.19(a)(2) ("The person shall not be housed in any facility under the jurisdiction of the Department of Corrections, if the person is under the age of 16 years").

k. Selective extension of this provision to older offenders. See Laurence Steinberg and Elizabeth Cauffman, A Developmental Perspective on Jurisdictional Boundary, in Jeffrey Fagan and Franklin E. Zimring eds., The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Chicago: University of Chicago Press, 2000), at 384:

> [A]dolescence is a period of tremendous intra-individual variability. Within any given individual, the developmental timetable of different aspects of maturation may vary markedly, such that a given teenager may be mature physically but immature emotionally, socially precocious but an intellectual late bloomer. . . .
>
> Variability *among* individuals in their biological, cognitive, emotional, and social characteristics is more important still . . . . [M]ost research suggests that, from early adolescence on, chronological age is a very poor marker for developmental maturity—as a visit to any junior high school will surely attest.

See also Elizabeth R. Sowell et al., Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation, 21 J. Neurosci. 8819 (2001); Jeffrey Jensen Arnett, Emerging Adulthood: Theory of Development from the Late Teens Through the Twenties, 55 Am. Psychologist 46 (2000).

ORIGINAL PROVISION

§ 6.05. Young Adult Offenders.

(1) <u>Specialized Correctional Treatment.</u> A young adult offender is a person convicted of a crime who, at the time of sentencing, is sixteen but less than twenty-two years of age. A young adult offender who is sentenced to a term of imprisonment that may exceed thirty days [alternatives: (1) ninety days; (2) one year] shall be committed to the custody of the Division of Young Adult Correction of the Department of Correction,

and shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to his needs.

(2) <u>Special Term.</u> A young adult offender convicted of a felony may, in lieu of any other sentence of imprisonment authorized by this Article, be sentenced to a special term of imprisonment without a minimum and with a maximum of four years, regardless of the degree of the felony involved, if the Court is of the opinion that such special term is adequate for his correction and rehabilitation and will not jeopardize the protection of the public.

[(3) <u>Removal of Disabilities; Vacation of Conviction.</u>

(a) In sentencing a young adult offender to the special term provided by this Section or to any sentence other than one of imprisonment, the Court may order that so long as he is not convicted of another felony, the judgment shall not constitute a conviction for the purposes of any disqualification or disability imposed by law upon conviction of a crime.

(b) When any young adult offender is unconditionally discharged from probation or parole before the expiration of the maximum term thereof, the Court may enter an order vacating the judgment of conviction.]

[(4) <u>Commitment for Observation.</u> If, after presentence investigation, the Court desires additional information concerning a young adult offender before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Division of Young Adult Correction of the Department of Correction for observation and study at an appropriate reception or classification center. Such Division of the Department of Correction and the [Young Adult Division of the] Board of Parole shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period.]

[*End of original provision*]

ARTICLE 6B. SENTENCING GUIDELINES

***

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

(1) The sentencing commission shall develop instruments or processes to assess the needs of offenders for rehabilitative treatment, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs. When these

instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(2) The commission shall develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(3) The commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

Comment:

a. Scope. Responsible actors in every sentencing system—from prosecutors to judges to parole officials—make daily judgments about the treatment needs of offenders, and the risks of recidivism posed by offenders. These judgments, pervasive as they are, are notoriously imperfect. They often derive from the intuitions and abilities of individual decisionmakers, who typically lack professional training in the sciences of human behavior. In some instances, judgments about offenders' future conduct may be influenced by the biases—conscious or unconscious—of official decisionmakers. Frequently, as when statistical recidivism risk instruments are used by parole-releasing authorities, behavioral predictions are given weight in procedural settings that allow little or no opportunity for challenge by the person affected, yet may add many years to the duration of a prison term.

This Section recognizes that American sentencing systems will and should take account of an offender's future behavior, including the offender's amenability to rehabilitation and propensity to recidivate, when assigning penalties, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (recognizing the purposes of offender rehabilitation and the incapacitation of dangerous offenders as fundamental to the sentencing system). The provision seeks to bring the best available information to these tasks, and draws on the research capabilities of the sentencing commission to provide such information to sentencing courts through the vehicle of sentencing guidelines.

A primary ambition of § 6B.09 is to bring greater transparency and procedural fairness to considerations of predicted conduct in the sentencing system, particularly when evaluations of recidivism risk are at issue. In the Code's determinate sentencing scheme, no parole-releasing agency exists to pass such judgments. Instead, the revised Code "domesticates" the use of risk assessments by repositioning them in the open forum of the courtroom, where the tools devised by the sentencing commission are available for inspection, and where the constitution guarantees the offender legal representation to contest any adverse findings. This represents a significant constraint on the use of recidivism risk as a sentencing factor when compared with the current realities of American criminal justice, and especially when § 6B.09's scheme is matched against everyday practices in states where prison policy is made primarily through the release decisions of parole boards.

Section 6B.09 takes an attitude of skepticism and restraint concerning the use of high-risk predictions as a basis of elongated prison terms, while advocating the use of low-risk predictions as grounds for diverting otherwise prison-bound offenders to less onerous penalties. When debating the use of recidivism measures during sentence proceedings, the Code's drafters were deeply concerned about the use of prediction instruments in pursuit of the selective incapacitation of especially dangerous offenders—even though exactly this policy has been effected by parole boards for many decades. Longstanding tolerance of the risk-based incapacitative approach has stemmed in part from the low-profile workings of the parole-release process. The Institute anticipates that other substantive concerns about the use of risk assessments in sentencing decisions will no doubt be brought forward in the courtroom setting—issues that were never raised in the low-visibility, low-process forums of parole release.

The revised Code's approach to risk assessment is constrained in comparison to the 1962 Code. The original Code included offender-based judgments of risk as a major variable in the sentencing process. Section 7.03 of the 1962 Code called for risk-based analysis as a ground for "extended" minimum and maximum terms of imprisonment. Section 7.03(1) authorized judges to identify "persistent" offenders "whose commitment for an extended term is necessary for protection of the public." Categorization as a persistent offender under the original Code was based on an offender's age and criminal record. Original § 7.03(3) authorized extended prison terms for an offender found by the courts to be "a dangerous, mentally abnormal person." This provision required the court to make findings, following a psychiatric examination of the offender, that the offender's mental condition was "gravely abnormal," and that the offender posed "a serious danger to others."

In addition, the 1962 Code made risk assessment a primary responsibility of the parole board in determining the lengths of prison terms. Under original § 305.9(1)(a), continued confinement of a prisoner was appropriate when the board found a "substantial risk" that the prisoner would not conform his behavior to the law or the conditions of his parole. Prolonged incarceration could also be supported on the parole board's judgment that the prisoner's

continued participation in rehabilitative programming "will substantially enhance his capacity to lead a law-abiding life when released at a later date," see original § 305.9(1)(d). Given the 1962 Code's indeterminate sentencing structure, such inquiries into risk of reoffending and incomplete rehabilitation could serve as the basis for many years of extended confinement in individual cases. For example, for a felony of the second degree, the parole board's views on offender risk could be the difference between a one-year prison stay and a ten-year term. For first-degree felonies, such considerations might determine whether an offender served only one year, or any period up to a life prison term. See original § 6.06.

Needs and risk assessments are distinct tasks, and are treated separately in this provision. Needs assessments seek to identify criminogenic attributes of particular offenders that may be addressed through correctional programming. One goal of needs assessment is to match particular offenders with the treatment interventions most likely to bring about positive changes. Risk assessments, in contrast, estimate the probability that an individual will engage in violent or other criminal conduct in the future.

New § 6B.09 contemplates the use of risk assessments only when supported by credible recidivism research, and encourages the use of actuarial-risk-assessment instruments as a regular part of the felony sentencing process. Actuarial—or statistical—predictions of risk, derived from objective criteria, have been found superior to clinical predictions built on the professional training, experience, and judgment of the persons making predictions. The superiority of actuarial over clinical tools in this arena is supported by more than 50 years of social-science research.

b. Offender needs assessments. The revised Code takes an open-ended approach to evaluations of the treatment needs of offenders, and their amenability to rehabilitative programs of particular kinds. The science of matching individual offenders to particular treatment programs best suited to them is still in its infancy. There is no stable research consensus on how best to perform the task. The revised Code is therefore not directive on this question, and permits the use of clinical as well as actuarial methods for the determination of offenders' correctional needs and the types of interventions reasonably likely to address those needs. The main strategy of subsection (1) is to provide impetus to the research function of the sentencing commission, and a procedure for incorporating the resulting knowledge into the judicial sentencing process.

c. Risk assessment and judicial discretion. Subsection (2) mandates that evidence-based means of risk assessment be developed by the sentencing commission. Where appropriate, these tools may be incorporated generally into the sentencing guidelines, where their ultimate use will reside in the discretion of the trial judge.

Subsection (3) mandates that certain information be made available to, and be considered by, the court. Section 6B.09 significantly expands judicial discretion in cases where an offender is identified as posing an unusually low risk to public safety. Under

subsection (3), for example, the sentencing court may impose a mitigated sentence without encountering the hurdle of the guidelines departure standard, see § 7.XX(2) (Tentative Draft No. 1, 2007). In addition, subsection (3) qualifies the operation of mandatory-minimum-penalty provisions, increasing the sentencing court's power to override the application of such laws in appropriate cases.

d. Low-risk offenders. Among felony offenders sentenced to prison, a term of incarceration is sometimes unnecessary on grounds of public safety. Risk assessments are most easily justified when used to identify otherwise prison-bound offenders whose confinement will likely serve no incapacitative purpose. From an actuarial perspective, attempts to identify persons of low recidivism risk are more often successful than attempts to identify persons who are unusually dangerous. If used as a tool to encourage sentencing judges to divert low-risk offenders from prisons to community sanctions, risk assessments conserve scarce prison resources for the most dangerous offenders, reduce the overall costs of the corrections system, and avoid the human costs of unneeded confinement to offenders, offenders' families, and communities. The use of validated actuarial tools produces lower probabilities of future victimizations in society than prison-diversion decisions based on professional or clinical judgments.

e. High-risk offenders. While not mandating or encouraging the practice, subsection (2) would permit the use of actuarial offender risk assessments as a basis for punishments more severe than offenders would otherwise have received. Judgments—or guesses—about offenders' future criminality have long been integral to American criminal-justice systems at the judicial sentencing stage and, even more significantly, in the decisions of parole boards. Subsection (2) contemplates substantive risk-based decisions comparable to those historically made by paroling agencies, but now considered in open court, with a full record, and ultimately subject to appellate review. Equivalent protections have never been available in the context of parole boards' release decisions. One fundamental goal of § 6B.09 is to bring transparency and accountability to a part of the sentencing system that has long existed in darkness.

Section 6B.09 is not motivated by a policy determination that, compared with past practice, it is desirable to expand the use of risk assessment as a basis for longer incarceration terms. There are compelling reasons for an attitude of caution in the use of high-risk assessments at sentencing. Most importantly, error rates when projecting that a particular person will engage in serious criminality in the future are notoriously high. Although there have been important advances in the predictive sciences in recent decades, particularly when applied to mentally-ill offender populations, most projections of future violence are wrong in significant numbers of cases. The unavoidable mis-sorting of "false positives"—those predicted to be dangerous who are in fact harmless—presents compound ethical problems. Some find it difficult to countenance the extended incarceration of any human being in anticipation of crimes they have not yet committed—even "true positives" who would in fact

commit the predicted criminal acts if released. With false positives, the case is harder still: extended incarceration is imposed for crimes they will *never* commit.

Although the problem of false positives is an enormous concern—almost paralyzing in its human costs—it cannot rule out, on moral or policy grounds, all use of projections of high risk in the sentencing process. If prediction technology shown to be reasonably accurate is not employed, and crime-preventive terms of confinement are not imposed, the justice system knowingly permits victimizations in the community that could have been avoided. Although specific victims cannot be named in advance, the human suffering brought about by "true positives" in the community is both serious and, in statistical terms, ineluctable. In short, we can avoid the unneeded incarceration of those incorrectly identified as dangerous offenders (whom we cannot separate in advance from the truly dangerous) only by accepting the costs of victimizations of innocent parties (whom we cannot identify in advance). There is no wholly acceptable alternative in either direction—indeed, both options approach the intolerable. The proper allocation of risk, as between convicted offenders and potential crime victims, is a policy question as difficult as any faced by criminal law in a civilized society.

In presumptive sentencing-guidelines systems, favored by the revised Code, one important layer of procedural protection to allegedly high-risk defendants is mandated by the federal constitution. Before an elevated penalty may be imposed based on a projection of future dangerousness, the underlying facts must be found by a jury, under the reasonable-doubt standard of proof, as required by the Sixth Amendment, see § 7.07B (Tentative Draft No. 1, 2007). Once supportive facts are established by appropriate procedures, however, ultimate discretion about whether and how to make use of an adverse risk assessment remains with the trial court subject to appellate review. See § 7.07B(6) (id.). This constitutional requirement does not exist, however, in advisory guidelines systems, or in indeterminate sentencing systems.

f. Reasonable feasibility. One important question left for case-by-case judicial determination in the administration of § 6B.09 is whether the sentencing commission has established the reasonable reliability of predictions generated under this provision. That is, if predictions of future behavior are not attended by reasonable proofs of their accuracy, they may not be consulted as part of the sentencing process. Ultimately this is an issue that must be resolved by the courts of each state. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007).

g. Proportionality constraints. The consideration of needs and risk assessments under this provision may not be used to support a sentence that is disproportionately lenient or severe in light of the gravity of the offense, the harms, if any, done to crime victims, and the blameworthiness of the offender. See § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007). The proportionality constraint, which applies under the revised Code to all criminal sentencings, is a feature of statutory law and is intended to regulate punishment severity more closely than the forgiving standard of "gross disproportionality" under federal constitutional law. Although

all actors in the sentencing system are required by law to exercise their authorities in ways calculated to avoid disproportionate penalties, the Code places ultimate responsibility to render judgments of sentence proportionality in the courts. See §§ 7.XX(2),(3) (id.); 7.ZZ(6)(b) (id.) (the latter provision not yet approved by the Institute).

h. Provision requires adequate funding. The performance of research needed to support § 6B.09 is not included among the sentencing commissions' mandatory responsibilities in Article 6A, see § 6A.05 (Tentative Draft No. 1, 2007). Section 6A.05(4)(b) states that the commission "*may* . . . conduct or participate in original research to test the effectiveness of sentences imposed and served in meeting the purposes [of sentencing, including offender rehabilitation and the incapacitation of dangerous offenders] in § 1.02(2)." Section 6A.05(4)(c) states that the commission "*may* . . . collect and, where necessary, conduct research into the subsequent histories of offenders who have completed sentences of various types and the effects of sentences upon offenders, victims, and their families and communities." Section 6A.05, Comment *d*, recognizes that research of this kind is expensive and time-consuming, and therefore should not be part of the commission's mandatory duties in the absence of additional resources.

Legislatures that adopt § 6B.09 must recognize that supplemental funding will be needed to support the use of evidence-based sentencing recommended in this provision. Expenditures on necessary research may realize large benefits. Particularly with respect to the identification of low-risk offenders, substantial monetary savings may result from the diversion of offenders who otherwise would have been incarcerated. With respect to the extended confinement of high-risk offenders, the avoidance of future serious victimizations, if more successfully achieved under this provision than through other methods, carries significant economic and intangible benefits.

REPORTER'S NOTE

a. Scope. Risk assessment may be defined as "predicting who will or will not behave criminally" in the future. Needs assessment, in contrast, may be defined as "using predictive methods to attempt a reduction in criminality through assignment to differential treatments." See Stephen D. Gottfredson and Laura J. Moriarty, Statistical Risk Assessment: Old Problems and New Applications, 52 Crime & Delinq. 178, 192 (2006).

On the superiority of actuarial over clinical predictions of risk, see Paul E. Meehl, Clinical vs. Statistical Prediction (1954); Michael Gottfredson & Donald Gottfredson, The Accuracy of Prediction, in Alfred Blumstein ed., Criminal Careers and Career Criminals (1986) ("in virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment"); W.M. Grove & Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction, 2 Psychology, Public Policy and Law 293 (1996); Grant T. Harris, Marnie E. Rice, and Catherine A. Cormier, Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 Law & Human Behavior 377

(2002) (finding that "composite clinical judgment scores were significantly correlated with violent recidivism, but significantly less than the actuarial scores"). In recent decades, the science of actuarial prediction has advanced substantially, while the success of clinical predictions has not. John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 Va. L. Rev. 391, 406 (2006).

b. Offender needs assessments. On the early stage of development of needs-assessment technologies for individual offenders, see Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002), at 42-44. A few states have built needs assessments into the legal framework of their sentencing systems. Kansas's risk-needs assessment statute for drug offenders, for example, incorporates actuarial tools for the determination of risk of recidivism, and clinical tools for the selection of treatment interventions to be used in specific cases. See Kan. Stat. § 4729(b)(1),(2).

d. Low-risk offenders. On the over-incarceration of low-risk offenders, see Anne Morrison Piehl, Bert Useem, and John J. DiIulio, Jr., Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States (1999), at 9 (cost-benefit analysis of imprisonment in three states, estimating that crime prevention through incapacitation could justify the confinement of only half of all inmates).

As a matter of predictive accuracy, it is easier to identify low-risk offenders than high-risk offenders. See Kathleen Auerhahn, Selective Incapacitation and the Problem of Prediction, 37 Criminology 703 (1999); Hennessey D. Hayes & Michael R. Geerken, The Idea of Selective Release, 14 Just. Quarterly 353, 368-369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders"; proposing policy of "selective release" as opposed to selective incapacitation); Stephen D. Gottfredson & Michael Gottfredson, Selective Incapacitation?, 478 Annals of the American Academy of Political and Social Science 135 (1985) ("Predictive accuracy, while much in need of improvement, is sufficient for [the policy of selective deinstitutionalization], but insufficient for [the policy of selective incapacitation]").

Virginia was the first state to develop an actuarial risk-assessment tool to be used at sentencing for purposes of diverting low-risk offenders otherwise bound for prison into community sanctions. The instrument was based on a study of recidivism patterns of Virginia felons released from Virginia's prisons over an 18-month period in the early 1990s. The study followed all releasees for a minimum period of three years, and used the probability of a new felony conviction as the measure of risk. The commission regularly updates its recidivism research to ensure that the guidelines' risk instruments remain current as predictive measures. See generally Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002); Virginia Criminal Sentencing Commission, 2010 Annual Report (2011), at 38-41.

e. High-risk offenders. For an argument in favor of the cautious use of actuarial assessment to identify offenders who pose a high risk of future dangerousness by sentencing courts, and with heightened procedural protections, see Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry & Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985).

For many years, the standard error rate among the best actuarial instruments tested in the research literature (measured as false positives versus true positives) stood at roughly two to one. See John Monahan, The

1 Clinical Prediction of Violent Behavior (1981), at 48-49. For some classes of offenders, however, significant
2 improvements in predictive accuracy have occurred over the past decade. See John Monahan et al., Rethinking
3 Risk Assessment: The MacArthur Study of Mental Disorder and Violence (2001). Among a validation sample
4 assembled to test the prediction methodology developed in the MacArthur Study, "true positive" rates of roughly
5 50 percent were achieved when predicting future violence among mentally ill offenders. See John Monahan et
6 al., An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders, 56 Psychiatric
7 Services 810 (2005). The better risk scales can yield correct classifications, measured against actual recidivism
8 data, in up to 70 percent of all cases (across all levels of risk, not just the highest risk category), although many
9 instruments currently in use do not perform as well. See Christopher Slobogin, Risk Assessment, in Joan
10 Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011);
11 Gerald G. Gaes, Review of CARAS: Colorado Actuarial Risk Assessment Scale (Colorado Department of Public
12 Safety, 2009), in Colorado Division of Criminal Justice in Cooperation with the State Board of Parole,
13 Information Collection and Analysis of Parole Board Decisions: Status Report (2009), Appendix B at 5-6,
14 available at dcj.state.co.us/ors/pdf/docs/SB09-135/SB09-135_Report_11-1-09.pdf (last visited Mar. 11, 2011);
15 Shamir Ratansi and Stephen M. Cox, State of Connecticut, Assessment and Validation of Connecticut's Salient
16 Factor Score (2007), at 6-7, available at www.ct.gov/doc/lib/doc/pdf/RevalidationStudy2007.pdf (last visited
17 Mar. 9, 2011); Tammy Meredith, John C. Speir, and Sharon Johnson, Developing and Implementing Automated
18 Risk Assessments in Parole, 9 Justice Research and Policy 1 (2007), at 15-17; James Austin, Dana Coleman,
19 Johnette Peyton, and Kelly Dedel Johnson, Reliability and Validity Study of the LSI-R Risk Assessment
20 Instrument (The Institute on Crime, Justice, and Corrections, 2003), at 18, available at
21 http://www.portal.state.pa.us/portal/server.pt/community/corrections___alternative_sanctions/7625/assessment_
22 instruments/526270 (last visited Mar. 9, 2011).

23 The U.S. Supreme Court has not addressed the constitutionality of the use of offender risk assessments
24 at sentencing when based on facts determined by the trial court as opposed to a jury. Under presumptive
25 sentencing guidelines, if risk assessments are used as the basis for aggravated departure penalties, the Sixth
26 Amendment almost certainly requires that the defendant be given the right to jury determination of underlying
27 facts other than prior convictions, with the requirement of proof beyond a reasonable doubt. See Blakely v.
28 Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549
29 U.S. 270 (2007). Risk assessments used in support of mitigated sentences, as recommended in § 6B.09(3),
30 present no Sixth Amendment issues under current law. See § 7.07B and Reporter's Note (Tentative Draft No. 1,
31 2007); Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes, 105
32 Colum. L. Rev. 1082, 1094-1101 (2005) (listing exceptions to *Blakely*'s holding). Under advisory sentencing
33 guidelines, the use of risk assessments at sentencing may not trigger Sixth Amendment concerns. In United
34 States v. Booker, all nine Justices were in agreement that sentencing factfinding under advisory guidelines could
35 be performed by the trial court free of the jury-trial guarantee. See 543 U.S. at 233 (2005) (Stevens, J., opinion
36 of the Court); id. at 259 (Breyer, J., opinion of the Court). For the revised Code's recommendations concerning
37 the design of an advisory-guidelines scheme, see Appendix A (Tentative Draft No. 1, 2007).

38 *i. Risk assessment as used by sentencing commissions.* Virginia was the first state to incorporate
39 actuarial risk-assessment instruments into sentencing guidelines. Both the validity of the instruments used, and

1 the effects on incarceration within the state, were evaluated independently by the National Center of State
2 Courts. See Virginia Sentencing Commission, 2006 Annual Report (2006), at 31-36; Brian J. Ostrom et al.,
3 Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). The Virginia risk-assessment
4 instrument takes account of an offender's gender, but not race or ethnicity, as a correlate of recidivism. Both
5 policy decisions comport with § 6B.06(2)(a),(4)(b) (Tentative Draft No. 1, 2007). Virginia uses actuarial
6 measures to identify low-risk drug and property offenders, and sex offenders at high risk of committing a future
7 offense of violence. Virginia Criminal Sentencing Commission, Assessing Risk Among Sex Offenders in
8 Virginia (2001). Virginia's use of identifications of high-risk offenders in the state does not conform to the
9 procedural restrictions recommended in this provision. The factual bases for projection are not made subject to
10 the jury-trial procedures laid out in § 7.07B (Tentative Draft No. 1, 2007). Moreover, trial-court sentencing
11 decisions are not subject to substantive appellate review in Virginia as they would be under the revised Code, see
12 § 7.ZZ (id.) (this provision not yet presented to the membership for approval).

13 For research on the question of whether an offender's gender correlates with risk of recidivism, see U.S.
14 Sentencing Comm'n, Measuring Recidivism: The Criminal History Computation of the Federal Guidelines 1
15 (2004), at 11 (reporting the results of a study which found that women recidivate at a lower rate than men, with a
16 rate of 24.3% for men and 13.7% for women); see also Patrick A. Langan & David J. Levin, U.S. Dep't of
17 Justice, Recidivism of Prisoners Released in 1994 (2002) , at 7; Allen J. Beck & Bernard E. Shipley, U.S. Dep't
18 of Justice, Recidivism of Prisoners Released in 1983, at 7 (1989), at 5. One study failed to find any important
19 difference in reoffending rates among men and women, although the study was limited to offenders released
20 from federal prisons. Miles D. Harer, Federal Bureau of Prisons, Recidivism Among Federal Prisoners Released
21 in 1987 (1994), at 3 ("Recidivism rates were almost the same for males and females; 40.9 percent of the males
22 recidivated compared to 39.7 percent of the females.").

23 Other states have also made risk assessment, or consultation of recidivism data, a feature of at least
24 some judicial sentencing decisions:

25 As part of 2003 drug-sentencing reform recommended by the Kansas Sentencing Commission, the
26 Kansas legislature instituted mandatory risk and needs assessments for offenders convicted of drug-possession
27 offenses. The assessments must be made available to sentencing courts as part of the presentence investigation
28 report. See Kan. Stat. §§ 21-4714(b)(9) & 21-4729(b). Under § 4729(h)(2), diversions of drug offenders from
29 prison to a community treatment program pursuant to the provision are exempted from the departure rules of the
30 state's sentencing guidelines.

31 Missouri's sentencing commission includes the same risk-assessment scoring system used by the state's
32 parole board (with minor modifications) as part of felony presentence reports. The reports provide sentencing
33 judges—and the parties—with a recidivism risk assessment at the time of sentencing. See Michael A. Wolff,
34 Missouri's Information-Based Discretionary Sentencing System, 4 Ohio State Crim. L.J. 95, 112-114 (2006)
35 ("The Parole Board's risk scoring is slightly more extensive because the Parole Board has three factors that it
36 uses that are based upon behavior while in prison; obviously, these institutional behavioral factors are not present
37 at the time of sentencing"). See also Missouri Sentencing Advisory Commission, Recommended Sentencing:

Report and Implementation Update 48-53, 72-74 (2005). The system is still too new for its effects on recidivism rates to be evaluated. See Wolff, supra, at 118.

North Carolina's sentencing commission has studied the possibility of generating risk- assessment instruments to be used at sentencing based on statewide recidivism data. See North Carolina Sentencing Policy and Advisory Commission, Correctional Program Evaluation: Offenders Placed on Probation or Released from Prison in Fiscal Year 2003/04 (2008), at pp. 106-107:

> *The validity of offender risk scores as a predictive tool might point to its use in the criminal justice decisionmaking process*. As we learn more about offenders and whether they will recidivate, the more critical question for policy makers is how to target resources efficiently to prevent future criminality. To this end, the use of risk scores in this and previous reports has proven to be the most comprehensive predictive measure of recidivism. The risk score assigned to an offender, which is comprised of preexisting personal and criminal history factors, has been consistently associated with the disposition and program assignments imposed by the court as well as with the offender's probability of reoffending. Since the most expensive correctional resources (i.e., prisons) are predominantly being used by the high risk offenders and minimal resources are required by the low risk offenders, it may prove to be a good use of tax dollars to target medium risk offenders for less restrictive correctional programming. This investment in offenders who are medium risk may play an important part in reducing their possibility of recidivating and ultimately utilizing more expensive resources. The availability of risk scores earlier in the criminal justice process might also help inform the discretion of decisionmakers such as judges and prosecutors at conviction and sentencing.

In Oregon, Judge Michael Marcus has developed a computerized "sentencing support" system that provides sentencing judges with information concerning offenders' likelihood of recidivism (of any kind, as well as violent recidivism) following sentences to criminal sanctions of different types, based on the offense, the offender's characteristics, and recidivism data in the state. See Michael Marcus, Sentencing Support Tools: User Manual for Judges (2009), at 7, 10, available at http://www.smartsentencing.info/sentencingsupporttransition.html (last visited Mar. 14, 2011). The software incorporates an offender's gender and "ethnicity" (broken down into categories of Asian, African American, Hispanic, American Indian or Alaskan, and White) as correlates of postsentence recidivism. The consideration of race and ethnicity is disapproved in Tentative Draft No. 1 (2007), § 6B.06(2)(a), and raises serious constitutional concerns, while consideration of gender for the narrow purpose of risk and needs assessments is expressly permitted by the revised Code, id., § 6B.06(4)(b).

Wisconsin's sentencing guidelines incorporate offender risk assessments into all guidelines worksheets. See, e.g., Wisconsin Sentencing Commission, Guidelines Worksheet: Robbery, Wis. Stat. § 943.32, at http://wsc.wi.gov/docview.asp?docid=3302 (last visited Mar. 9, 2011). See also Wisconsin Sentencing Commission, Three Critical Sentencing Elements Reduce Recidivism: A Comparison Between Robbers and Other Offenders (2006).

With the exception of capital cases and offenses carrying a sentence of life without possibility of release, Washington State authorizes the sentencing court to order a risk assessment prior to sentencing and requires the court to consider the assessment if it is prepared. See Rev. Code Wash. § 9.94A.500(1).

Sentencing commissions often use the scoring of criminal history within guidelines as a form of offender risk assessment. Some commissions have tested empirically the accuracy of recidivism projections based solely on criminal-history categories within the guidelines. See, e.g., U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines (2004).

STATUTORY NOTE

Virginia Code § 17.1-803

§ 17.1-803. Powers and duties [of Virginia Criminal Sentencing Commission].

The Commission shall:

1. Develop, maintain and modify as may be deemed necessary, a proposed system of statewide discretionary sentencing guidelines for use in all felony cases which will take into account historical data, when available, concerning time actually served for various felony offenses committed prior to January 1, 1995, and sentences imposed for various felony offenses committed on or after January 1, 1995, and such other factors as may be deemed relevant to sentencing.

2. Prepare, periodically update, and distribute sentencing worksheets for the use of sentencing courts which, when used, will produce a recommended sentencing range for a felony offense in accordance with the discretionary sentencing guidelines established pursuant to subdivision 1.

3. Prepare, periodically update, and distribute a form for the use of sentencing courts which will assist such courts in recording the reason or reasons for any sentence imposed in a felony case which is greater or less than the sentence recommended by the discretionary sentencing guidelines.

4. Prepare guidelines for sentencing courts to use in determining appropriate candidates for alternative sanctions which may include, but not be limited to (i) fines and day fines, (ii) boot camp incarceration, (iii) local correctional facility incarceration, (iv) diversion center incarceration, (v) detention center incarceration, (vi) home incarceration/electronic monitoring, (vii) day or evening reporting, (viii) probation supervision, (ix) intensive probation supervision, and (x) performance of community service.

5. Develop an offender risk assessment instrument for use in all felony cases, based on a study of Virginia felons, that will be predictive of the relative risk that a felon will become a threat to public safety.

6. Apply the risk assessment instrument to offenders convicted of any felony that is not specified in (i) subdivision 1, 2 or 3 of subsection A of § 17.1-805 or (ii) subsection C of § 17.1-805 under the discretionary sentencing guidelines, and shall determine, on the basis of such assessment and with due regard for public safety needs, the feasibility of achieving the goal of placing 25 percent of such offenders in one of the alternative sanctions listed in subdivision 4. If the Commission so determines that achieving the 25 percent or a higher

percentage goal is feasible, it shall incorporate such goal into the discretionary sentencing guidelines, to become effective on January 1, 1996. If the Commission so determines that achieving the goal is not feasible, the Commission shall report that determination to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia on or before December 1, 1995, and shall make such recommendations as it deems appropriate.

7. Monitor sentencing practices in felony cases throughout the Commonwealth, including the use of the discretionary sentencing guidelines, and maintain a database containing the information obtained.

8. Monitor 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.

9. Study felony statutes in the context of judge-sentencing and jury-sentencing patterns as they evolve after January 1, 1995, and make recommendations for the revision of general criminal offense statutes to provide more specific offense definitions and more narrowly prescribed ranges of punishment.

10. Report upon its work and recommendations annually on or before December 1 to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia. Such report shall include any modifications to the discretionary sentencing guidelines adopted by the Commission pursuant to subdivision 1 and shall be accompanied by a statement of the reasons for those modifications.

11. Perform such other functions as may be otherwise required by law or as may be necessary to carry out the provisions of this chapter.

PART III. TREATMENT AND CORRECTION

***

ARTICLE 305. PRISON RELEASE AND POSTRELEASE SUPERVISION

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

(1) Prisoners shall receive credits of [15] percent of their full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A. Prisoners' dates of release under this subsection shall be calculated at the beginning of their term of imprisonment.

(2) Prisoners shall receive additional credits of up to [15 percent of their full terms of imprisonment as imposed by the sentencing court] [120 days] for satisfactory participation in vocational, educational, or other rehabilitative programs.

(3) Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.

(4) Credits under this provision may only be revoked upon a finding by a preponderance of the evidence that the prisoner has committed a criminal offense or a serious violation of the rules of the institution, and the amount of credits forfeited shall be proportionate to that conduct.

Comment:

a. Scope. This is a revision of § 305.1 in the 1962 Model Penal Code (see "Original Provision" below). The revised provision creates a strong presumption that credits for good behavior will be awarded as against the full lengths of prison sentences imposed by the courts, in accordance with a fixed statutory formula. These allowances—usually called "good time" credits—may be forfeited only upon a finding by the Department of Corrections that the prisoner has committed a serious violation of prison rules or has failed to participate satisfactorily in required programming. Additional credits for participation in vocational, educational, or other rehabilitative programs—often called "earned time" credits—are also authorized by this provision. Although statutory law establishes a ceiling for the amount of earned-time credits, more particularized judgments about the specific programs that merit the award of credits, and the amounts of discounts to be attached to particular activities, are delegated to the Department of Corrections.

The 1962 provision recommended that a credit of 20 percent be subtracted from both the minimum and maximum terms of a prisoner's sentence "[f]or good behavior and faithful performance of duties." An additional credit of 20 percent was available for "especially meritorious behavior" or "exceptional performance" of duties. Because the meritorious-

behavior reduction was of a type rarely granted, the operative ceiling upon good-time credits for the vast majority of prisoners under the former provision was 20 percent. This provision did not function in isolation, however. The original Code also vested substantial early-release authority in the parole board. Thus, a prisoner's actual release date depended upon discretionary decisionmaking by the department of corrections under former § 305.1, and the parole board's supplementary and greater powers under former § 305.6. The combined effects of these "back-end" release authorities rendered the sentencing system in the 1962 Code a highly *indeterminate* system. That is to say, at the time of the judge's pronouncement of a prison sentence, there was much indeterminacy about what the punishment would actually be.

The revised Code reflects changed policy views, since 1962, about the configuration of back-end sentencing discretion, held either by a parole agency or corrections department. Most importantly, drawing on the most successful sentencing reforms of the last 30 years, the revised Code recommends that the release discretion of the parole board be wholly eliminated, see § 6.06(4),(5) (this draft). This is a fundamental structural and institutional decision that renders the sentencing system as a whole a *determinate* system, see Appendix B, Reporter's Study: The Question of Parole-Release Authority (this draft). For most prison cases in a determinate system, there is a predictable correspondence between the sentence imposed by the court and the time actually served by the offender. One major reason for the revised Code's preference for a determinate framework is its philosophy that sentencing should be at its core a judicial process, see § 1.02(2)(b)(i) and Comment *h* (Tentative Draft No. 1, 2007). Further, a major premise of determinate frameworks is that back-end discretion is too easily exercised in arbitrary, discriminatory, vindictive, or politically-driven ways. It is an important goal of § 305.1 to effectuate the underlying policies of good time and earned time while extending as little power as possible to departments of corrections to override the judgments of sentencing courts.

Despite the Code's general policy preference in favor of determinacy, certain limited and, to the extent possible, routinized mechanisms of back-end discretion are justified in a well-ordered sentencing system. Indeed, there has never been a *pure* or *absolute* determinate sentencing regime in U.S. history. The technical definition of a determinate system is one with no parole-release authority. All judicial prison sentences, even in determinate structures, are subject to potential alteration by a number of later-in-time decisionmakers. One universal qualification to existing determinate structures is the availability of good-time and earned-time credits such as those addressed in this provision. The important policy questions, in creating such laws, include how the back-end credit allowances can best serve their functions while coexisting most comfortably within the general environment of a determinate system.

Subsections (1) and (2) define separate pragmatically-grounded mechanisms for the award of sentence credits, injecting a modest degree of indeterminacy into the Code's sentencing system. Respectively, the subsections are designed to further the goals of prison discipline and offender rehabilitation.

Subsection (1) recognizes that prison officials require a degree of authority over prison durations as a tool to manage the in-prison behavior of inmates. In recognition of the perils of back-end discretion, and to avoid undue dilution of judicial sentencing authority, this power should be granted sparingly, in an amount sufficient but not greater than needed for its purposes. For the same reasons, the power to withhold good-time credits should be narrowly defined. The credits should automatically be built into the calculation of each prisoner's release date at the outset of the prison stay. There is no magic formula for the exact quantum of available credits, but many present-day correctional systems operate with good-time discounts of 15 percent or less. Subsection (1), in bracketed language, recommends that credits in roughly this amount must be awarded to prisoners in the ordinary course, and may be forfeited only when adequate proof has established a serious disciplinary violation or new criminal offense as required in subsection (4).

Subsection (2) of revised § 305.1 encourages inmates to participate in work, educational, or other rehabilitative programming made available to them in the prison setting. The subsection's rationale is that such activities stand a reasonable chance of furthering a prisoner's rehabilitation. In empirical research, completion of in-prison programming is often correlated with a reduced risk of recidivism following release. We lack the tools to discern *which* inmates have benefited from a given program, or when the benefit has taken hold. Still, it remains good public policy to promote the use of rehabilitative tools known to benefit groups within the inmate population. As a concession to our present lack of knowledge, subsection (2) is open-ended on the questions of which programs should be made available, the amount of credits that should be offered for completion of one program or another, and other implementation details. Unlike subsection (1), corrections officials will necessarily exercise much case-by-case discretion in the administration of subsection (2). Over time, as evidence-based practices of in-prison rehabilitation improve, departments of corrections will be better positioned to allocate earned-time credits wisely.

There is arguably an additional policy basis for provisions like subsections (1) and (2). Some advocate the use of good-time and earned-time credits, the more the better, as a means of shortening prison sentences, reducing aggregate prison populations, and bringing down correctional costs. Indeed, historically, prison-population control has been one of the recurring functions of good-time laws. This objective, however, plays little role in the formulation of revised § 305.1. Looking to the larger institutional structure of the revised Code, correctional resource management is made a core function of the sentencing commission, and state sentencing commissions in the United States since 1980 have proven remarkably successful at discharging that responsibility, see § 6A.07 (Tentative Draft No. 1, 2007). Ceding a duplicative power to corrections officials, to be exercised as a matter of lightly-regulated back-end discretion, would greatly complicate the sentencing commission's ability to do its job, and would unduly compromise the values of a determinate system.

1 *b. Amount of credits available.* The recommendation of a 15 percent good-time discount
2 in subsection (1) is intended to be suggestive rather than directive, as signaled by the use of
3 brackets. The available research and policy literature on good time as a correctional tool is
4 sparse, and is inadequate to support conclusions as to best practices. A survey of American
5 determinate sentencing systems reveals substantial variations in approach. The federal law
6 and some states cap the available discount at 15 percent of a prison term, although a few
7 states allow for as much as a 50 percent reduction, depending on offense type and criminal
8 history. Primarily out of fears of unnecessarily investing sentencing discretion in corrections
9 officials, the revised Code opts for a suggested formula at the low end of this range.

10 Subsection (1) recommends that credits be calculated against the full term of the
11 judicially imposed prison sentence, and that this calculation be made at the outset of each
12 prisoner's term. Different counting formulas are possible even after a percentage formula is
13 established. For example, credits might be awarded at the end of each year, based on time
14 served to date. This practice would result in a total discount measured against the denominator
15 of time actually served by the prisoner rather than the larger denominator of the judicially-
16 pronounced sentence, which most prisoners will not serve in full. As a general matter, the
17 revised Code takes the view that it is good policy to resolve doubts in the application of the
18 good-time formula in favor of the prisoner. The primary evil in back-end provisions is the
19 bestowal of power to *withhold* credits on improper grounds. A clear principle of lenity works
20 to reduce this danger.

21 The Institute strongly recommends that good-time credits be available to prisoners
22 regardless of whether they are confined in a prison or jail, and should be calculated to include
23 any term of presentence detention credited to the prisoner under § 6.06A (slated for future
24 drafting). Some states do not grant good-time credits against jail time, and this practice has
25 survived constitutional challenge. This restrictive approach is disfavored by the Code on
26 policy grounds, despite its constitutional permissibility. One assumption of § 305.1 is that
27 good-time credits will be routinely awarded in the vast majority of cases. To preserve the
28 values of a determinate system, and to best effect the judgment and expectations of the
29 sentencing court concerning sentence severity, the allocation of credits should be as
30 regularized as possible. Their availability should not depend on the happenstance of where an
31 offender serves all or a portion of his sentence—or whether an offender has served part of his
32 sentence while awaiting trial and sentencing on the current charge.

33 As for earned-time credits under subsection (2), no strict rule of automatic or
34 presumptive awards is desirable. Given our present knowledge base about offender
35 rehabilitation and prison management, there is no clear reason to favor any definite formula in
36 model legislation. Much depends on the evidence of success of specific programs in reducing
37 future criminal behavior, the improving knowledge of which prisoners are amenable to
38 specific interventions, the observed results of varying incentive systems on program

1 enrollment, and the exploration of methods to reach subjective judgments of what should
2 count as "satisfactory" participation by individual inmates.

3 The alternative bracketed options in subsection (2) reflect the uncertainties above, as well
4 as the fact that wide differences in the administration of earned-time credits exist across U.S.
5 jurisdictions. Subsection (2) provides for either a percentage discount or fixed-time reduction
6 as a reward for program participation, and is agnostic about the precise amount of credit to be
7 offered in either scenario. Care should be taken, however, that the earned-time provision does
8 not distort the values of a determinate system. In adopting subsection (2), a state legislature
9 potentially delegates a substantial measure of sentencing authority to its department of
10 corrections. The Code's general concern over the possible inequities of back-end discretion
11 militates in favor of a low ceiling on this authority, all the more so because the nature of
12 earned time does not allow for routinization. Thus, for example, an enlightened legislature
13 should be cautious in authorizing a percentage allowance above the 15 percent suggested in
14 brackets in subsection (2), more so than if a similar increase were contemplated in the good-
15 time calculation suggested in subsection (1).

16 An additional important concern within any system of earned-time credits is that in-
17 prison programs are not equally available to all prisoners in all facilities. Good-quality
18 rehabilitative interventions are in notoriously short supply, and tend to have long waiting lists
19 where they exist. This creates many unavoidable inequities. Among them, only eligible
20 prisoners who have access to a program slot can reap the benefits of § 305.1(2). Other equally
21 deserving prisoners are excluded from the program's rehabilitative potential, and will suffer
22 longer confinement terms even if they are eager to participate. These are serious difficulties,
23 but they cannot be resolved within the four corners of the earned-time provision itself. The
24 remedy can come only on a larger scale, through the development and funding of
25 rehabilitative opportunities for all prisoners, which the revised Code identifies as a primary
26 responsibility of the sentencing system, see § 1.02(2)(b)(vi) (Tentative Draft No. 1, 2007). In
27 drafting subsection (2), it is perhaps defensible to assume that each state will provide adequate
28 infrastructure for an equitable earned-time system. Still, in the real world, universal
29 rehabilitative opportunities will not exist in any American prison system in the foreseeable
30 future. Subsection (2) thus represents a further judgment: that the unfairness visited upon
31 inmates unable to gain access to qualifying programs is outweighed by the societal benefits of
32 maximizing participation in the programs that do exist.

33 *c. Deductions from mandatory prison terms.* The revised Code continues the Institute's
34 longstanding policy of categorical opposition to the use of mandatory-minimum terms of
35 incarceration, see § 6.06 and Comment *d*. Despite the Institute's disapproval, however, every
36 U.S. jurisdiction has enacted numerous mandatory-minimum penalties. Where such penalties
37 exist, the revised Code seeks to soften their effects. In the context of good-time and earned-
38 time credits, questions sometimes arise concerning prisoners' eligibility when serving
39 mandatory prison terms. In some legislation, eligibility is expressly withheld as part of the

mandatory sentence. Subsection (3) resolves any doubts that might otherwise exist in favor of prisoners serving mandatory terms, while also expressing the more general policy view that mandatory sentences—if a legislature must create them—should be subject to reductions under § 305.1 along with other prison sentences.

d. Grounds for forfeiture of credits. Because prisons tend to have many rules, governing such things as personal hygiene and the times at which inmates must appear for meals, and including detailed requirements of which prisoners are sometimes unaware, subsection (4) specifies that only a "serious violation" of institutional rules—or a new criminal offense—may support the removal of credits for good behavior. This is at base a matter of fairness and proportionality: For violations of disciplinary rules that are less than serious, prisons can employ lesser sanctions, or deprivations of privileges, that do not rise to a readjustment of the prison sentence itself. The limiting language in subsection (4) also helps ensure that the back-end discretion created in § 305.1 does not replicate the broad-based release discretion traditionally exercised by parole boards.

Section 305.1 does not address the procedural safeguards that should attend the granting, forfeiture, and restoration of good-time credits. These subjects were dealt with elsewhere in the 1962 Code, see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985), and remain subjects for future drafting in the Code revision project. Subsection (4) does, however, speak to the burden of factual proof for disciplinary allegations that may result in the forfeiture of good-time credits. Arguably, the evidentiary burden has as much effect on the workings of the forfeiture system as the black-letter definition of predicate acts. Today, many prison-discipline processes work with extremely low burdens. The minimum constitutionally-required standard of review of good-time forfeiture decisions is that they be supported by "some evidence." Subsection (4) provides a higher floor, that the relevant facts must be established by at least a preponderance of the evidence.

e. Vesting. The Institute considered inclusion of a "vesting" provision in § 305.1, which would limit the power of corrections officials to remove good-time credits long after they were earned. For example, the following subsection might be added to the black-letter language above:

> **[Five] years after credits for good behavior are earned under this Section, the credits shall vest, and may not be lost or forfeited by the prisoner during the balance of a prison sentence.**

A vesting device along these lines would limit the possibility of vindictive removal of good-time credits that have accumulated over a period of many years, and would reinforce § 305.1's presumption that, for most prisoners, good-time credits will be reliably granted. However, no American jurisdiction in 2011 provided for the vesting of good time, and only a small number of states had ever done so. No scholarly literature analyzes the wisdom of such a proposal, or documents the supposed evil of vindictive action by corrections officials late in

1 a prison term. The Institute concluded that too little information is available to support model
2 legislation on the subject, but commends to states and researchers the project of studying
3 more closely the merits of a vesting mechanism.
4

5 **REPORTER'S NOTE**

6 *a. Scope.* Good-time and earned-time provisions are nearly universal in the United States, and are found
7 in all determinate sentencing systems that make use of sentencing guidelines—the system type that is the
8 institutional basis for the revised Code, see Model Penal Code: Sentencing, Report (2003), at 50-125. Beneath
9 this apparent consensus, however, there is a bewildering diversity in approach across the states, with no easy
10 route to the identification of best practices. See National Council of State Legislatures, Statutes Relating to Good
11 Time/Earned Time (2009) (50-state survey); National Council of State Legislatures, Cutting Corrections Costs:
12 Earned Time Policies for State Prisoners (2009); Nora V. Demleitner, Good Conduct Time: How Much and for
13 Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777 (2009); Dora
14 Schriro, Is Good Time a Good Idea?: A Practitioner's Perspective, 21 Fed. Sent. Rptr. 179 (2009).

15 James Jacobs has posited three categories of good-time credits: good conduct defined as compliance
16 with institutional rules or the absence of disciplinary violations ("good time" in traditional parlance); meaningful
17 participation in programs (often called "earned time"); and extraordinary service such as saving the life of a
18 prison guard or helping to quell a riot (sometimes known as "meritorious good time"). James B. Jacobs,
19 Sentencing by Prison Personnel: Good Time, 30 UCLA L. Rev. 217, 221 (1982). The first two categories are
20 incorporated into § 305.1(1) and (2). The third is addressed elsewhere, in § 305.7 of the revised Code (this draft)
21 (creating sentence-modification power responsive to "extraordinary" circumstances).

22 A fourth category has been suggested for *emergency* good-time credits, awarded to reduce prison
23 populations in times of acute overcrowding. Ellen F. Chayet, Correctional "Good Time" as a Means of Early
24 Release, 6 Crim. Justice Abstracts 521, 524 (1994); see also National Council of State Legislatures, Cutting
25 Corrections Costs (2009). This function is not incorporated into § 305.1, partly because prison-population
26 control is made a core responsibility of the sentencing commission under the revised Code, see § 6A.07
27 (Tentative Draft No. 1, 2007), and partly out of fears of investing too much discretion over incarceration terms in
28 corrections officials, with concomitant dangers of abuse. See Jacobs, Sentencing by Prison Personnel, 30 UCLA
29 L. Rev. at 267-269 (expressing doubts over the use of good time as a prison-population control device). In some
30 instances, it may be politically attractive to meet a population crisis with a back-end solution of increased good-
31 time allowances, on the theory that such provisions have low public visibility. If credit formulas are changed
32 permanently as a response to a short-term crisis, however, this may not result in sound long-term policy. A better
33 solution, if the good-time apparatus is to be turned to this purpose, is to authorize the temporary suspension of
34 the normal rules for credit allowances. See Chayet, "Good Time" as a Means of Early Release, at 524 (13 state
35 codes authorize "supplemental" good-time-credit awards under emergency crowding conditions).

36 The research literature on the use and benefits of good-time and earned-time provisions is exceedingly
37 thin. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 522 ("Despite its use in prison systems

throughout the world, credit-based release is a subject that has received limited research attention."). No one knows, even roughly, what the optimum credit allowances might be in different settings—or, indeed, whether the credit systems are at all successful in promoting prison discipline or offender rehabilitation. See Demleitner, Good Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 2009 at 783; Bert Useem et al., Sentencing Matters, But Does Good Time Matter More?), Institute for Social Research, University of New Mexico, Working Paper No. 14 (1996), at 4; Melissa Pacheco, Good Time and Programs for Prisoners (Nationwide), Institute for Social Research, University of New Mexico, Working Paper No. 3 (1996), at 6 ("The general assumption is that good time systems are necessary for the maintenance of order and discipline in the prison. However, there are no systematic data to support this belief. . . . There have been no studies that confirm that good time contributes to inmate reform."). The few substantial studies that exist are decades old. Two studies of good-time practices in the 1980s found that inmates released early had recidivism rates indistinguishable from control groups. James Austin, Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy, 32 Crime & Delinq. 404, 463-469 (1986); P.A. Malak, Early Release (Colorado Division of Criminal Justice, 1984). A third study in the 1980s found no strong evidence that inmates covered by Michigan's good-time policy were less likely to commit prison infractions than inmates not covered. James G. Emshoff & William S. Davidson, The Effect of "Good Time" Credit on Inmate Behavior, 14 Crim. Just. & Beh. 335, 343-344 (1987). A balanced summary of the thin research literature on good time is found in Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 534:

> It is not clear whether good time improves the in-prison behavior of inmates, but correctional administrators and staff believe that it assists them in maintaining institutional control. There is, however, no evidence that good-time credits have rehabilitative benefits, although in earned release programs, under certain conditions, credits may provide inmates with an incentive to engage in self-improvement. Finally, there is significant evidence to suggest that good time contributes to disparities in sentences served and correctional treatment inequities.

b. Amount of credits available. Because the Model Penal Code's sentencing system removes parole-release discretion in prison cases, the closest state analogues to § 305.1 are found in similarly determinate systems. Relevant provisions include: Ariz. Rev. Stat. § 41-1604.07(A), (C) (granting "one day for every six days served" for most prisoners, subject to forfeiture for rules violations or failure to participate in programming); Cal. Penal Code § 2933(b) ("For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months"; this is a general rule subject to exceptions based on crime type and criminal history); id. § 2933.05(a) (additional credits for program participation available, not to exceed 6 weeks during any 12-month period of confinement); § 2935 (possibility of additional 12-month reduction in sentence for heroism or extraordinary service to safety of institution); Del. Code Ann. tit. 11, § 4381(e) (up to 100 days of "good time" credit in a year for both good behavior and participation in programming; the ceiling for good behavior alone is 36 days per year); 730 Ill. Comp. Stat. 5/3-6-3(a)(2.1) (most prisoners eligible to receive "one day of good conduct credit for each day of his or her sentence of imprisonment"); Ind. Code § 35-50-6-3 (rate of accrual of credits depends on inmate classification; most generous formula is "one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing"); id. § 35-50-6-3.3(i) (capping credit time at the lesser of 4 years or one-third of a

1 person's "total applicable credit time"); Kan. Stat. § 21-4722(a)(2) (good time credits of 15 or 20 percent,
2 depending on type and grade of offense); id. § 21-4722(e) (an additional credit of 60 days for program
3 completion available to inmates convicted of less serious felonies); Me. Rev. Stat. Ann. tit. 17-A, § 1253(3) ("a
4 person sentenced to imprisonment for more than 6 months is entitled to receive a deduction of 10 days each
5 month for observing all rules of the department and institution"); § 1253(4), (5) (up to an additional 5 days per
6 month may be deducted for inmates participating in various in-prison or community programs); Minn. Stat.
7 § 244.101, subd. 1 (supervised-release term equal to 1/3 of the prison term normally results in release after 2/3 of
8 the pronounced sentence); id. § 244.05, subd. 1b(b) (release can be delayed for disciplinary violation or refusal
9 to participate in rehabilitative program); N.C. Gen. Stat. § 15A-1340.17(d),(e) (potential earned-time reductions
10 vary by offense and criminal record, but do not exceed 45 percent); Ohio Rev. Code § 2967.193 (E)(3) (eligible
11 prisoners may earn credits for participation in programs or periods they have remained in "minimum security
12 status"; total credits not to exceed 1/3 their "minimum" or "definite" prison term); Or. Rev. Stat. § 421.120
13 (various rules and formulas for good-time and earned-time credits); id. § 421.121(2)(a) ("The maximum amount
14 of time credits earned for appropriate institutional behavior, for participation in the adult basic skills
15 development program . . . or for obtaining a diploma, certificate or degree . . . may not exceed 30 percent of the
16 total term of incarceration"); Va. Code § 53.1-202.2 (establishing system of "sentence credits" "earned through
17 adherence to rules, . . . program participation . . . and by meeting such other requirements as may be established
18 by law or regulation"); id. § 53.1-202.3 (providing that no more than "four and one-half sentence credits may be
19 earned for each thirty days served"); id. § 53.1-202.4 (State Board of Corrections to establish criteria for award
20 of sentence credits and for their forfeiture); Wash. Rev. Code § 9.94A.729 (allowing "earned release time" for
21 low-risk nonviolent offenders up to 50 percent of their term of sentence; for serious violent and sex offenders up
22 to 10 percent; and for other offenders up to 33 percent). Many different good-time and earned-time formulas are
23 found in indeterminate sentencing states, as well. For a recent statutory survey, see National Conference of State
24 Legislatures, Statutes Related to Good Time/Earned Time (June 2009).

25 Subsection (1) provides that its credits shall be calculated against the "full terms of imprisonment as
26 imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any
27 period of detention credited against sentence under § 6.06A." This language clarifies a number of possible
28 ambiguities in the counting rules. See Barber v. Thomas, 130 S. Ct. 2499 (2010) (construing federal good-time
29 statute to require the less generous of two alternative counting methods); McGinnis v. Royster, 410 U.S. 263
30 (1973) (upholding state practice of not awarding credits for jail time).

31 An earlier proposed version of § 305.1 capped the available credits for both good-time and earned-time
32 at a total of 15 percent, see Discussion Draft No. 2 (2009), at 81. The current formulation was influenced by the
33 recommendation of the ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in
34 a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love,
35 Reporter), at 28 (that revised § 305.1 should add to the credits available in subsection (2) "an additional 15%
36 good time credit to be earned for participation in work and other rehabilitative activities . . . to give prison
37 authorities tools to encourage participation in reentry programming"). See also Nora V. Demleitner, Good
38 Conduct Time: How Much and for Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing,

61 Fla. L. Rev. 777, 792-793, 796 (2009) (suggesting a total allowance in § 305.1 of one-third of a prison sentence, split between institutional compliance and program participation).

Some states reward inmates' participation in rehabilitative programming with a fixed credit upon program completion. For example, in 2009, the Colorado General Assembly authorized the Department of Corrections to award 60 days of credit toward release to prisoners serving prison sentences for nonviolent offenses who had successfully completed in-prison programs. This credit is available only once per prison term. The 120-day allowance, bracketed in alternative subsection (2), is within the range of fixed credits currently authorized in state codes. See National Conference of State Legislatures, Cutting Corrections Costs: Earned Time Policies for State Prisoners (2009), at 2 ("The typical range for a one-time credit is between 30 days and 120 days.").

c. Deductions from mandatory prison terms. Most state good-time provisions do not speak to the question of whether credits are to be deducted from mandatory-minimum prison sentences, or do so on an offense-by-offense basis. The general rule stated in subsection (3) derives from the Institute's categorical disapproval of mandatory penalties rather than the weight of existing statutory examples. Nonetheless, subsection (3) finds precedent in at least one jurisdiction. See Iowa Code § 903A.5(1) ("Earned time accrued and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to [various provisions listed]"). Protracted litigation has occurred under some mandatory-penalty schemes when this issue is not resolved by statute. See Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. Davis L. Rev. 1025 (2004); In re Cervera, 16 P.3d 176, 178-180 (Cal. 2001).

d. Grounds for forfeiture of credits. Although there is little research on the actual behavior of prison disciplinary processes, practitioners and scholars in the field report that good-time credits are granted to most prisoners in the normal course, and that forfeiture is a relatively rare event. See Schriro, Is Good Time a Good Idea?, 21 Fed. Sent. Rptr. 179; Demleitner, Good Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 777; Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. 217. Assuming this is so, and also concluding it is a desirable state of affairs, subsection (4) reinforces the norm of routinely awarded credits by its recommendation that the substantive grounds of forfeiture should be narrowly defined.

Subsection (4) would also rule out certain questionable grounds for good-time forfeiture that exist in current American law. For instance, 13 states allow the revocation of good-time credits when a prisoner is found to have filed a frivolous lawsuit. In at least one state, forfeiture is authorized when an inmate demands DNA testing that ultimately confirms the inmate's guilt. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts 521; Tonja Jacobi and Gwendolyn Carroll, Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*,* 102 Northwestern L. Rev. 263, 292 (2008); Fed. Bureau of Prisons, Legal Resource Guide to the Federal Bureau of Prisons 2008, at 14 (2008).

The subject of procedural safeguards in the prison disciplinary process is of considerable importance, but it is not taken up in this provision. The 1962 Code addressed questions of process later in Article 305, but offered few solid prescriptions, see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985). These remain potential issues for later drafting in the Code revision project, see Discussion Draft No. 2 (2009), at 117-121 ("General Plan for Revision: Parts III and IV of the 1962 Model Penal Code").

Minimum due-process requirements for good-time forfeiture are mandated by federal constitutional law. See Wolff v. McDonnell, 418 U.S. 539 (1974); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445 (1985). Nonetheless, in many prison systems, the ultimate fairness of the process has come under doubt. As James Jacobs reported in his classic study:

> Prison personnel preside over disciplinary hearings and such persons are subject to the pressures of institutional security, staff morale, and bureaucratic expediency. Despite the *Wolff* procedures, these hearings tend to be informal and perfunctory. "Not guilty" verdicts are extremely rare and, usually, the only doubtful issue is how severe the punishment will be.

Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 238 (1982); see also Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 531-533 (collecting studies).

e. Vesting. A handful of American jurisdictions at one time provided for the vesting of good-time credits, although some also provided for "liens" against future earnings of good- time credits for bad behavior. All of the vesting statutes have since been repealed. See Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 239-240; Cal. Penal Code § 2931 (vesting provision not applicable to offenders whose crimes were committed on or after January 1, 1983); Minn. Stat. § 244.04 (cancelling vesting provision for offenders whose crimes were committed after August 1, 1993).

ORIGINAL PROVISION

§ 305.1. Reductions of Prison Terms for Good Behavior.

For good behavior and faithful performance of duties, the term of a prisoner sentenced to imprisonment for an indefinite term with a maximum in excess of one year, shall be reduced by [six] days for each month of such term. In addition, for especially meritorious behavior or exceptional performance of his duties, a prisoner may receive a further reduction, not to exceed [six] days, for any month of imprisonment. The total of all such reductions shall be deducted:

(1) from his minimum term of imprisonment, to determine the date of his eligibility for release on parole; and

(2) from his maximum term of imprisonment, to determine the date when his release on parole becomes mandatory.

[*End of original provision*]

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

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language

below sets out principles that a legislature should seek to effectuate through enactment of such a provision.

1. The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.

2. After first eligibility, a prisoner's right to apply for sentence modification shall recur at intervals not to exceed 10 years.

3. The department of corrections shall ensure that prisoners are notified of their rights under this provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers. The judicial panel or other judicial decisionmaker shall have discretion to appoint counsel to represent applicant prisoners who are indigent.

4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence. The judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under this standard.

5. The judicial panel or other judicial decisionmaker shall be empowered to modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law.

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

7. An adequate record of proceedings under this provision shall be maintained, and the judicial panel or other judicial decisionmaker shall be required to provide a statement of reasons for its decisions on the record.

8. There shall be a mechanism for review of decisions under this provision, which may be discretionary rather than mandatory.

9. The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by the judicial panel or other judicial decisionmaker when considering applications under this provision.

10. The legislature should instruct the sentencing commission to recommend procedures for the retroactive application of this provision to prisoners who were sentenced before its effective date, and should authorize retroactivity procedures in light of the commission's advice.

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Comment:

a. Scope. This provision is new to the Code. It creates a "second-look" process for sentence modification available to prisoners who have served exceptionally long terms. After 15 years of continuous confinement, prisoners are given the right to apply to a judicial panel or other judicial decisionmaker for possible modification of their original sentences. The Section complements § 305.7 (this draft), which permits judicial modification of prison sentences under circumstances of advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons.

No provision closely similar to § 305.6 exists in any American jurisdiction. The Model Code has never limited itself to a restatement of existing law, however. While it is true that much of the Code's mission is to identify, incorporate, and build upon best practices that have proven themselves in operation, the Code has always had an additional, aspirational dimension. When a careful appraisal of existing law reveals problems that are both serious and neglected, the Code has offered ambitious recommendations. In the 1962 Code, for example, many provisions in Part I (the "General Part"), especially the *mens rea* analysis pioneered in § 2.02, represented major advances over contemporary state codes and common law. The revised Code has continued in this spirit and has tendered other recommendations in the absence of prior precedent. See, for example, § 6A.07(3) (Tentative Draft No. 1, 2007) (calling for the routine preparation of "demographic" impact projections, including racial and ethnic impacts, whenever laws and guidelines affecting sentencing are proposed); § 6.11A (2011) (this draft) (recommending a consolidated and specialized statutory approach for the sentencing in adult courts of offenders who were under age 18 when their offenses were committed).

This provision is stated in terms of "principles for legislation" rather than recommended black-letter statutory language. This is because the provision envisions new *institutional* arrangements for prison-release decisions that have not been tested in practice. In this respect, § 305.6 is more ambitious than an innovative substantive provision, or a new procedural recommendation that can be executed within existing institutional frameworks. For the cases it reaches, § 305.6 would effect a change in the allocation of sentencing authority analogous to the creation of a sentencing commission in a jurisdiction that has never had one, the introduction of meaningful appellate sentence review in a state with no such history, or the abolition of parole-release discretion in a formerly indeterminate system. All of these are fundamental structural changes—but are distinguishable from § 305.6 because they have long

track records. It is possible for a model code to supply recommended statutory language and fine-grained implementation advice when the subject is sentencing reforms dating back more than 30 years. In the case of § 305.6, there is no equivalent fund of experience upon which to draw.

The Institute calls for a new approach to prison release in cases of extraordinarily long sentences for two reasons: First, American criminal-justice systems make heavy use of lengthy prison terms—dramatically more so than other Western democracies—and the nation's reliance on these severe penalties has greatly increased in the last 40 years. The impact on the nation's aggregate incarceration policy has been enormous. At the time of the revised Code's preparation, the per capita incarceration rate in the United States was the highest in the world. As a proportion of its population, the United States in 2009 confined 5 times more people than the United Kingdom (which has Western Europe's highest incarceration rate), 6.5 times more than Canada, 9 times more than Germany, 10 times more than Norway and Sweden, and 12 times more than Japan, Denmark, and Finland. The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation's exceptional use of long confinement terms that make no allowance for changes in the crime policy environment.

Second, § 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.

The policy imperatives of § 305.6 coexist with the revised Code's general preference for a "determinate" sentencing system, see § 6.06(4) and (5) (this draft); Appendix B, Reporter's Study: The Question of Parole-Release Authority (this draft). Section 305.6 is crafted to be a narrow incursion upon the Code's general preference for determinate sentences, and to avoid the shortcomings of the parole-release framework. It offers a wholly new institutional model, targeted to a small group of cases, that substitutes a judicial decisionmaker for the administrative parole board. It also represents a fundamental departure from the underlying theory of parole release, which supposed that most prisoners could be rehabilitated and that the parole board could discern when rehabilitation had been achieved in individual cases. Prisoner rehabilitation remains an eligible concern in appropriate cases under paragraph (4), see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), but it is far from the only admissible consideration, or the basic underpinning, of the sentence-modification power.

While § 305.6 is innovative and ambitious, it will impact only a small share of all prison sentences. Given the Code's good-time allowances, which are expected to be granted to the great majority of inmates, see § 305.1 (this draft), only those serving pronounced terms of more than 20 years are likely to be affected by the second-look process. In most existing

American criminal-justice systems, offenders with such sentences make up a tiny fraction of all prison admissions—probably on the order of two or three percent in most states. Their numbers are larger in standing populations, because offenders with shorter sentences move through the corrections system far more quickly. But it is the rate of admissions that will determine the case flow of eligible applicants under § 305.6, beginning 15 years post-admission for each cohort of long-term prisoners.

Despite the relatively small absolute numbers of eligible prisoners at any given time, implementation of a second-look process will carry substantial costs. If a state legislature selects existing trial courts as the decisionmaking authority, for example, staffing and workload adjustments will probably be necessary. Likewise, if a wholly new judicial tribunal is chartered, the legislature must allocate start-up and operational funding. No matter where the modification power is reposed, state expenditures for prosecutors' offices and appointed defense counsel can be expected to increase, see paragraphs (3) and (6). Finally, the burdens of the first years of the new process will be greater than in later years, partly because the experimental phase of any undertaking carries efficiency costs, but also because each jurisdiction will have to address retroactivity issues for prisoners who have already served 15 years or more of prison time under prior law, see paragraph (10).

Apart from monetary costs, predictable political risks will be visited upon any judicial authority vested with sentence-modification powers. Decisions to release prisoners short of their maximum available confinement terms are often unpopular, and even one instance of serious reoffending by a releasee can focus overwhelming negative attention upon the releasing authority. This is true of any back-end system for the adjustment of prison stays, but the case mix under § 305.6 will be unique, with a heavy tilt toward the most serious offenses and victimizations. Care must be taken in the design of the sentence-modification scheme that decisions are seen to be made according to transparent and defensible criteria, and that the authorized decisionmakers are afforded institutional supports that will ensure the independence needed for the exercise of reasoned judgment.

b. A "second look" at long-term sentences. No determinate sentencing system can be absolute, and no purely determinate system has ever existed in American law. All jurisdictions that have abrogated the releasing authority of a parole agency have retained mechanisms such as good-time and earned-time credits, compassionate-release provisions, ad hoc emergency contingencies for prison overcrowding, and the clemency power of the executive. The question is not *whether* original judicial sentences should ever be subject to change in a determinate structure, but what exceptions should be grafted onto the generally determinate scheme. The second-look authority is one such special case, especially in a nation that makes frequent use of exceptionally severe prison sentences. Whenever a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors and injustices. On this principle, determinate prison sentences are least justifiable as they extend in length from months and

years to decades. Both moral and consequentialist judgments become suspect when their effects are projected so far forward into a distant future.

The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses. It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue.

On utilitarian premises, lengthy sentences may also fail to age gracefully. Advancements in empirical knowledge may demonstrate that sentences thought to be well founded in one era were in fact misconceived. An optimist would expect this to be so. For example, research into risk-assessment methods over the last two decades has yielded significant (and largely unforeseen) improvements. Projecting this trend forward, an individualized prediction of recidivism risk made today may not be congruent with the best prediction science 20 years from now. Similarly, with ongoing research and investment, new and effective rehabilitative or reintegrative interventions may be discovered for long-term inmates who previously were thought resistant to change. Proven and credible rehabilitative programming may become a pillar of deincarceration policy in the United States, as some contemporary advocates of "evidence-based sentencing" now expound. Twenty years or more in the future, with sturdier empirical foundations, the perceived collapse of rehabilitation theory could be substantially reversed.

The illustrations above could be multiplied many times over. On every conceivable utilitarian premise, it is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past.

c. Time periods. Paragraph (1) sets the timing of first eligibility for possible sentence modification under this section, and paragraph (2) advises the legislature to provide for recurring eligibility at intervals no longer than 10 years. There was near consensus within the Institute that 15 years was the proper time period for engagement of the second-look authority—at least until experimentation and actual experience under § 305.6 suggests a different arrangement. Where there was disagreement over the 15-year provision, it came from proponents of significantly shorter periods, such as 10 or even 5 years.

While § 305.6 contemplates much room for experimentation by state legislatures, the Institute would not endorse a period longer than 15 years. Nor should a substantially abridged eligibility period be codified without deliberation. If much shorter time lines are employed, there is a danger that the second-look authority will skew the system as a whole toward an indeterminate framework. Because shorter sentences occur in much larger numbers than very long sentences, a trimming of the eligibility period would geometrically expand caseloads under § 305.6, as if moving down from the apex toward the base of a pyramid. The financial costs of the second-look mechanism, and the practical burdens placed on the judicial decisionmaker, could be greatly magnified. More importantly, the policy foundations of the sentencing system would be eroded. An eligibility timeline substantially shorter than 15 years could upset the balance of institutional powers that has proven successful in a number of states—and is the template for the Code's sentencing structure.

A 15-year eligibility formula is also driven by the underlying theory of § 305.6. The very justification for a second-look exception within a determinate framework is that sentences of extraordinary length present compelling ethical and utilitarian uncertainties—directly as a consequence of the amount of time they span.

Calculations of when the 15-year period has elapsed should be made with the benefit of any doubt going to the prisoner-applicant. Section 305.6 is intended to reach prisoners serving an aggregate period of incarceration no matter how that period has been legally composed. Paragraph (1) expressly extends to "prisoners who have served 15 years of *any sentence of imprisonment*." This language should be read literally and broadly. For example, a prisoner serving a single 30-year sentence based on one count of conviction should become eligible for sentence modification at the same time as a prisoner serving two consecutive 15-year sentences or a prisoner serving two concurrent 30-year terms. The configuration of the original sentence will of course be one important consideration for the judicial decisionmaker to weigh when discharging its sentence-modification responsibilities, and any sentencing guidelines produced under paragraph (9) might incorporate this concern, as well. But the makeup of the original sentence is not relevant to the timing of first eligibility. The trigger for the second-look authority is the passage of enough time that the premises underlying the original sentence should be revisited, and any significant changes in circumstances assessed.

Paragraph (1)'s reference to "any sentence of imprisonment" may benefit from clarification through statutory definition. The following language is one possible formulation:

> **"Sentence of imprisonment" shall include a single sentence or multiple sentences resulting in an aggregate period of confinement, whether imposed concurrently or consecutively, in a single proceeding or multiple proceedings.**

Paragraph (2) states that a prisoner's eligibility to apply for sentence modification must recur at least every 10 years after denial of an initial application. The 10-year period is

1 meant as an outer limit on the time period for successive applications. So long as the date of
2 first eligibility is set at 15 years or a similar period, the procedures for recurring applications
3 can do little to undermine the general determinacy of the sentencing system unless they are
4 heedlessly generous. While the numbers of prisoners who reach the 15-year mark of
5 confinement terms is small, the numbers dwindle further after 20 or 25 years. States are free
6 to provide for fixed eligibility intervals shorter than 10 years consistent with § 305.6, or to
7 make other arrangements such as allowing the judicial decisionmaker to set dates of next
8 eligibility within a 10-year ceiling.

9 *d. Identity of the official decisionmaker.* Although § 305.6 calls for considerable
10 experimentation by the states in its implementation, the Code firmly recommends that the
11 sentence-modification authority should be viewed as a *judicial* function. The root conception
12 of § 305.6 is that, while many applications will be screened out at an early stage, something
13 akin to a resentencing will occur in cases that proceed the full length of the process, see
14 paragraph (4) and Comment *f*. Accordingly, judges should be empowered as the responsible
15 decisionmakers. The judicial model for sentence modification is also consistent with the
16 institutional philosophy of the Code, carried through the sentencing system as a whole, that
17 judges should be the central authorities in the system, with a greater share of sentencing
18 discretion than other official actors, see § 1.02(2)(b)(i) and Comment *h* (Tentative Draft No.
19 1, 2007).

20 There is also a persuasive *negative* case in support of a judicial decisionmaker. In
21 large part, the project of creating a second-look provision grew out of disillusionment with
22 traditional arrangements of back-end discretion over the lengths of prison terms, which place
23 large reservoirs of power in parole agencies and corrections officials. These policy judgments
24 are echoed throughout the revised Code. The Code's determinate framework removes the
25 prison-release authority of parole boards, see § 6.06(4) and (5) (this draft); Appendix B,
26 Reporter's Study: The Question of Parole-Release Authority (this draft). While corrections
27 departments continue to exercise power over good-time allowances, the revised Code seeks to
28 circumscribe and regularize the process, see § 305.1 and Comment *a* (this draft).

29 Paragraph (1) states that the modification power should be exercised by "a judicial
30 panel or other judicial decisionmaker." Given the experimental nature of the provision as a
31 whole, the identity of the judicial authority is left open-ended. Each jurisdiction that adopts
32 the provision must design an institutional architecture that will best suit its local needs and
33 circumstances. This could entail the creation of a new court or other judicial authority, or
34 reliance on the existing court system. In early drafts of the second-look provision, the
35 sentence-modification power was to be reposed in "a trial court of the jurisdiction in which
36 the prisoner was sentenced." See § 305.6(2) (Preliminary Draft No. 6, April 11, 2008). In
37 some states, this may prove to be the simplest arrangement, and it enjoys a natural "fit" with
38 the concept of § 305.6 as calling for a new sentencing decision in selected cases. The "back-
39 to-court" proposal met with strong opposition, however, if it were the Code's sole black-letter

recommendation to be addressed indiscriminately to all jurisdictions. Doubts were expressed that the trial courts in many or most states were well positioned to discharge the second-look responsibility. Each legislature must weight these concerns when crafting the institutional machinery that will work best in its state.

The doubts were several, but do not apply equally to all state judicial systems. First, § 305.6 would add to the workload of already overburdened trial courts. Problems of docket overload exist nationwide, but in some places are more acute than in others. There is a danger that trial judges in some jurisdictions would treat sentence-modification applications as nuisances, of far lower priority than their pending cases, and would feel pressure to dispose of the bulk of cases on the papers alone, without a hearing or counsel. As one experienced trial judge put it:

> The reality is that after fifteen years it is extremely unlikely that the original sentencing judge will be the judge to take the second look. . . . [Y]ou are asking a busy judge to review some other judge's case—a case with which he or she has no familiarity and no first-hand knowledge of why the sentencing judge made the initial sentencing decision.

There is a related danger that different trial courts would attach varying degrees of importance to sentence-modification applications, and that disparity in outcomes under § 305.6 would result from the idiosyncrasies of individual judges. Some might make frequent use of the modification authority while others would rarely or never do so. Sentencing guidelines and an appellate review process could perhaps iron out some of these disparities, but individual trial judges would still possess the greatest share of second-look discretion.

Finally, judges in some jurisdictions are more politically vulnerable than in others—and there is every reason to anticipate that many second-look decisions will be politically charged. The cases that come forward will by definition include the most serious offenses and the most blameworthy offenders. Many will involve great harms suffered by victims, their families, and communities. A decision to amend an original sentence might trigger a public and media backlash. Because methods for the appointment, retention, or election of trial judges vary a great deal across the states, it may be unrealistic, unfair, or counterproductive to place the entire weight of second-look decisionmaking onto single judges. One risk is that timorous judges would fail to act on meritorious applications; another is that courageous judges would be voted out of office.

The alternative to the "back-to-court" approach is for the legislature to create a wholly new judicial decisionmaker for the sentence-modification process, preferably a "panel" of several judges or retired judges. If such a new authority is created for the sole purpose of ruling upon § 305.6 applications, and is separately funded, sentence-modification applications will not be in danger of being pushed to a back shelf in favor of other matters. Also, judicial panels or other decisionmakers who regularly discharge the sentence-modification function

can be expected to develop specialized expertise, and a uniformity of approach, greater than if § 305.6 were administered by individual trial judges. A panel would carry the further advantage of distributing responsibility and accountability over more than one individual, thus muting the political costs attached to unpopular decisions. If the panel were composed of former judges, who need not stand for retention or election, the risks would be further reduced. There is much room for innovation in dealing with questions of competency, expertise, and independence. Some legislatures might find it desirable to charter sentence-modification panels that retain a judicial character, but include former prosecutors and defense lawyers, or other criminal-justice professionals, as well as sitting or former judges. In the spirit of § 305.6, majority representation by judges would remain an essential ingredient, so the panel would retain its judicial character, but the heightened difficulty of second-look cases may call for broader representation.

A further advantage of the creation of an independent judicial authority for second-look decisions might be that the original trial judge, even if still on the bench, would not be asked to reevaluate his or her own sentence. Different views on this question are easily imaginable. Some may think it an optimum arrangement to return the case to the original sentencer—although the time periods involved in § 305.6 will often make this infeasible. At best, this preference would be spottily met. Alternatively, some may fear that the original sentencer, when still available, would bring a psychological investment in the original sentence that would affect the modification proceedings. Fresh, objective analysis would be difficult no matter how carefully the law declared that the purpose of § 305.6 is not to review the correctness of the original sentence. Moreover, if this worry is justified, the impediment would exist only for a few applicants, on the happenstance of when the original sentencing took place in a judge's career. Indeed, on this reasoning—even in a system that designates trial courts as the relevant authority under § 305.6—a legislature might choose to prohibit the original judge from hearing a sentence-modification application, in favor of another trial court. All of this falls within the realm of state-by-state experimentation envisioned by this section.

No matter what the legislature's choice of judicial decisionmaker, states that adopt the recommendations of § 305.6 will be exploring new ground. A minority of states recognize no judicial authority whatsoever to modify a prison sentence once its execution has begun. Most states grant trial courts a sentence-reconsideration power that expires a mere several months after the original sentencing. Section 305.6 has little similarity with these provisions. It creates a sentence-modification power that activates many years after the original sentencing, at the back end of the sentence chronology rather than the front end. Only a handful of states have adopted a judicial sentence-modification mechanism that extends years into the execution of a prison term—and only two impose periods of delay before the court's authority comes into being, with eligibility periods generally much shorter than the 15 years recommended in the revised Code. There is only limited precedent for the notion that judicial

sentencing discretion, selectively exercised, may play an important role deep into the execution of a long prison term.

The Institute weighed and rejected a split decisionmaking model for this section. Long consideration was given to the possible inclusion of a "gatekeeper" to ensure that only colorable applications are presented to the judicial decisionmaker for consideration. Instead, the provision envisions that the judicial authority itself will create appropriate processes of its own to review and screen out applications that are unmeritorious on their face. Subsection (4) explicitly authorizes such a process, both to manage the workload of applications in general, and preserve resources for those applications that deserve closest attention. A centralized sorting approach would be consistent with this section, or the use of an outside agency to offer nonbinding recommendations. For example, a probation department might be enlisted to give preliminary input, perhaps as part of a larger responsibility to prepare presentence reports in designated cases. The main concern is that there be no external gatekeeper with the power to select or veto cases. It is difficult to imagine an existing agency that could safely be entrusted with so much power. In the related context of compassionate release, gatekeepers such as the department of corrections have been seen to unduly choke off the flow of meritorious petitions, see § 305.7 and Comment *c* (this draft).

Paragraphs (6) through (8) of this Section are not intended to apply to applications summarily dismissed as unmeritorious under paragraph (4).

e. Assistance to eligible prisoners. Paragraph (3) provides that the department of corrections in each jurisdiction must establish procedures to notify eligible prisoners of their rights under § 305.6, and must give prisoners adequate assistance for the preparation of applications. The assistance may be provided by nonlawyers, such as knowledgeable staff members or volunteers, or qualified prisoners. Without basic support of this kind, the sentence-modification process would prove empty for many long-term prisoners. Some would be unaware of their rights, or unable to calculate accurately their first eligibility date. Others would be unable to make informed strategic choices, such as the decision of when to file an application, or would lack the skills to formulate an application that fairly captures the arguments in their favor.

Paragraph (3) further states that the judicial panel or decisionmaker must be given the discretion to appoint legal counsel to indigent prisoners. Implicit in this provision is that the legislature must authorize funding for such representation. Normally an appointment of counsel would not be made unless the judicial authority has reviewed a prisoner's application and determined that a hearing is warranted. In some instances, however, it may be necessary to appoint counsel to assist a prisoner in the preparation of an amended application.

f. Model of decisionmaking; substantive standard. The theoretical model of § 305.6, for colorable applications that survive the screening stage, is that the judicial decisionmaker should engage in a thought process that resembles a de novo sentencing decision. Paragraph

(4) describes the final modification decision as "analogous to a resentencing." The decisionmaker should not be expected to reconstruct the reasoning behind the original sentence, or critique the decision of the sentencing judge many years before. It must be emphasized that the purpose of § 305.6 is not to review the correctness of the original sentence. Such a task would be pointless and perhaps impossible, given the passage of time. Any notion of review might also raise a barrier to sentence modifications if they are perceived as a disparagement of the sentencing judge. After a period of 15 years, § 305.6 presumes that much new information about the prisoner will have accumulated, new criminological knowledge may exist about offender rehabilitation and other relevant utilitarian objectives and, in some cases, broader societal values relevant to punishment decisions may have shifted, see Comment *b*. The ultimate inquiry is whether, in light of current information, the purposes of sentencing in Tentative Draft No. 1 (2007), § 1.02(2), would best be served by completion of the original sentence or a modified sentence.

Thus, for example, the unserved balance of an applicant's prison sentence might be justified on the reasonable belief that the offender presents a continuing danger to the community, see id. § 1.02(2)(a)(ii), and so the judicial decisionmaker could rule under paragraph (4) that the original sentence should remain undisturbed on incapacitation grounds. On the other hand, there may be cases in which there are no reasonable grounds to believe the prisoner presents a danger to public safety. For example, a prisoner's progress in correctional treatment programs and behavior while institutionalized may now support a low assessment of recidivism risk. Or, over a period of 15 years or more, prediction technology may have improved so that an offender previously placed in a "high risk" category may be differently classified using contemporary tools. See § 6B.09 (this draft). Depending on what other considerations exist in the case, the judicial decisionmaker may well decide that there is no sound rationale for the applicant's continued incarceration.

Sentence modifications on proportionality grounds may be warranted if the opprobrium attached to certain criminalized conduct has diminished over a long period of time. Even for offenses as grave as homicide, societal values sometimes shift in unforeseeable ways, as may be occurring across recent decades in connection with killings of battering spouses by their victims or instances of euthanasia and assisted suicide. That these subjects are hotly controversial, and the public's attitudes in flux, suggests at least the possibility that a new consensus as to offense gravity and proportionate penalties may emerge over the coming generation. The level of societal condemnation attached to drug usage has also proven highly mutable over the past century, with large swings in the criminal law's approaches to mind-altering substances such as alcohol, marijuana, and crack versus powder cocaine. For the vast majority of criminal offenses, the revised Code does not anticipate fundamental shifts in the community's judgments of proportionate penalties in a time span of 15 years. In the unusual instances when this does occur, however, the sentencing system should be empowered to respond. Under paragraph (4), the judicial decisionmaker would be permitted to evaluate the

proportionality of the punishment already experienced by offenders in light of present-day values, together with the remainder of the original sentence still to be served.

Section 305.6 rejects a number of alternative models that might be posited for a sentence-modification provision, which are different or more limited than the resentencing model. Many of these are already effected in other parts of the Code. The second-look provision is not meant to displace rules concerning sentence reconsideration authorized during the early stages of a prison sentence. The sentencing judge's front-end reconsideration powers should perhaps be expanded beyond existing rules, but this is a separate subject to be taken up in an as-yet-undrafted provision of the revised Code. Section 305.6 is not intended as a new form of appellate review or other reappraisal of the correctness of the original sentence (appellate sentence review will also be addressed elsewhere, see § 7.ZZ (Tentative Draft No. 1, 2007) (draft provision submitted for informational purposes only)). Nor is § 305.6 meant to be a reinstitution of the traditional parole inquiry focused primarily on the timing of offender rehabilitation, a reward or incentive for good behavior while incarcerated (addressed in § 305.1, this draft), a new form of judicial clemency or mercy (the clemency power has never been a part of the Model Code), or a vehicle that responds only to demonstrably "new" circumstances that have arisen since the original sentencing (see § 305.7, this draft).

It bears emphasis that § 305.6 has been designed largely out of deep dissatisfaction with the discretionary-release framework of indeterminate sentencing systems in the United States, and it would subvert the policies of the provision to locate the second-look authority in a parole board. The clarity of this recommendation as to institutional design should not, however, be read to suggest that, as a matter of substantive sentencing policy, inquiries into prisoner rehabilitation should not be allowed—or should be subjected to some form of heightened skepticism. Under § 305.6, rehabilitation remains an eligible concern on an equal footing with other utilitarian objectives, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), all of which are admissible when found to be "reasonably feasible." It is therefore incorporated expressly into § 305.6(4)'s criteria. But it is not the only admissible consideration, far less the general underpinning, of the sentence-modification power. Rehabilitation may justify a modification of penalty, for example, when the judicial decisionmaker finds reasonable grounds for belief that an applicant-prisoner has in fact been reformed, and that this consideration supports a modification of sentence in light of all other relevant circumstances. It may also support a change in penalty if the judicial decisionmaker finds that the prisoner's rehabilitation is a reasonably feasible goal for the future, but that an altered sentence is needed to facilitate the process.

g. What modifications are permitted. Paragraph (5) states that the judicial decisionmaker must be given the power to "modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence." Subject to the ceiling on prospective severity, this is intended to be as broad an authority as possible to craft a modified sentence. An amended sentence could

take the form of a shortened prison term, but might also include new or altered sanctions such as a longer or shorter term of postrelease supervision than originally imposed, a term of intermittent confinement (as in a halfway house or day-reporting center), and newly-imposed economic sanctions including fines, forfeitures, and victim restitution. Any lawful sanction or combination of sanctions that would have been available to the original sentencing judge should be among the options permissible at sentence modification.

The primary limitation placed on the judicial decisionmaker's authority is the Section's prohibition of increases in severity of punishment. Paragraph (5) makes clear that § 305.6 is designed to operate only in the direction of lenity. This bias is almost certainly required by constitutional law, particularly if § 305.6 were applied to prisoners whose crimes predated its enactment, but is fundamental to the Institute's conception of the provision even in the absence of constitutional command. The second-look mechanism is meant to work as a check on the state's power to impose punishments of extraordinary severity, not an enhancement of that power.

Paragraph (5) further clarifies that the sentence-modification authority "shall not be limited by any mandatory-minimum term of imprisonment under state law." A similar exemption from the force of mandatory penalties exists under the compassionate-release provisions of some states, see § 305.7(8) and Comment *i* (this draft). Paragraph (5) is also consistent with the revised Code's general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute's longstanding disapproval of such laws, see § 6.06, Comment *d* (this draft) ("The revised Code continues the 'firm position of the Institute that legislatively mandated minimum sentences are unsound.'"). For a discussion of other provisions in the revised Code that seek to mute the effects of mandatory penalties, see § 6.06, Comment *d*.

h. Minimum procedural requirements. Section 305.6 does not give detailed guidance on the subject of required procedures. Many important subjects go unaddressed. For instance, hearings will no doubt be required in many second-look cases that reach the stage of full consideration, but § 305.6 lays down no standard for when hearings should be convened, or what level of formality is appropriate. The provision's modesty on this subject stems from the fact that the sentence-modification process envisioned by the Code is untried. There is no body of experience to inform fine-grained questions of implementation. Especially at this level, the provision encourages experimentation, and acknowledges the need for flexibility in approach across jurisdictions.

The Section does, however, lay down several core principles of fair process that should be effectuated by each legislature in one way or another. Paragraph (6) states that notice of sentence-modification proceedings should be given to the relevant prosecuting authorities, and also to crime victims when they are still living and can be contacted with reasonable efforts. Given the long time periods to eligibility under § 305.6, victims will sometimes be unavailable. And, of course, some crimes that are currently paired with

1 extremely long sentences, such as drug offenses in some jurisdictions, have no identifiable
2 victim. Where prosecutors and victims are notified, and wish to participate, paragraph (6)
3 supposes that they should be allowed to have input into the sentence-modification
4 proceedings, but does not seek to define the nature of that input. One possible model is the
5 original sentencing hearing, suggested by the fact that the substantive mission of the second-
6 look provision resembles that of a de novo sentencing. The revised Code will speak to
7 victims' rights of participation in sentencing proceedings in a separate provision slated for
8 future drafting.

9 Also basic to fair process are paragraph (7)'s injunctions that adequate records of
10 proceedings must be maintained, and that the judicial decisionmaker must be required to
11 provide a statement of reasons for its decisions on the record. Sound recordings of hearings, if
12 any, should be maintained, and any dossier or other information considered by the judicial
13 decisionmaker should be preserved. While there is no requirement that the decisionmaker's
14 statement of reasons be in writing, it must be sufficient to explain why the standard for
15 decision in (4) was met or unmet in a given case. Boilerplate explanations, too often a feature
16 of parole-release systems, should be viewed as unsatisfactory.

17 *i. Appeals.* The revised Code disapproves of the existence of great powers of
18 sentencing discretion without the check of appellate review. At the same time, it is the Code's
19 policy that the "intensity" of review should not be constructed in such a way that judicial
20 discretion to individualize penalties is unduly restricted, see § 7.ZZ (Tentative Draft No. 1,
21 2007). The intensity of an appellate process increases with the likelihood that any given
22 decision will be reviewed, non-deferential legal standards of review, and high reversal rates.
23 Paragraph (8) does not attempt to strike an exact balance between intensity of review and the
24 scope of discretion ceded to the sentence-modification authority. It insists merely that an
25 effective review mechanism of some kind must be in place. No appeal as of right need be
26 created under paragraph (8), but each state must give an appellate tribunal discretion to hear
27 prisoners' appeals from adverse rulings. Without at least this much potential for review, any
28 guidelines or other substantive decision criteria developed under paragraphs (4) and (9) would
29 be demoted to advisory status. Indeed, a central criticism of the traditional parole-release
30 process is that the parole board's discretion is not subject to enforceable regulations or
31 meaningful substantive review. The probability of reversal need not be great under § 305.6(8)
32 in order for a competent appellate body to reinforce the legal status of decision rules. In
33 addition, a growing body of appellate precedent, from selected cases that present important
34 issues, can promote principled analysis through the development of a common law of
35 sentence modification.

36 *j. Sentencing guidelines.* Because the theoretical model for § 305.6 most closely
37 resembles the resentencing of long-term prisoners, it follows that the sentencing commission
38 should have responsibility to promulgate guidelines for the process. Sentence-modification
39 guidelines, and their amendments over time, would be informed by the judgment of the

diverse membership of the commission, the commission's investigations into the views of stakeholders throughout the justice system, and its ongoing monitoring of sentence-modification decisions once the second-look process has begun to operate. Sentence-modification guidelines could aid the judicial decisionmaker in the difficult tasks of selecting cases under paragraph (4) to be brought forward for full consideration, and in reaching ultimate dispositions in those cases. A guidelines framework would also help distribute the political costs of sentence modification so that they do not fall entirely upon the judicial decisionmaker, but are shared by a broadly representative and bipartisan commission. The danger of popular backlash might be diffused, for example, when a controversial modification ruling is seen to be consistent with the guidelines' presumptions or recommendations.

Paragraph (9) provides that sentence-modification guidelines are subject to all the strictures of Article 6B. Most importantly, this means that the guidelines may carry no more than presumptive force, see § 6B.04 (Tentative Draft No. 1, 2007), so that ultimate sentencing authority remains with the judiciary. In the normal course, the judicial decisionmaker will have the final word under § 305.6, although the mechanism for appeals will in some cases include the input of an appellate tribunal. Given the innovative nature of the long-term sentence-modification power, the development of principled grounds of decision—a common law of sentence modification, as it were—can best be promoted through a three-way conversation that includes the judicial decisionmaker, the reviewing courts, and the sentencing commission.

Sentencing guidelines can address thorny substantive questions that are not appropriate for resolution in the Code itself. For example, there may be some categories of cases for which the guidelines state a presumption in favor of release at first eligibility. In other instances, the guidelines might provide that the judicial decisionmaker look with increasing sympathy upon prisoner applications in the second or third rounds of recurring eligibility under paragraph (2).

k. Retroactivity. Over the long run, caseloads under § 305.6 will be determined by the numbers of prisoners 15 years in the past who were sentenced to sufficiently long terms that they are still incarcerated. During the initial period, however, there will be a backlog of prisoners who were sentenced under prior law, who have already been incarcerated for 15 years or more, but who have not had access to the newly-instituted sentence-modification procedure. Although the numbers of such inmates should not be overwhelming, they will be present in greater numbers during the initial phase of § 305.6's administration than in later years. Important questions of retroactivity thus arise, and must be considered from viewpoints of policy and pragmatic realities.

From a policy perspective, there is no doubt that a new second-look process should be given retroactive force in some form. The considerations that support enactment of § 305.6 apply just as forcefully to long prison terms imposed in the past as to those not yet imposed. Indeed, because many jurisdictions have been operating without the constraints of

proportionality, utilitarian purposes, and correctional resource management that are fundamental to the revised Code, extremely long sentences handed down under prior law might especially be in need of reconsideration. Simply put, given the scale of incarceration in the United States, unprecedented historically or in any other nation, and the prison overcrowding crisis in many jurisdictions, delayed implementation of § 305.6 would ignore the systemic imperatives that impelled its creation.

Even so, the question of retroactivity presents genuine practical difficulties with which each jurisdiction must contend. The number of prisoners eligible for retroactive consideration will vary substantially from state to state, as will the resources allocated to the new sentence-modification authority. States that choose to implement § 305.6 in a way that provides many procedural protections to applicants, and encourages maximum deliberation by the decisionmaker, will process cases more slowly than states that take a less formal approach. At least in some systems, it is unlikely that the judicial decisionmaker will be physically capable of clearing the backlog of cases in short order. Principles of selectivity, prioritization, and the queuing of applications are likely to be needed.

Paragraph (10) states that the legislature, after receipt of the recommendations of the sentencing commission, should provide for the retroactive application of the second-look provision, but paragraph (10) is not unduly restrictive about how this should be done. The optimum approach for each state should be fashioned in light of correctional and case-processing data that the sentencing commission is best positioned to assemble and analyze. Paragraph (10) adopts a retroactivity strategy similar to that taken to the retroactive application of new sentencing guidelines that decrease punishment severity over prior law, see § 6B.11(3) and Alternative § 6B.11(3) (Tentative Draft No. 1, 2007).

REPORTER'S NOTE

a. Scope. For a careful argument in favor of a second-look provision of the kind recommended in § 305.6, see Richard S. Frase, Second Look Provisions in the Proposed Model Penal Code Revisions, 21 Fed. Sent. Rptr. 194 (2009) (Professor Frase argued persuasively that there should be recurring eligibility under subsection (1), which was not a feature of the original draft of § 305.6).

On the dwindling activities of pardoning and clemency authorities in recent decades, see Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent. Rptr. 153 (2009).

For worldwide incarceration rates, see Roy Walmsley, World Prison Population List, 8th ed. (International Centre for Prison Studies, 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8 (last visited Mar. 9, 2011). For further analysis of historically-high U.S. incarceration rates, see The Pew Center on the States, One in 31: The Long Reach of American Corrections (2009), available at

1 http://www.pewcenteronthestates.org/news_room_detail.aspx?id=49398 (last visited Mar. 9, 2011); David
2 Garland ed., Mass Imprisonment: Social Causes and Consequences (2001).

3 In order to weigh the burden § 305.6 will impose on the criminal-justice system, it is helpful to estimate
4 the percentage of prison-bound offenders who receive sentences that will result in time served of greater than 15
5 years. No comprehensive national data on this question are available. However, the U.S. Dept. of Justice reports
6 on felony sentences in the nation's 75 largest counties on a periodic basis. The most recent report, from 2004,
7 collects statistics on 57,497 defendants charged with felonies, 10,156 of whom were convicted and sentenced to
8 prison. See U.S. Dept. of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2004
9 (2008), at 1; Felony Defendants in Large Urban Counties, 2004—Statistical Tables (2008), table 26. Among the
10 group sentenced to prison, 7 percent received *maximum* prison terms of 10 years or more, including 1 percent of
11 the prison-bound group who received life sentences. There is no separate reporting of sentences in excess of 15
12 years—or any other term of years greater than 10. We can estimate, however, that the percentage of newly-
13 sentenced prisoners who might someday file petitions under § 305.6 is substantially less than the 7 percent of the
14 total who receive sentences of 10 years or more. First, among any cohort of sentenced offenders, the more
15 serious punishments are outnumbered by the less serious, so this 7 percent almost certainly includes far more 10-
16 year terms than 20- or 30-year terms. It is unlikely that more than 2 to 3 percent of all prison-bound defendants
17 receive imposed maximum terms in excess of 15 years. It should also be noted that these data go only to
18 maximum sentences as pronounced by the sentencing court rather than the actual term served by inmates—and
19 we know that few prisoners remain confined for the full maximum period. Nationally, the Justice Department
20 estimates that offenders serve, on average, 55 percent of their pronounced prison sentences. See U.S. Dept. of
21 Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004—Statistical Tables
22 (2008), table 1.5. Thus, based on these aggregated statistics from large urban counties, the percentage of prison
23 admittees who will actually serve terms of 15 years or more is in the low single digits.

24 The numbers and percentages of extremely long prison sentences can be expected to vary substantially
25 from state-to-state, however. See generally Franklin E. Zimring and Gordon Hawkins, The Scale of
26 Imprisonment (University of Chicago Press, 1991), at 137-155 (arguing that states are so different in their use of
27 prison sentences that they should be seen as "fifty-one different countries"). While we lack comparative data on
28 state prison sentences longer than 15 years, we know that individual states make dramatically different use of life
29 prison terms and sentences of life without possibility of release (usually called "life without parole" or
30 "LWOP"). See Ashley Nellis and Ryan S. King, No Exit: The Expanding Use of Life Sentences in America (The
31 Sentencing Project, 2009), at 6 ("In 16 states, at least 10% of people in prison are serving a life sentence. In
32 Alabama, California, Massachusetts, Nevada and New York, at least 1 in 6 people in prison are serving a life
33 sentence. On the other end of the spectrum, there are 10 states in which 5% or fewer of those in prison are
34 serving a life sentence, including less than 1% in Indiana."); id. at 9 ("Nationally, there are nine states in which
35 more than 5% of persons in prison are serving an LWOP sentence. On the other end of the spectrum, 15 states
36 incarcerate less than 1% of persons in prison for LWOP."). The diversity of policy and practice concerning life
37 sentences suggests that similarly large state-by-state variations would be found in the use of other extremely long
38 prison sentences.

1 *b. A "second look" at long-term sentences.* A limited second-look mechanism within a determinate
2 sentencing framework, reserved for very serious crimes, was discussed in Andrew von Hirsch and Kathleen J.
3 Hanrahan, The Question of Parole (1979), at 108 ("Such a procedure might have the advantage of allowing the
4 case to be considered in a calmer atmosphere, when it has lost some of its notoriety and a more detached
5 assessment of the crime can be made."). These authors expressed reservations, however, about reproducing the
6 problems of an indeterminate sentencing system. See id. ("If the initial time-fix is subject to later alteration, the
7 time-fixer may be tempted, in his first decision, to resolve all doubts in favor of lengthier terms since he or she
8 knows that 'mistakes' can be corrected later.")

9 On the shifting norms and priorities of criminal law, see Lawrence M. Friedman, Crime and
10 Punishment in American History (1993); Samuel Walker, Popular Justice: A History of American Criminal
11 Justice (2d ed. 1997); David F. Musto, The American Disease: Origins of Narcotic Control (1999); Michael
12 Tonry, Crime and Public Policy, in Tonry ed., The Oxford Handbook of Public Policy (2009). For human
13 accounts of the effects of long-term imprisonment, and changes in inmates over long periods of time, see Ron
14 Wikberg, The Long-Termers, in Wilbert Rideau and Ron Wikberg, Life Sentences: Rage and Survival Behind
15 Bars (1992). For a more academic discussion, see Robert Johnson, Hard Time: Understanding and Reforming
16 the Prison (2d ed. 1996), ch. 4. On the change in criminal propensity over the life course, see Alfred Blumstein
17 and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47
18 Criminology 327 (2009). On the reemergence of rehabilitative theory under an evidence-based model, and the
19 prospects for deincarceration that would follow, see Lawrence W. Sherman, Reducing Incarceration Rates: The
20 Promise of Experimental Criminology, 46 Crime & Delinq. 299 (2000).

21 *c. Time periods.* There are very few provisions that specify a minimum period of confinement that must
22 elapse before a sentencing-modification power comes into being. The mechanism of delayed eligibility is not
23 wholly unknown, however. See 11 Del. Code § 4217(f) ("the Court may order that said offender shall be
24 ineligible for sentence modification pursuant to this section until a specified portion of said Level V sentence has
25 been served, except that no offender who is serving a sentence of incarceration at Level V imposed pursuant to a
26 conviction for a violent felony in Title 11 shall be eligible for sentence modification pursuant to this section until
27 the offender has served at least one-half of the originally imposed Level V sentence"); N.H. Rev. Stat.
28 § 651:20(a) ("Any person sentenced to state prison for a minimum term of 6 years or more shall not bring a
29 petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence,
30 whichever is greater, and not more frequently than every 3 years thereafter. Any person sentenced to state prison
31 for a minimum term of less than 6 years shall not bring a petition to suspend sentence until such person has
32 served at least 2/3 of the minimum sentence, or the petition has been authorized by the sentencing court.").

33 On the definition of "sentence of imprisonment," see 18 U.S.C. § 3584(c) ("Multiple terms of
34 imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a
35 single, aggregate term of imprisonment"); Me. R. Crim. P. 35(d) ("A sentence is the entire order of disposition,
36 including conditions of probation, suspension of sentence, and whether it is to be served concurrently with, or
37 consecutively to, another sentence"); N.H. Rev. Stat. § 651:20(a)(1),(2) ("For concurrent terms of imprisonment,
38 the minimum term shall be satisfied by serving the longest minimum term imposed, and the maximum term shall
39 be satisfied by serving the longest maximum term. . . . For consecutive terms of imprisonment, the minimum

terms of each sentence shall be added to arrive at an aggregate minimum term, and the maximum terms of each sentence shall be added to arrive at an aggregate maximum term.").

d. Identity of the official decisionmaker. While no close precedent exists for a judicial "second look" procedure, a few states currently provide for the judicial modification or reduction of some prison sentences long after they were originally imposed. The closest analogues are 11 Del. Code § 4217 (judicial sentence-modification discretion exists upon recommendation of Department of Corrections and Board of Parole); Ind. Code § 35-38-1-17(b) (after passage of one year, court may resentence any prisoner to a community punishment if this had been an option at the original sentencing; otherwise resentencing of prisoner requires approval of prosecutor); N.H. Rev. Stat. § 651:20 (prisoners may petition court to suspend their sentences after serving a specified portion of their terms; earlier petitions require the recommendation of the department of corrections); and N.J. Rules of Court, R. 3:21-10(b) (court may entertain motion at any time to modify a custodial sentence in order to place offender into a substance-abuse treatment program; transfer of prisoner to intensive supervision program also authorized upon review of a three-judge panel). A judicial release provision exists in Ohio, but it does not apply to sentences longer than 10 years. See Ohio Rev. Code § 2929.20(3). In at least one state, judges until recently had power to modify prison sentences after many years—a practice sometimes called "bench parole," but this authority existed from the date of original sentencing. See Cecilia Klingele, Changing the Sentence Without Hiding the Truth: Sentence Modification as a Promising Method of Early Release, 52 Wm. & Mary L. Rev. 465, 503-506 (2010) (discussing Maryland Rule of Court 4-345, which was amended in 2005 to put a five-year limit on the sentencing court's "revisory power).

Effective in 2010, the New Jersey legislature created a new procedure for the potential release of long-term prisoners who are otherwise parole-ineligible, but who have served a period of 20 years. The new law bears some resemblance to early drafts of § 305.6. Within New Jersey's State Parole Board, there is now a "Blue Ribbon Panel for Review of Long-Term Prisoners' Parole Eligibility" made up of former judges, former prosecutors, and former public defenders. The panel has discretion whether to review individual cases after the 20-year mark. For the cases it selects, the panel's main power is to declare prisoners parole eligible who otherwise would not be. In one sense, this is a muscular provision. There is no statutory limitation on the panel's ability to confer parole eligibility. The statute, for example, would appear to reach prisoners who are serving sentences of life without parole or mandatory periods of incarceration of more than 20 years. Beyond this, however, the panel's role is merely advisory. Once parole eligibility is in place, the State Parole Board assumes jurisdiction; at this stage, the panel may do no more than make a "recommendation regarding the case." See N.J. Stat. § 30:4-123.96.

Some jurisdictions in roughly similar contexts have used the Department of Corrections as a gatekeeper for prisoner petitions. Under the federal compassionate-release provision, for example, the Director of the Bureau of Prisons must make a recommendation in favor of sentence modification before the matter may be heard by the courts. This arrangement has resulted in only a small trickle of recommendations each year. See Stephen R. Sady & Lynn Deffebach, Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration, 21 Fed. Sent. Rptr. 167 (2009) ("with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled

on"); Mary Price, A Case for Compassion, 21 Fed. Sent. Rptr. 170 (2009) (recommending that, "[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion."). In light of this experience, the American Bar Association Commission on Effective Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in § 305.6, and encouraged the consideration of gatekeeping entities other than Departments of Correction. See ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28.

f. Model of decisionmaking; substantive standard. Most sentence-modification provisions do not articulate a theoretical model or substantive criteria for granting a sentence reduction. There are a few exceptions. See 11 Del. Code § 4217(c) ("Good cause under this section shall include, but not be limited to, exceptional rehabilitation of the offender, serious medical illness or infirmity of the offender and prison overcrowding."); id. § 4217(d)(3) (Board of Parole, which screens applications for sentence modification before they are submitted to the courts, "may reject an application for modification if it determines that the defendant constitutes a substantial risk to the community"); Me. R. Crim. P. 35(c)(2) ("The ground of the motion shall be that the original sentence was influenced by a mistake of fact which existed at the time of sentencing"); Mass. R. Crim. P. 29(a) (sentencing court may "revise or revoke such [original] sentence if it appears that justice may not have been done"); N.D. R. Crim. P. 35(b), Explanatory Note ("A motion under the rule is essentially a plea for leniency"); Tenn. R. Crim. P. 35, Advisory Commission Comment ("The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice."). The Notes of the Advisory Committee on Rules to former Fed. R. Crim. P. 35(b) (discussing the 1983 amendment) stated that "the underlying objective of rule 35 . . . is to 'give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim,'" quoting U.S. v. Ellenbogan, 390 F.2d 537, 543 (2d Cir. 1968).

g. What modifications are permitted. The authority granted to the judicial decisionmaker in paragraph (5) to disregard the terms of a mandatory-penalty provision finds some precedent in the American law of sentence modification, and is a relatively common feature of existing compassionate-release provisions. See Kan. Stat. § 21-4603(e) (applicable to offenders sentenced prior to July 1, 1993) ("The court shall modify the sentence at any time before the expiration thereof when such modification is recommended by the secretary of corrections unless the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the inmate will not be served by such modification. *The court shall have the power to impose a less severe penalty upon the inmate, including the power to reduce the minimum below the statutory limit on the minimum term prescribed for the crime of which the inmate has been convicted*.") (emphasis supplied). This sentence-modification authority was not carried forward with enactment of the Kansas Sentencing Guidelines. See also Md. Code Crim. P. § 8-107 (Under procedure where trial-court sentences are reviewable by a three-judge review panel, "[a] review panel may not order a decrease in a mandatory minimum sentence unless the decision of the review panel is unanimous").

In the setting of compassionate release for age or infirmity, American law generally makes prisoners eligible for consideration even though they are otherwise subject to mandatory-minimum terms of incarceration, although many states make narrow exceptions, e.g., for capital cases or sentences of life without parole. See Alaska Stat. § 33.16.085(a) ("Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical parole [if statutory criteria satisfied]"); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) ("This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole."); Conn. Gen. Stat. § 54-131k ("The Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any sentence of imprisonment, except an inmate convicted of a capital felony"); Fla. Stat. § 947.149 (parole commission's power to grant medical release exists "[n]otwithstanding any provision to the contrary" except for inmates under sentence of death); Idaho Code § 20-223(f) ("Subject to the limitations of this subsection and notwithstanding any fixed term of confinement or minimum period of confinement . . . the commission may parole an inmate for medical reasons."); La. Rev. Stat. § 15:574.20(A)(1) ("Notwithstanding the provisions of this Part or any other law to the contrary, any person sentenced to the custody of the Department of Public Safety and Corrections may, upon referral by the department, be considered for medical parole by the Board of Parole. Medical parole consideration shall be in addition to any other parole for which an inmate may be eligible, but shall not be available to any inmate who is awaiting execution or who has a contagious disease."); N.H. Rev. Stat. § 651-A:10-a(VI) ("An inmate who has been sentenced to life in prison without parole or sentenced to death shall not be eligible for medical parole under this section"); N.M. Stat. § 31-21-25.1(B) ("Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible."); N.C. Gen. Stat. § 15A-1369.2(b) ("Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article"); Ore. Rev. Stat. § 144.122(4) ("The provisions of this section do not apply to prisoners sentenced to life imprisonment without the possibility of release or parole"); R.I. Stat. § 13-8.1-1 ("Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except those serving life without parole shall at any time after they begin serving their sentences be eligible for medical parole consideration, regardless of the crime committed or the sentence imposed."); 28 Vt. Stat. § 502a(d) ("Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is serving a sentence, including an inmate who has not yet served the minimum term of the sentence" may be eligible for medical parole); Wyo. Stat. § 7-13-424(a) ("Notwithstanding any other provision of law restricting the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may grant a medical parole to any inmate meeting the conditions specified in this section."). In other states, the sentence-modification power cannot alter a mandatory-minimum prison term. See 11 Del. Code § 4217(f) ("no offender who is serving a statutory mandatory term of incarceration at Level V imposed pursuant to a conviction for any offense set forth in Title 11 shall be eligible for sentence modification pursuant to this section during the mandatory portion of said sentence"; although this preclusion does not apply in cases of "serious medical illness or infirmity"); State v. Peterson, 2007 WL

1 2609244 (N.J. Super. A.D. 2007) (holding Rule 3:21-10(b) does not permit court to reduce sentence below a
2 statutory mandatory-minimum period of incarceration).

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5 **§ 305.7. Modification of Prison Sentences in Circumstances of Advanced Age, Physical**
6 **or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons.**

7 **(1) An offender under any sentence of imprisonment shall be eligible for judicial**
8 **modification of sentence in circumstances of the prisoner's advanced age, physical or**
9 **mental infirmity, exigent family circumstances, or other compelling reasons warranting**
10 **modification of sentence.**

11 **(2) The department of corrections shall notify prisoners of their rights under this**
12 **provision when it becomes aware of a reasonable basis for a prisoner's eligibility, and**
13 **shall provide prisoners with adequate assistance for the preparation of applications,**
14 **which may be provided by nonlawyers.**

15 **(3) The courts shall create procedures for timely assignment of cases under this**
16 **provision to an individual trial court, and may adopt procedures for the screening and**
17 **dismissal of applications that are unmeritorious on their face under the standard of**
18 **subsection (7).**

19 **(4) The trial courts shall have discretion to determine whether a hearing is**
20 **required before ruling on an application under this provision.**

21 **(5) If the prisoner is indigent, the trial court may appoint counsel to represent the**
22 **prisoner.**

23 **(6) The procedures for hearings under this Section shall include the following**
24 **minimum requirements:**

25 **(a) The prosecuting authority that brought the charges of**
26 **conviction against the prisoner shall be allowed to represent the state's**
27 **interests at the hearing;**

28 **(b) Notice of the hearing shall be provided to any crime victim or**
29 **victim's representative, if they can be located with reasonable efforts;**

30 **(c) The trial court shall render its decision within a reasonable time**
31 **of the hearing;**

32 **(d) The court shall state the reasons for its decision on the record;**

33 **(e) The prisoner and the government may petition for discretionary**
34 **review of the trial court's decision in the [Court of Appeals].**

(7) The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the purposes of sentencing in § 1.02(2).

(8) The court may modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law.

(9) When a prisoner who suffers from a physical or mental infirmity is ordered released under this provision, the department of corrections as part of the prisoner's reentry plan shall identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

(10) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by courts when considering the modification of prison sentences under this provision.

Comment:

a. Scope. This provision is new to the Code. Most state codes include sentence-modification provisions that permit the "compassionate release" or "medical parole" or "geriatric release" of aged or infirm prisoners, although the relevant terminology and eligibility criteria vary widely. A handful of jurisdictions have enacted provisions that include broader or open-ended standards. Current federal law on the subject states that "extraordinary and compelling reasons" may warrant the reduction of an incarceration term. These expressly include exigent family circumstances such as the death of a spouse who was the sole caretaker of the prisoner's minor children. Section 305.7 embraces and combines all of the above grounds for sentence modification into a single provision, to be administered by trial courts in light of the underlying purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007).

The sentence-modification authority under this Section may be exercised at any time during a term of imprisonment. The provision is intended to respond to circumstances that arise or are discovered after the time of sentencing, when those circumstances give compelling reason to reevaluate the original sentence.

b. Criteria for eligibility. Subsection (1) sets forth the grounds for eligibility for sentence modification, which include "circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence." Subsection (1) interlocks with subsection (7), which requires that such considerations "justify a modified sentence in light of the purposes of sentencing in

§ 1.02(2).” This standard is enforceable by an appellate court, via discretionary review under subsection (6)(e), and may be elucidated both by the accumulation of judicial precedent, and by sentencing guidelines promulgated by the sentencing commission under subsection (10).

The purposes of sentencing that originally supported a sentence of imprisonment may in some instances become inapplicable to a prisoner who reaches an advanced age while incarcerated, or a prisoner whose physical or mental condition renders it unnecessary, counterproductive, or inhumane to continue a term of confinement. Subsection (1) makes separate provision for circumstances of age and infirmity. This is because advanced age may limit a person’s capabilities, including the physical wherewithal to commit criminal acts, even in the absence of illness, injury, or special disability. Most states provide for the early release of aged and physically infirm inmates, or their removal to other institutions or programs. Some limit their provisions to cases of terminal illness or other very extreme conditions such as paralysis or a coma. The revised Code eschews such a narrow approach in favor of a standard that allows the courts to assess the full context of the situation, including the prisoner’s condition and capabilities, and the presence or absence of reasons for continued confinement.

Only a minority of compassionate-release laws embrace serious mental infirmities, but the revised Code recommends that this should become the universal practice. While estimates vary, it is clear that a substantial percentage of inmates in the nation’s prisons suffer from mental illnesses. Often, effective treatment is unavailable in prison, conditions of the institution may exacerbate the inmate’s condition, and the inmate’s impairment may make it impossible to navigate the daily life of the penitentiary.

No state code expressly authorizes prison sentence reductions on grounds of exigent family circumstances, but the principle is incorporated into the current federal code and sentencing guidelines. Given the powerful collateral effects of prison sentences on families, and the well-documented concern that incarceration of a parent is highly correlated with later offending by children, the sentencing system must be permitted in “exigent” circumstances to take account of third-party consequences of the penalties it imposes, and avoidable future harms that may be generated by the legal system itself. More broadly, the express reference to exigent family circumstances in subsection (1) signals that § 305.7 is not confined philosophically to events that occur within institutional walls. Cases arising under § 305.7 will usually focus on circumstances having to do with the prisoner, or the prisoner’s behavior, but the provision is flexible enough to reach compelling changes of circumstances outside the institution. One primary goal of sentencing under the revised Code is the restoration of communities affected by a criminal offense, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007), and the effectiveness of the sentencing system as a whole is measured in part by “the effects of criminal sanctions upon families and communities,” § 1.02(2)(b)(vii) (id.).

1 The open-ended "compelling reasons" standard in subsection (1) borrows from the
2 most flexible of existing provisions in American correctional codes. Current federal law on
3 the subject states that "extraordinary and compelling reasons" may warrant a reduction of a
4 term. At least one state code uses the catch-all standard of "good cause shown." Another
5 looks to whether the prisoner is "a suitable candidate for suspension of sentence," without
6 elaboration of what counts toward suitability. There are only a few compassionate-release
7 laws of such scope nationwide. In a related setting, however, it is relatively common to find
8 prison-release provisions that respond to "extraordinary" events of an unspecified nature.
9 Many existing good-time provisions grant sentence discounts for a prisoner's extraordinarily
10 meritorious conduct, and are intended to reward acts such as heroism during a prison riot,
11 saving the life of a prison guard, or preventing an escape. Perhaps in recognition that
12 extraordinariness is not distillable into specific statutory language, these laws are often
13 expressed in terms of a general standard. The original Code, for example, offered a sentence
14 reduction of up to 20 percent for "especially meritorious behavior or exceptional performance
15 of his duties," see Model Penal Code, Complete Statutory Text § 305.1 (1985). The revised
16 Code elects to remove such broad authority from the department of corrections, see § 305.1
17 (this draft), and transfers decisional discretion to the courts.

18 Many compassionate-release statutes expressly require a finding that the prisoner does
19 not pose a threat to public safety before release from prison may be ordered by the court. The
20 revised Code contains no explicit command of this kind. Nevertheless, subsection (7) requires
21 that the court's sentence-modification power be exercised in light of the purposes of
22 sentencing in § 1.02(2) (Tentative Draft No. 1, 2007). These include the incapacitation of
23 dangerous offenders, see § 1.02(2)(a)(ii) (id.). A global statement in subsection (7),
24 incorporating all of the purposes in § 1.02(2), is superior to a requirement that only one
25 among those purposes should be reflected in the judge's decision.

26 *c. Identity of decisionmaker.* Section 305.7 places final decisional authority in the trial
27 courts, rather than a board of pardons, parole agency, or corrections department. This
28 recommendation follows the minority practice among American states. It reflects the Code's
29 policy preference for "front-end" decisionmakers over "back-end" agencies in the sentencing
30 chronology, and conforms to the Code's general philosophy that sentencing is primarily a
31 judicial function. See § 305.6 and Comment *d*.

32 In one important respect, § 305.7 departs sharply from current American laws of
33 compassionate release. The provision declines to interpose a gatekeeper in the sentence-
34 modification process to screen applications and decide which ones are worthy of
35 consideration by the trial courts. In nearly all jurisdictions that have designated the courts as
36 ultimate decisionmakers, the department of corrections or another agency plays such a role;
37 the courts enjoy no sentence-modification power in the absence of a motion or
38 recommendation from the gatekeeper.

1 There was much debate within the Institute concerning the advantages and dangers of
2 a gatekeeping mechanism of this kind. On the one hand, a system that routes all applications
3 directly to the courts may result in an undifferentiated flood of petitions, requiring the
4 expenditure of scarce judicial resources to separate wheat from chaff. Further, the absence of
5 a gatekeeper might actually reduce the number of worthy petitions. A system of third-party
6 screening might promote meritorious cases if, for example, a department of corrections is alert
7 to inmates' potential eligibility, and encourages applications that would not otherwise be
8 made. On the other side of the balance, however, is the substantial worry that a gatekeeper
9 would exercise its authority on too few occasions, thus choking off potentially worthy
10 applications. While there is little research or data on how state departments of corrections
11 have wielded their gatekeeping discretion in the compassionate-release setting, the Federal
12 Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal
13 compassionate-release provision a virtual nullity. Unless a state legislature is confident that its
14 corrections officials—or alternative gatekeepers that may be identified—will discharge
15 screening authority under § 305.7 in a way that comports with the statute's intentions, the
16 revised Code recommends that the screening process be performed within the court system,
17 see subsection (3).

18 *d. Assistance provided by department of corrections.* Many eligible prisoners will be
19 unaware of their rights under § 305.7, or will lack the skills or competence to assert those
20 rights. There is little benefit to the prisoner, the corrections system, or the public at large when
21 a strong case goes unasserted. Paragraph (2) provides that the department of corrections must
22 provide appropriate notice whenever it learns of reasonable grounds for a prisoner's
23 eligibility. The department must ensure that correctional staff, and health providers,
24 understand this responsibility. In addition, the department must make adequate assistance
25 available to prisoners for the preparation of applications. The assistance may be provided by
26 nonlawyers, such as knowledgeable staff members or volunteers, or qualified prisoners.

27 *e. Assignment and screening of applications.* Subsection (3) requires that the courts
28 create a method of timely assignment of applications to individual trial courts. Because the
29 provision lacks a third-party gatekeeper, see Comment *c* above, subsection (3) authorizes the
30 courts to create a screening process of their own, both to manage the workload of many
31 applications, and to preserve judicial resources for those colorable applications that deserve
32 close attention. A centralized screening approach, prior to assignment to individual judges,
33 would be consistent with this provision.

34 Additional provisions of § 305.7 allow for the sorting of applications into levels of
35 higher and lower priority. Paragraph (4) makes clear that the trial courts have discretion to
36 rule on applications with or without a hearing, and paragraph (5) gives the court discretion to
37 appoint counsel in selected cases. Sentencing guidelines promulgated under subsection (10)
38 may also speak to the question of what types of applications should receive a full hearing, and
39 which may be disposed through more summary process.

f. Appointment of counsel. Paragraph (5) recommends that the legislature grant the courts discretion to appoint legal counsel to represent indigent prisoners. Normally appointment will be appropriate only after the court has determined that a hearing is warranted. In some instances, however, the court may conclude that counsel is necessary to assist a prisoner in the preparation of an amended application.

g. Minimum hearing procedures. Section 305.7 delegates much rulemaking authority to the court system itself, but subsection (6) speaks to selected procedural issues of importance for cases that reach the stage of a hearing. Given that sentence modification under this provision may occur at any stage during a prison term, and may represent a radical change in penalty, the prosecuting authority must be allowed to represent the government's interests. Likewise, crime victims should be notified when a hearing has been set, if they are available and can be located through reasonable efforts. The revised Code will speak generally to victims' rights of participation in sentencing proceedings, at various stages of the process, in a separate provision slated for future drafting.

Subsections (6)(d) and (e) are especially important within the Code's scheme. Because § 305.7 creates a broad sentence-modification power, that will in some cases be exercised under an open-ended standard, and must in all cases include careful analysis of the basic sentencing purposes of § 1.02(2) (Tentative Draft No. 1, 2007), it is essential that the courts' reasoning process be visible and open to review. Accordingly, subsections (6)(d) and (e) require that trial courts give reasons for their decisions on the record, and that the appellate courts have discretion to accept appeals from adverse rulings. These basic protections will promote the legitimacy and accountability of the process, aid in reasoned decisionmaking, add to the effectiveness of the applicable sentencing guidelines, and encourage the development of a common law of sentence modification.

h. Substantive standard for sentence modification. Section 305.7 is designed to respond to circumstances that arise or are discovered after the time of sentencing, including cases in which the full effects of known conditions, such as a prisoner's physical or mental illness, are not appreciated until a later date. Such circumstances must provide compelling reason to reevaluate the original sentence, and to replace it with a modified penalty, when measured against the underlying purposes of § 1.02(2) (Tentative Draft No. 1, 2007).

i. What modifications are permitted. Paragraph (8) states that the court may "modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence." Subject to the ceiling on prospective severity, this is intended to give the courts broad authority to impose a modified sentence, which may take the form of a shortened prison term, but may also include new or altered sanctions of other kinds, such as new requirements of postrelease supervision and treatment.

Paragraph (8) also states that the sentence-modification power "is not limited by any mandatory-minimum term of imprisonment under state law." A number of compassionate-release provisions in current American codes likewise grant authority to override mandatory-minimum sentences, although some states make narrow exceptions to the general rule that mandatory penalties do not limit the modification power, e.g., for capital cases or sentences of life without parole. Paragraph (8) is consistent with the revised Code's general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute's longstanding disapproval of such laws, see § 6.06, Comment *d* (this draft).

j. Transition to outside medical and mental-health care. Whenever a prisoner suffering from a physical or mental infirmity is released, there should a plan for adequate treatment of the prisoner outside of prison. It would be perverse for § 305.7 to encourage the "dumping" of ex-prisoners into the community without adequate provision for the continuing care that they need. To avoid this possibility, subsection (9) provides that the department of corrections, as part of the prisoner's reentry plan, must identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

k. Sentencing guidelines. Paragraph (10) requires the sentencing commission, on an ongoing basis, to produce and amend sentencing guidelines addressed to the courts for sentence-modification decisions under this provision. These guidelines may be addressed to the screening decisions courts must make in separating potentially meritorious applications from the frivolous, the determination of which applicants should be given the benefits of a full hearing, and final dispositions. Given the scope of the sentence-modification power under § 305.7, principled grounds for decision can best be evolved within an institutional framework that allows inputs from the trial courts, the appellate courts under paragraph (6)(e), and the sentencing commission through guidelines.

It should be noted that Article 6B governs the sentence-modification guidelines promulgated under this provision. Most importantly, the guidelines may carry no more than presumptive force, see § 6B.04 (Tentative Draft No. 1, 2007), so that ultimate decisionmaking authority remains with the trial courts, subject to the possibility of appellate review.

REPORTER'S NOTE

b. Criteria for eligibility

(1) Advanced age. Inmates aged 50 and older have been the fastest-growing age group in the nation's prisons, and the costs of their confinement, largely driven by medical expenses, are three times greater than for younger prisoners. See Carrie Abner, Council of State Governments, Graying Prisons: States Face Challenges of an Aging Inmate Population (2006), at 9 ("Some estimates suggest that the elder prisoner population has grown by as much as 750 percent in the last two decades"); Mike Mitka, Aging Prisoners Stressing Health Care System,

JAMA 292:4, 423 (2004) (noting that "A 50-year-old inmate may have a physiological age that is 10 to 15 years older . . . due to such factors as abuse of illicit drugs and alcohol and limited lifetime access to preventive care and health services.").

For existing laws on the subject of geriatric release, see Conn. Gen. Stat. § 54-131k(a) ("so physically or mentally debilitated, incapacitated or infirm as a result of advanced age . . . as to be physically incapable of presenting a danger to society"); D.C. Code § 24-468(a)(2) ("The inmate is 65 years or older and has a chronic infirmity, illness, or disease related to aging"); Ga. Code § 42-9-42(c) ("notwithstanding other provisions of this chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons"); Mo. Stat. § 217.250 ("advanced in age to the extent that the offender is in need of long-term nursing home care"); N.J. Rules of Court, R. 3:21-10(B)(2) ("infirmity"); N.M. Stat. § 31-21-25.1(F) (geriatric parole available when inmate is "sixty-five years of age or older [and] suffers from a chronic infirmity, illness or disease related to aging"); N.C. Gen. Stat. § 15A-1369 (release available for geriatric inmate "who is 65 years of age or older and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that he or she does not pose a public safety risk"); Ore. Rev. Stat. § 144.122(1)(c) (inmate "[i]s elderly and is permanently incapacitated in such a manner that the prisoner is unable to move from place to place without the assistance of another person"); Va. Code § 53.1-40.01 ("Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence"); 18 U.S.C. § 3582(c)(1)(A)(ii) ("the defendant is at least 70 years of age, has served at least 30 years in prison"); Wyo. Stat. § 7-13-424(a)(ii) ("The inmate is incapacitated by age to the extent that deteriorating physical or mental health substantially diminishes the ability of the inmate to provide self-care within the environment of a correctional facility").

(2) Physical infirmity. See Alaska Stat. § 33.16.085(a)(1),(5) ("the prisoner is severely medically or cognitively disabled" and "the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner"); Ark. Code § 12-29-404(a) ("an inmate has an incurable illness which, on the average, will result in death within twelve (12) months, or when an inmate is permanently physically or mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction"); Cal. Penal Code § 1170(e)(2)(A),(C) (effective January 1, 2009) (prisoner is terminally ill or "permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function"); Conn. Gen. Stat. § 54-131k(a) ("so physically or mentally debilitated, incapacitated or infirm as a result of advanced age or as a result of a condition, disease or syndrome that is not terminal as to be physically incapable of presenting a danger to society"); 11 Del. Code § 4346(e) ("Whenever the physical or mental condition of any person confined in any institution demands treatment which the Department cannot furnish"); D.C. Code § 24-468(a)(1) ("permanently incapacitated or terminally ill"); Fla. Stat. § 947.149(1)(a),(b) (inmate is terminally ill or suffers from "a condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, renders the

1 inmate permanently and irreversibly physically incapacitated to the extent that the inmate does not constitute a
2 danger to herself or himself or others"); Ga. Code § 42-9-42(c) ("notwithstanding other provisions of this
3 chapter, the board may, in its discretion, grant pardon or parole to any aged or disabled persons"); Idaho Code
4 § 20-223(f) (prisoner is terminally ill or, "by reason of an existing physical condition which is not terminal, is
5 permanently and irreversibly physically incapacitated"); La. Rev. Stat. § 15:574.20(B)(1),(2) (inmate is
6 terminally ill or, "by reason of an existing physical or medical condition, is so permanently and irreversibly
7 physically incapacitated that he does not constitute a danger to himself or to society"); Mich. Comp. Laws
8 § 791.235(10) ("The parole board may grant a medical parole for a prisoner determined to be physically or
9 mentally incapacitated"); Minn. Stat. § 244.05, subd. 8 ("the offender suffers from a grave illness or medical
10 condition and the release poses no threat to the public"); Mo. Stat. § 217.250 ("a disease which is terminal . . . or
11 when confinement will necessarily greatly endanger or shorten the offender's life"); Mont. Code § 46-23-
12 210(1)(c)(i) ("a medical condition requiring extensive medical attention" or "a medical condition that will likely
13 cause death within 6 months or less"); Neb. Rev. Stat. § 83-1,110.02(1) ("terminally ill or permanently
14 incapacitated"); N.H. Rev. Stat. § 651-A:10-a(I)(a) ("terminal, debilitating, incapacitating, or incurable medical
15 condition or syndrome"); N.J. Rules of Court, R. 3:21-10(B)(2) ("illness or infirmity"); N.M. Stat. § 31-21-
16 25.1(A)(6) ("permanently incapacitated and terminally ill" inmates are eligible for medical parole); McKinney's
17 Cons. Law of N.Y. § 259-r(1)(a) (eff. Sept. 1, 2009) (inmate suffers from "a terminal condition, disease or
18 syndrome and [is] so debilitated or incapacitated as to create a reasonable probability that he or she is physically
19 incapable of presenting any danger to society"); N.C. Gen. Stat. § 15A-1369 ("permanently and totally disabled"
20 or "terminally ill"); Ohio Rev. Code § 2967.05 ("imminent danger of death"); 57 Okl. Stat. § 332.18(B) ("an
21 inmate who is dying or is near death . . . or whose medical condition has rendered the inmate no longer a threat
22 to public safety"); Ore. Rev. Stat. § 144.122(1)(b) ("severe medical condition including terminal illness"); R.I.
23 Stat. § 13-8.1-3 (terminally ill or "suffering from a condition caused by injury, disease, or illness which, to a
24 reasonable degree of medical certainty, permanently and irreversibly physically incapacitates the individual to
25 the extent that no significant physical activity is possible, and the individual is confined to bed or a wheelchair");
26 S.C. Code of Laws § 24-21-970 ("Consideration [for pardon] shall be given to any inmate afflicted with a
27 terminal illness where life expectancy is one year or less"); Tenn. Code § 41-21-227(i)(2)(A)(i),(ii) ("[i]nmates
28 who, due to their medical condition, are in imminent peril of death [and] [i]nmates who can no longer take care
29 of themselves in a prison environment due to severe physical . . . deterioration"); Tex. Admin. Code, tit. 37,
30 § 143.34(a) ("terminal illness, total disability, or for needed medical care which cannot be provided by the
31 medical facilities of the Texas Department of Corrections."); 28 Vt. Stat. § 502a(d) ("a terminal or debilitating
32 condition so as to render the inmate unlikely to be physically capable of presenting a danger to society"); Wyo.
33 Stat. § 7-13-424(a)(i),(iii),(iv) ("The inmate has a serious incapacitating medical need which requires treatment
34 that cannot reasonably be provided while confined in a state correctional facility" or "[t]he inmate is
35 permanently physically incapacitated as the result of an irreversible injury, disease or illness which makes
36 significant physical activity impossible, renders the inmate dependent on permanent medical intervention for
37 survival or confines the inmate to a bed, wheelchair or other assistive device where his mobility is significantly
38 limited" or "[t]he inmate suffers from a terminal illness caused by injury or disease which is predicted to result in
39 death within twelve (12) months").

(3) Mental infirmity. See Alaska Stat. § 33.16.085(a)(1),(5) ("the prisoner is severely . . . cognitively disabled" and "the prisoner is incapacitated to an extent that incarceration does not impose significant additional restrictions on the prisoner"); Ark. Code § 12-29-404(a) ("inmate is permanently . . . mentally incapacitated to the degree that the community criteria are met for placement in a nursing home, rehabilitation facility, or similar setting providing a level of care not available in the Department of Correction or the Department of Community Correction"); Conn. Gen. Stat. § 54-131k(a) ("so . . . mentally debilitated . . . as to be physically incapable of presenting a danger to society"); 11 Del. Code § 4346(e) ("Whenever the . . . mental condition of any person confined in any institution demands treatment which the Department cannot furnish"); Mich. Comp. Laws § 791.235(10) ("The parole board may grant a medical parole for a prisoner determined to be . . . mentally incapacitated"); N.J. Rules of Court, R. 3:21-10(B)(2) ("illness or infirmity"); Tenn. Code § 41-21-227(i)(2)(A)(ii) ("Inmates who can no longer take care of themselves in a prison environment due to severe physical or psychological deterioration").

(4) Exigent family circumstances. 18 U.S.C. § 3582(c)(1)(A)(i), allows judicial modification of a term of imprisonment (albeit only upon motion of the Director of the Bureau of Prisons), if the court finds that "extraordinary and compelling reasons warrant such a reduction," in light of the general purposes of sentencing in 18 U.S.C. § 3553(a). The U.S. Sentencing Commission, granted statutory power to issue policy statements for the implementation of this provision, has determined that one example of "extraordinary and compelling reasons" is "The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children." U.S. Sentencing Guidelines, §1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement), Commentary, § I(A)(iii). Until 1994, Bureau of Prisons regulations governing sentence-reduction motions, under § 3582(c)(1)(A)(i) and 18 U.S.C. § 4205(g), explicitly contemplated invoking the judicial sentence-modification authority "if there is an extraordinary change in an inmate's personal or family situation." 28 C.F.R. § 572.40 (1993).

(5) Open-ended criteria. Most state codes do not authorize sentence modification on open-ended grounds, but at least three American jurisdictions have done so. See N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend prison sentence exists at any time if "the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence"); N.J. Rules of Court, R. 3:21-10(b)(3) (sentence may be reduced or changed "for good cause shown," but only upon joint motion of the prisoner and the prosecuting authority); 18 U.S.C. § 3582(c)(1)(A)(i) (if, following motion from Federal Bureau of Prisons, court finds "extraordinary and compelling reasons warrant such a reduction").

(6) Requirement that public safety not be jeopardized. Such a condition is ubiquitous in laws authorizing compassionate release. See, e.g., Alaska Stat. § 33.16.085(a)(2)(B) (requirement that "the prisoner will not pose a threat of harm to the public"); Cal. Penal Code § 1170(e)(2)(B) (effective January 1, 2009) ("The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety"); D.C. Code § 24-468(a)(1),(2) ("release of the inmate under supervision is not incompatible with public safety"); Fla. Stat. § 947.149(1)(a) (requirement that "the inmate does not constitute a danger to herself or himself or others"); La. Rev. Stat. § 15:574.20(B)(1) (requirement that inmate "does not constitute a danger to himself or to society"); Minn. Stat. § 244.05, subd. 8 (medical release available only if "the release poses no

threat to the public"); N.H. Rev. Stat. § 651-A:10-a(I)(c) (requirement that "[t]he parole board has determined that the inmate will not be a danger to the public, and that there is a reasonable probability that the inmate will not violate the law while on medical parole and will conduct himself or herself as a good citizen"); N.M. Stat. § 31-21-25.1(F) (requirement that inmate "does not constitute a danger to himself or to society"); McKinney's Cons. Law of N.Y. § 259-r(1)(b) (eff. Sept. 1, 2009) ("release shall be granted only after the board considers whether, in light of the inmate's medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law"); N.C. Gen. Stat. § 15A-1369.2(a)(2) (inmate must be "incapacitated to the extent that the inmate does not pose a public safety risk"); R.I. Stat. § 13-8.1-4(f) (board must consider whether "there is a reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the release is compatible with the welfare of society and will not so depreciate the seriousness of the crime as to undermine respect for the law"); Tenn. Code § 41-21-227(i)(2)(B) (release available to "those inmates who can be released into the community without substantial risk that they will commit a crime while on furlough").

c. Identity of decisionmaker. Like § 305.7, a number of existing statutory provisions repose ultimate sentence-modification authority in the trial courts. Nearly all of these first require that a motion or recommendation be made by the department of corrections or other gatekeeping authority. See 18 U.S.C. § 3582(c) (motion by Federal Bureau of Prisons required); Cal. Penal Code § 1170(d) & (e) (if more than 120 days from initial sentencing, a recommendation to recall sentence is required from either the Department of Corrections and Rehabilitation or the Board of Parole Hearings); D.C. Code § 24-468 (motion by Federal Bureau of Prisons required); Mont. Code § 46-23-210(2) (only for cases in which offender was declared parole ineligible at original sentencing); N.H. Rev. Stat. § 651:20(I)(b) (judicial power to suspend prison sentence exists at any time if "the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence"); N.J. Rules of Court, R. 3:21-10(b)(2) (allowing motion at any time to amend "a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant"). The New Jersey law imposes no gatekeeper for applications based on illness or infirmity, but requires consent of the prosecutor before a more general sentence-modification power may be invoked "for good cause shown," see N.J. Rules of Court, R. 3:21-10(b)(3). New Jersey has a separate mechanism for "medical parole," limited to terminally ill inmates, which is administered by its parole board, see N.J. Stat. § 30:4-123.51c.

A majority of state laws analogous to § 305.7 designate a nonjudicial official or agency as decisionmaker. Most of these, however, assume the existence of a parole-release agency—an institutional arrangement not recommended by the revised Code, see § 6.06(3),(4) and Appendix B, Reporter's Study, The Question of Parole-Release Authority (this draft). See Alaska Stat. § 33.16.085 (board of parole); Ark. Code § 12-29-404 (post prison transfer board); Conn. Gen. Stat. § 54-131k (board of pardons and paroles); 11 Del. Code § 4346(e) (board of parole); Fla. Stat. § 947.149 (parole commission); Ga. Code § 42-9-42(c) (board of pardons and paroles); La. Rev. Stat. § 15:574.20 (board of parole); Mich. Comp. Laws § 791.235(10) (parole board); Minn. Stat. § 244.05, subd. 8 (commissioner of corrections); Mo. Stat. § 217.250 (board of probation and parole or governor); Mont. Code § 46-23-210 (board of pardons and parole for most cases); Neb. Rev. Stat. § 83-1,110.02(1) (board of parole); N.H. Rev. Stat. § 651-A:10-a (parole board); N.M. Stat. § 31-21-25.1 (parole

board); McKinney's Cons. Law of N.Y. § 259-r (board of parole); N.C. Gen. Stat. §§ 15A-1369 through 15A-1369.5 (postrelease supervision and parole commission); Ohio Rev. Code § 2967.05 (governor upon recommendation of director of rehabilitation and correction); 57 Okl. Stat. § 332.18(B) (pardon and parole board); S.C. Code of Laws § 24-21-970 (governor following recommendation of probation, parole, and pardon-services board); Tenn. Code § 41-21-227(i)(3) (commissioner of department of corrections given authority to grant furlough of indeterminate duration); Tex. Admin. Code, tit. 37, § 143.31 (governor upon recommendation of board of pardons and paroles); Va. Code § 53.1-40.01 (parole board).

After much debate, the Institute decided not to endorse a third-party gatekeeping mechanism in § 305.7, and instead located the responsibility to screen petitions in the trial courts themselves. This judgment was based on experience under the federal compassionate-release provision, which requires a motion from the Director of the Bureau of Prisons before the matter may be heard by the courts. This arrangement has resulted in only a trickle of recommendations each year. See Stephen R. Sady & Lynn Deffebach, Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration, 21 Fed. Sent. Rptr. (2009)) ("with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on"); Mary Price, A Case for Compassion, 21 Fed. Sent. Rptr. 170 (2009) (recommending that, "[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion."). In light of this experience, the American Bar Association Commission on Effective Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in both §§ 305.6 and 305.7 of the revised Code. See ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28.

If a state decides that there must be an outside gatekeeper for compassionate-release petitions, the ABA Commission encouraged creative thought in designating a gatekeeper other than the Department of Corrections. One suggestion was that an expert clemency commission might play this role. See Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent. Rptr. 153 (2009); Report of the Second Look Roundtable, at 15 ("The clemency commission could be enlisted to double duty as gatekeeper for the judicial sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i)").

i. What modifications are permitted. Many state provisions authorize, at least in some instance, a sentence modification that departs from the terms of a mandatory-minimum sentence. See Alaska Stat. § 33.16.085(a) ("Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical parole [if statutory criteria satisfied]"); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) ("This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole."); Conn. Gen. Stat. § 54-131k ("The Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any sentence of imprisonment, except an inmate convicted of a capital felony"); Fla. Stat. § 947.149 (parole commission's power to grant medical release exists "[n]otwithstanding any provision to the

1 contrary" except for inmates under sentence of death); Idaho Code § 20-223(f) ("Subject to the limitations of this
2 subsection and notwithstanding any fixed term of confinement or minimum period of confinement . . . the
3 commission may parole an inmate for medical reasons."); La. Rev. Stat. § 15:574.20(A)(1) ("Notwithstanding
4 the provisions of this Part or any other law to the contrary, any person sentenced to the custody of the
5 Department of Public Safety and Corrections may, upon referral by the department, be considered for medical
6 parole by the Board of Parole. Medical parole consideration shall be in addition to any other parole for which an
7 inmate may be eligible, but shall not be available to any inmate who is awaiting execution or who has a
8 contagious disease."); N.H. Rev. Stat. § 651-A:10-a(VI) ("An inmate who has been sentenced to life in prison
9 without parole or sentenced to death shall not be eligible for medical parole under this section"); N.M. Stat. § 31-
10 21-25.1(B) ("Inmates who have not served their minimum sentences may be considered eligible for parole under
11 the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any
12 other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible."); N.C.
13 Gen. Stat. § 15A-1369.2(b) ("Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons
14 convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall
15 not be eligible for release under this Article"); Ore. Rev. Stat. § 144.122(4) ("The provisions of this section do
16 not apply to prisoners sentenced to life imprisonment without the possibility of release or parole"); R.I. Stat.
17 § 13-8.1-1 ("Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except
18 those serving life without parole shall at any time after they begin serving their sentences be eligible for medical
19 parole consideration, regardless of the crime committed or the sentence imposed."); 28 Vt. Stat. § 502a(d)
20 ("Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is
21 serving a sentence, including an inmate who has not yet served the minimum term of the sentence" may be
22 eligible for medical parole); Wyo. Stat. § 7-13-424(a) ("Notwithstanding any other provision of law restricting
23 the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may
24 grant a medical parole to any inmate meeting the conditions specified in this section.").

APPENDIX A

PROPOSED DELETIONS OF PROVISIONS

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

§ 6.07. Sentence of Imprisonment for Felony; Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten years nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five years nor more than ten years.

REPORTER'S NOTE ON PROPOSED DELETION

Original § 6.07, as it interacts with original § 7.03, is unconstitutional under Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), Cunningham v. California, 549 U.S. 270 (2007), and related Sixth Amendment decisions. The extended incarceration terms made available in original § 6.07 depended upon the legally required factual bases enumerated in § 7.03(1), (2), (3), or (4).

Aside from its constitutional infirmity, the mechanism of elevated sentences created in original § 6.07 and § 7.03 no longer represents sound public policy. The use of risk assessments at sentencing is better handled through the empirically informed procedures envisioned in proposed § 6B.09 (this draft). Further, when used to support the imposition of extended incarceration terms, the factual bases of adverse risk assessments should not be established through informal sentencing procedures, even were this constitutionally permissible. Instead, they should be subject to the jury-trial and heightened-standard-of-proof safeguards mandated under the Sixth Amendment for factfinding legally required to enhance sentence severity, see § 7.07B (Tentative Draft No. 1, 2007); § 6B.09, Comment *e* (this draft).

The rationale for a two-tiered approach to statutory maximum sentences no longer exists in the sentencing structure envisioned in the revised Code. The original Model Penal Code attempted to make use of statutorily authorized maximum penalties as meaningful regulators of sentence severity across large numbers of cases. Thus, in § 6.06, maximum prison terms for most felonies were set lower than comparable provisions in the majority of U.S. jurisdictions at the time of the 1962 Code's adoption. Instead of allowing very high maximums to be available to the entire docket of felony cases in a given class, the original Code accommodated the most serious of offenses at each level through the mechanism of "extended term" sentencing. Unless a case fell within the criteria for an extended prison term, punitive severity was capped by the relatively low ceilings in § 6.06.

In the revised Code's sentencing system, statutory maximum penalties are no longer the first line of defense against outlier sentences. Instead, a matrix of sentencing guidelines specify reasonably narrow ranges of presumptive penalties nested within the expansive boundaries defined by statutory maximum ceilings. Sentences more severe than guidelines presumptions must satisfy the modestly enforceable legal standard for guidelines departures, and are subject to meaningful substantive review in the appellate courts. Sentences extraordinarily out of line with guidelines presumptions fall subject to even more intensive appellate scrutiny. For criminal sentences of any kind in the revised Code, the trial and appellate courts hold authority to moderate excessive punitive severity under statutorily granted powers of proportionality review. In short, the institutional arrangements and interrelationships of the revised Code, unknown to the drafters of the 1962 Code, now approach the problems addressed in original § 6.06 and § 7.03 in entirely new ways.

§ 6.09. Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Extended Terms.

(1) In the cases designated in Section 7.04, a person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to an extended term of imprisonment, as follows:

(a) in the case of a misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than one year and the maximum of which shall be three years;

(b) in the case of a petty misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than six months and the maximum of which shall be two years.

(2) No such sentence for an extended term shall be imposed unless:

(a) the Director of Correction has certified that there is an institution in the Department of Correction, or in a county or city [or other appropriate political

subdivision of the State] that is appropriate for the detention and correctional treatment of such misdemeanants or petty misdemeanants, and that such institution is available to receive such commitments; and

(b) the [Board of Parole] [Parole Administrator] has certified that the Board of Parole is able to visit such institution and to assume responsibility for the release of such prisoners on parole and for their parole supervision.

REPORTER'S NOTE ON PROPOSED DELETION

Comment a. Scope. This provision is deleted for the reasons stated in § 6.07, Reporter's Note on Proposed Deletion (this draft).

§ 6.11. Place of Imprisonment.

(1) When a person is sentenced to imprisonment for an indefinite term with a maximum in excess of one year, the Court shall commit him to the custody of the Department of Correction [or other single department or agency] for the term of his sentence and until released in accordance with law.

(2) When a person is sentenced to imprisonment for a definite term, the Court shall designate the institution or agency to which he is committed for the term of his sentence and until released in accordance with law.

REPORTER'S NOTE ON PROPOSED DELETION

This provision is not of sufficient importance for inclusion in the revised Code. Although the revised Code no longer divides prison sentences into the opposing categories of "indefinite" and "definite" terms, see § 6.06A (slated for future drafting), the original section effectively separated felony prison sentences in subsection (1) from misdemeanor terms in subsection (2). In the case of felony terms, the policy of original § 6.11 was to ensure that a centralized state agency would make classification and institutional assignments for all prisoners. Although the original Code would have preferred a single state authority for misdemeanor sentences, subsection (2) was a concession to the reality, in most states, of local governance of jails.

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§ 6.12. Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor.

If, when a person has been convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with

the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

REPORTER'S NOTE ON PROPOSED DELETION

This Section has enjoyed so few state adoptions, and has had so little influence on actual judicial practice, that deletion is appropriate. Provisions elsewhere in the revised Code already create judicial discretion to depart from statutory and guideline sentences—even to depart from mandatory-minimum statutory penalties—when the resulting punishment would be disproportionately harsh or would not be grounded sufficiently in the purposes of sentencing set forth in § 1.02(2) (Tentative Draft No. 1, 2007). See § 7.XX (id.) (sentencing court's authority to depart from guidelines and mandatory penalties); § 7.ZZ (id.) (provision not yet approved) (proposing statutory appellate-court authority, broader than existing constitutional authority, to review sentences for proportionality, and to reduce any sentence authorized or mandated in the criminal code on "subconstitutional" proportionality grounds).

§ 6.13. Civil Commitment in Lieu of Prosecution or of Sentence.

(1) When a person prosecuted for a [felony of the third degree,] misdemeanor or petty misdemeanor is a chronic alcoholic, narcotic addict [, prostitute] or person suffering from mental abnormality and the Court is authorized by law to order the civil commitment of such person to a hospital or other institution for medical, psychiatric or other rehabilitative treatment, the Court may order such commitment and dismiss the prosecution. The order of commitment may be made after conviction, in which event the Court may set aside the verdict or judgment of conviction and dismiss the prosecution.

(2) The Court shall not make an order under Subsection (1) of this Section unless it is of the view that it will substantially further the rehabilitation of the defendant and will not jeopardize the protection of the public.

REPORTER'S NOTE ON PROPOSED DELETION

The policy debate surrounding civil commitment has changed substantially since the original Code was drafted. It will be important to ask whether a revised Code should renew the original Code's approach, which assumed that civil-commitment powers existed independently of the criminal code in each jurisdiction, and sought to facilitate the use of such mechanisms in the discretion of sentencing judges.

Original § 6.13 did not speak to the controversial subject, in contemporary policy, of civil commitment used for the continuing confinement of persons after they have served their prison terms as imposed by the criminal process. Such add-on periods of institutionalization have been upheld by the Supreme Court in the realm of "sexual predator" laws, even when

indefinite and potentially lifelong in duration, and they have been struck down by the Court in the context of deportable aliens thought (by the INS) to present a public danger. Kansas v. Hendricks, 521 U.S. 346 (1997); Seling v. Young, 531 U.S. 250 (2001); Zadvydas v. Davis, 533 U.S. 678 (2001). Because ongoing civil commitment is not conceived in constitutional law as "criminal" punishment, persons subject to such laws receive lesser procedural protections than defendants in a criminal case.

The current draft gives attention to the subpopulations of offenders embraced in original § 6.13 but, for the most part, would keep their adjudications and dispositions on the "criminal" as opposed to the "civil" side of the line. The draft contemplates that specialized sentencing provisions be included in Article 6 of the Code for offenders under the age of 18, mentally-ill or mentally-impaired offenders, substance-abusing offenders, and offenses which might be handled through a restorative-justice process as an alternative to traditional sentencing proceedings. See Reporter's Introductory Memorandum (this draft).

ARTICLE 7. AUTHORITY OF THE COURT IN SENTENCING

§ 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

1 **(3) The defendant is a dangerous, mentally abnormal person whose**
2 **commitment for an extended term is necessary for protection of the public.**

3 **The Court shall not make such a finding unless the defendant has been subjected**
4 **to a psychiatric examination resulting in the conclusions that:**

5 **(a) his mental condition is gravely abnormal;**

6 **(b) his criminal conduct has been characterized by a pattern of**
7 **repetitive or compulsive behavior or by persistent aggressive behavior with**
8 **heedless indifference to consequences; and**

9 **(c) such condition makes him a serious danger to others.**

10 **(4) The defendant is a multiple offender whose criminality was so extensive**
11 **that a sentence of imprisonment for an extended term is warranted.**

12 **The Court shall not make such a finding unless:**

13 **(a) the defendant is being sentenced for two or more felonies, or is**
14 **already under sentence of imprisonment for felony, and the sentences of**
15 **imprisonment involved will run concurrently under Section 7.06; or**

16 **(b) the defendant admits in open court the commission of one or**
17 **more other felonies and asks that they be taken into account when he is**
18 **sentenced; and**

19 **(c) the longest sentences of imprisonment authorized for each of the**
20 **defendant's crimes, including admitted crimes taken into account, if made**
21 **to run consecutively would exceed in length the minimum and maximum of**
22 **the extended term imposed.**

23

24 **REPORTER'S NOTE ON PROPOSED DELETION**

25 *Comment a. Scope.* This provision is deleted for the reasons stated in § 6.07,
26 Reporter's Note on Proposed Deletion (this draft).

27

28 **§ 7.04. Criteria for Sentence of Extended Term of Imprisonment; Misdemeanors and**
29 **Petty Misdemeanors.**

30 **The Court may sentence a person who has been convicted of a misdemeanor or petty**
31 **misdemeanor to an extended term of imprisonment if it finds one or more of the grounds**
32 **specified in this Section. The finding of the Court shall be incorporated in the record.**

33 **(1) The defendant is a persistent offender whose commitment for an extended term**
34 **is necessary for protection of the public.**

The Court shall not make such a finding unless the defendant has previously been convicted of two crimes, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless:

> **(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or**

> **(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.**

(3) The defendant is a chronic alcoholic, narcotic addict, prostitute or person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time.

The Court shall not make such a finding unless, with respect to the particular category to which the defendant belongs, the Director of Correction has certified that there is a specialized institution or facility that is satisfactory for the rehabilitative treatment of such persons and that otherwise meets the requirements of Section 6.09(2).

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

> **(a) the defendant is being sentenced for a number of misdemeanors or petty misdemeanors or is already under sentence of imprisonment for crimes of such grades, or admits in open court the commission of one or more such crimes and asks that they be taken into account when he is sentenced; and**

> **(b) maximum fixed sentences of imprisonment for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively, would exceed in length the maximum period of the extended term imposed.**

REPORTER'S NOTE ON PROPOSED DELETION

Comment a. Scope. This provision is deleted for the reasons stated in § 6.07, Reporter's Note on Proposed Deletion (this draft).

1 **§ 7.05. Former Conviction in Another Jurisdiction; Definition and Proof of Conviction;**
2 **Sentence Taking into Account Admitted Crimes Bars Subsequent Conviction**
3 **for Such Crimes.**

4 **(1) For purposes of paragraph (1) of Section 7.03 or 7.04, a conviction of the**
5 **commission of a crime in another jurisdiction shall constitute a previous conviction.**
6 **Such conviction shall be deemed to have been of a felony if sentence of death or of**
7 **imprisonment in excess of one year was authorized under the law of such other**
8 **jurisdiction, of a misdemeanor if sentence of imprisonment in excess of thirty days but**
9 **not in excess of a year was authorized and of a petty misdemeanor if sentence of**
10 **imprisonment for not more than thirty days was authorized.**

11 **(2) An adjudication by a court of competent jurisdiction that the defendant**
12 **committed a crime constitutes a conviction for purposes of Sections 7.03 to 7.05**
13 **inclusive, although sentence or the execution thereof was suspended, provided that the**
14 **time to appeal has expired and that the defendant was not pardoned on the ground of**
15 **innocence.**

16 **(3) Prior conviction may be proved by any evidence, including fingerprint records**
17 **made in connection with arrest, conviction or imprisonment, that reasonably satisfies**
18 **the Court that the defendant was convicted.**

19 **(4) When the defendant has asked that other crimes admitted in open court be**
20 **taken into account when he is sentenced and the Court has not rejected such request, the**
21 **sentence shall bar the prosecution or conviction of the defendant in this State for any**
22 **such admitted crime.**

23

24 **REPORTER'S NOTE ON PROPOSED DELETION**

25 In the revised Code, the proper treatment of criminal history as a sentencing factor is a
26 matter to be addressed in the first instance by the sentencing commission through guidelines,
27 see § 6B.07 (Tentative Draft No. 1, 2007), subject to judicial power to depart from guidelines,
28 see § 7.XX (id.). The question does not require separate treatment in Article 7. In any event,
29 subsections (1) through (3) would be anachronisms in the scheme of the revised Code, which
30 will abrogate the "extended term" provisions referenced in subsections (1) and (2), and which
31 exists under a new constitutional regime for the use of criminal history as an aggravating
32 factor, see § 7.07B (id.).

33 Subsection (4) of former § 7.05 raises the thorny issue of sentences based on crimes
34 other than those for which offenders have been convicted. This question has already been
35 addressed in part by the revised Code, see § 6B.06(2)(b) (Tentative Draft No. 1, 2007), which
36 states that guidelines provisions affecting the severity of punishment may not be based upon:

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.

Original § 7.05(4) does not conflict with new § 6B.06(2)(b), and might be considered for inclusion in the revised Code as a supplemental recommendation. It states a rule unknown to American law, but well established in England, which allows the "taking into account" of nonconviction offenses at sentencing. Andrew Ashworth has summarized the English rule as follows:

> In principle . . . it is wrong for an offender to be sentenced on the basis of offences with which he has not been charged or convicted, or offences more serious than that of which he has been convicted. However, if the offender asks the court to 'take into consideration' some further offences, he will be treated as admitting those offences and will be sentenced on that basis . . . .

In England, once offenses have been taken into consideration in this way, they may not be charged in any future proceeding. Andrew Ashworth, Sentencing and Criminal Justice, Third Edition (London: Butterworths, 2001), at 310. Original § 7.05 attempts to erect a similar barrier to future charges.

In a federalist system, however, the legislature of one jurisdiction cannot bind prosecuting authorities in other jurisdictions, so the commitment given in § 7.05(4) is less than ironclad. Further, under U.S. constitutional law, a defendant may be prosecuted for alleged offenses that have been used in the past as a basis for sentence. See United States v. Witte, 515 U.S. 389 (1995) (Double Jeopardy Clause not offended by new prosecution of defendant for drug offenses used as basis for calculation of guidelines penalty in prior case). Qualifications to the preclusive force of a taking-into-account provision would have to be considered were the revised Code to include such a recommendation.

§ 7.08. Commitment for Observation; Sentence of Imprisonment for Felony Deemed Tentative for Period of One Year; Resentence on Petition of Commissioner of Correction.

(1) If, after presentence investigation, the Court desires additional information concerning an offender convicted of a felony or misdemeanor before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Department of Correction, or, in the case of a young adult offender, to the custody of the Division of Young Adult Correction, for observation and study at an appropriate reception or classification center. The Department and the Board of Parole, or the Young Adult Divisions thereof, shall advise the Court of their findings and

recommendations on or before the expiration of such ninety-day period. If the offender is thereafter sentenced to imprisonment, the period of such commitment for observation shall be deducted from the maximum term and from the minimum, if any, of such sentence.

(2) When a person has been sentenced to imprisonment upon conviction of a felony, whether for an ordinary or extended term, the sentence shall be deemed tentative, to the extent provided in this Section, for the period of one year following the date when the offender is received in custody by the Department of Correction [or other state department or agency].

(3) If, as a result of the examination and classification by the Department of Correction [or other state department or agency] of a person under sentence of imprisonment upon conviction of a felony, the Commissioner of Correction [or other department head] is satisfied that the sentence of the Court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender, the Commissioner, during the period when the offender's sentence is deemed tentative under Subsection (2) of this Section shall file in the sentencing Court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and may include a recommendation as to the sentence to be imposed.

(4) The Court may dismiss a petition filed under Subsection (3) of this Section without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the Court is of the view that the petition warrants such reconsideration, a copy of the petition shall be served on the offender, who shall have the right to be heard on the issue and to be represented by counsel.

(5) When the Court grants a petition filed under Subsection (3) of this Section, it shall resentence the offender and may impose any sentence that might have been imposed originally for the felony of which the defendant was convicted. The period of his imprisonment prior to resentence and any reduction for good behavior to which he is entitled shall be applied in satisfaction of the final sentence.

(6) For all purposes other than this Section, a sentence of imprisonment has the same finality when it is imposed that it would have if this Section were not in force.

(7) Nothing in this Section shall alter the remedies provided by law for vacating or correcting an illegal sentence.

REPORTER'S NOTE ON PROPOSED DELETION

Research is not complete on the question of how widely provisions of this kind have been adopted by the states. The proposal to delete the provision is therefore tentative.

1 **APPENDIX B**

2

3 **REPORTER'S STUDY**

4 **THE QUESTION OF PAROLE-RELEASE AUTHORITY**

5 Kevin R. Reitz

6 March 16, 2011

7

8 A fundamental policy question confronted in this draft is whether the revised Model
9 Penal Code's recommended sentencing system should be *determinate* or *indeterminate*, that
10 is, whether its official decisionmakers should include a parole board with substantial prison-
11 release discretion.[1] This study sets out information and analysis relevant to the Institute's
12 consideration of the question of parole release.

13 In traditional American indeterminate systems, for prison sentences, the judge imposes
14 a range of possible prison terms (often a very broad range) within which parole-board
15 discretion operates to set actual lengths of stay. The 1962 Code strongly endorsed the
16 indeterminate structure, which was in place in every American jurisdiction in the middle third
17 of the 20th century.[2] Under original § 6.06(2), for example, a judicially pronounced sentence
18 for a felony of the second degree might be "three to ten years" in prison.[3] Once the sentenced
19 offender served a minimum term of three years, perhaps reduced by credits for good behavior,
20 it was left to the parole board to decide whether the offender would be released after three
21 years, three years and one day, four years—or any length of stay up to the maximum of 10
22 years, which again might be lowered for the inmate's good behavior.[4] By historical usage, the

[1] By formal definition dating to the late 19th century, "indeterminate" sentencing systems are those that empower a parole-release agency to set the actual lengths of prison terms. Marvin E. Frankel, Criminal Sentences: Law Without Order (1973), at 86; David R. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America (1980), at 44.

[2] See Paul W. Tappan, Sentencing Under the Model Penal Code, 23 Law & Contemp. Prob. 528 (1958), at 538-539 ("That prison sentences should be indeterminate in length appears entirely justifiable on the basis of experience and reason. How long the offender should be imprisoned cannot be precisely determined in advance, but should be related to his behavior and attitude in the correctional situation."). Tappan was Associate Reporter for the correctional provisions of the 1962 Code.

[3] Original § 6.06(2) provided a fixed maximum prison sentence of 10 years for second-degree felonies (except in unusual cases where an "extended term" maximum of 20 years was available under §§ 6.07 and 7.03). The sentencing court, having decided to impose a prison sentence, held discretion only to set the minimum term—and was only free to select a minimum term of between one and three years.

[4] Under the original Code, full credit for an inmate's "good behavior and faithful performance of duties" could reduce both minimum and maximum prison terms by 20 percent. Reduction up to an additional 20

1 word "indeterminate" denotes that, on the day a prison sentence is handed down in court, no
2 one—including the judge—can estimate with any certainty how long the defendant will
3 actually be confined.[5] The severity of an indeterminate sentence is unknowable, sometimes
4 for many years.

5 Determinate sentencing systems, in contrast, are those that have removed the parole
6 board's authority to fix prison-release dates. Provisions for good time typically remain in
7 place to encourage rule compliance and enrollment in prison programs.[6] Thus, for example, in
8 a jurisdiction offering good-time credits of 20 percent, a judicially pronounced sentence of
9 five years will result in release eligibility after four years. Because good time is awarded
10 routinely to most inmates in most jurisdictions,[7] the actual time the defendant will serve is
11 reasonably calculable on the day of judicial sentencing. Judges as a general matter know the
12 severity of the punishments they select.

13 The choice between system types can be distilled to one of preference for who should
14 hold primary sentencing discretion in prison cases. Durations of terms are largely prescribed
15 by parole boards in an indeterminate structure, but the board's power is transferred to the
16 courts in a determinate framework. This is often described as a shift of sentencing discretion
17 from the "back end" to the "front end" of the sentencing chronology.[8]

18 Of these alternatives, the revised Code concludes that a properly-designed determinate
19 sentencing system is superior, see § 6.06(4) and (5) and Comments *a* and *e* (this draft). This
20 reflects, in part, the Code's preference for visible, regulated, and accountable forums for the

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percent could be made for "especially meritorious behavior or exceptional performance of his duties." See Model Penal Code, Complete Statutory Text § 305.1 (1985).

[5] Andrew von Hirsch and Kathleen J. Hanrahan, The Question of Parole: Retention, Reform, or Abolition (1979), at 27.

[6] See James B. Jacobs, Sentencing by Prison Personnel: Good Time, 30 UCLA L. Rev. 217, 240-252 (1982) (observing that both theorists and state legislatures have included good-time credits within their determinate sentencing schemes).

[7] See Nora V. Demleitner, Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777, 783 (2009) ("In both federal and state systems, most inmates are awarded the entire available amount of good time."); Dora Schriro, Is Good Time a Good Idea? A Practitioner's Perspective, 21 Fed. Sent'g Rptr. 179, 179 (2009) ("Typically, statutory good time is granted automatically when inmates meet certain requirements such as complying with prison rules and avoiding disciplinary infractions."); Jacobs, *Sentencing by Prison Personnel*, 30 UCLA L. Rev. 217, 225 ("In large prison systems with vast inmate turnover and scarce resources, it is inconceivable that a thoughtful decision could be made each month as to whether an individual prisoner deserves to be awarded good time. Therefore, there is an inexorable tendency for statutory and meritorious good time to be awarded automatically.").

[8] See Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Structures, 64 U. Colo. L. Rev. 679, 684 (1993) ("Almost all guidelines efforts have endeavored to move sentencing discretion from the back-end of the system to the front-end of the system. . . . Consequently, the leaders of many of the guideline efforts have come from the judiciary.").

1 exercise of sentencing discretion. It also reflects a policy judgment that the durations of prison
2 terms ordinarily should be determined by courts based on considerations known at the time of
3 sentencing, subject only to marginal adjustments for an inmate's conduct or achievements
4 while institutionalized. Finally, it reflects the reality that American parole boards have proven
5 to be, in the words of Kenneth Culp Davis, administrative agencies of low quality.[9]

6 While few defend indeterminate sentencing systems as they now exist, or have existed
7 in the past, there have been recurring calls for the "reinvention" of the nation's parole-release
8 agencies. While this remains a laudable goal worthy of serious effort, no reform has yet been
9 consummated that could serve as a platform for model legislation. Indeed, we lack evidence
10 that a "reinvention of parole" is possible in American correctional cultures—nor are there
11 compelling models of accomplishment elsewhere in the world.[10] In contrast to these
12 unknowns, there are a number of long-running determinate sentencing systems in the United
13 States that have enjoyed comparative successes in areas of policy implementation, sentence
14 uniformity, procedural fairness, transparency, the (marginal) reduction of racial disparities in
15 punishment, improved information systems, and correctional resource management.[11] It is
16 these proven systems that have supplied the institutional foundations for the new Code.

17 In advocating the elimination of the *release authority* of the parole board, the Code
18 raises no question about the desirability of high-quality aftercare for prison releasees and,
19 when needed, a period of continuing surveillance.[12] Postrelease supervision ("parole
20 supervision" in indeterminate states) is retained in the Code, with much continuity dating
21 back to the 1962 provisions. Indeed, the revised Code urges state legislatures to give priority
22 to investments in reintegrative services for ex-prisoners, often today called "reentry"
23 programs.[13] Because release dates are relatively easy to calculate in determinate systems,
24 planning for in-prison program completion and postrelease services is often easier than in a
25 discretionary release framework.

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[9] See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1971), at 133 ("the performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government").

[10] For an informative survey of European systems, see Nicola Padfield, Dirk van Zyl Smit, and Frieder Dünkel, Release from Prison: European Policy and Practice (2010).

[11] For a full discussion, see Model Penal Code: Sentencing, Report (2003), at 41-115.

[12] See Jack M. Kress, Prescription for Justice: The Theory and Practice of Sentencing Guidelines (1980), at 222 ("parole release decisionmaking and the supervision of released parolees bear neither a theoretical nor a practical relationship to the other. . . . [T]he abolition of parole release decisionmaking will not lead to any deleterious effects upon parole release supervision and may even improve its management").

[13] See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (stating that the "reintegration of offenders into the law-abiding community" is one principal purpose of the Code's provisions on sentencing).

1 Few absolutes exist in the law. The current draft qualifies the Institute's preference for
2 a determinate sentencing system in several ways—and comparable exceptions can be found in
3 all American determinate jurisdictions. First, the revised Code endorses the use of good-time
4 allowances, see § 305.1 (this draft). Second, the Code introduces a mechanism to confront the
5 problem of exceptionally long prison sentences—those measurable in decades rather than
6 months or years—which U.S. jurisdictions mete out more frequency than most other nations.
7 The draft creates a new process for a judicial decisionmaker to review lengthy prison terms
8 after inmates have spent 15 years in confinement, with recurring review thereafter, see
9 § 305.6 (this draft). Third, and building upon majority practice in the United States today,
10 § 305.7 (this draft) permits the judicial modification of prison sentences for aged or infirm
11 inmates, in cases of exigent family circumstances, or when other compelling reasons exist that
12 justify a modified sentence under the principles of § 1.02(2) (Tentative Draft No. 1, 2007).
13 Fourth, all U.S. jurisdictions have established a clemency power, usually held by the
14 executive, often mandated in the states' constitutions.[14]

15 Despite such provisos, there remain large differences in how and by whom sentencing
16 discretion is exercised in systems that have eliminated the parole board's release discretion
17 and those that have not. Because the policy choice between the two approaches is
18 fundamental to the institutional design of a criminal-sentencing system, this study sets out the
19 reasoning behind the draft's recommendations at some length.[15]

20

21

[14] Once exercised with great regularity in many states, the clemency power fell into relative disuse by the latter 20th century. Rachel Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent'g Rptr. 153 (2009).

[15] Strong views on both sides of this issue have been aired since the beginning of the Model Penal Code: Sentencing project. E.g., comments of Judge Jack Davies (supporting parole-release discretion in a new Model Penal Code sentencing system) and Judge Theodore A. McKee (favoring elimination of parole-release authority in the Code), ALI Members Consultative Group meeting, Philadelphia, September 21, 2002. Respected academic voices have called for the retention—with substantial reworking—of parole-release authority in American sentencing systems. See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 187 (recommendation that "we should reinstitute discretionary parole release in the 16 states that have abolished it"; recommendation founded on need to provide incentives to inmates to rehabilitate themselves and provide state officials a tool to prevent the release of dangerous inmates); Steven L. Chanenson, The Next Era of Sentencing Reform, 54 Emory L.J. 377, 455 (2005) (recommending "a guided, reconceptualized, and humble approach to parole release"; recommendation supported in major part by argument that such a system avoids Sixth Amendment requirements of jury factfinding at sentencing); Mark Bergstrom, Jordan Hyatt, & Stephen Chanenson, The Next Era of Sentencing Reform Revisited (paper presented to the American Bar Association Commission on Effective Criminal Sanctions: Roundtable on "Second Look" Sentencing Reforms, December 2008); Petty Burke & Michael Tonry, Successful Transition and Reentry for Safer Communities: A Call to Action for Parole (2006), at 30 (arguing that "such a sentencing scheme provides incentives that can be used to increase offenders' willingness to participate in treatment and engage in the process of change").

1 **THE POLICY QUESTION**

2 Fourteen states, the federal system, and the District of Columbia have abolished the
3 release discretion of parole boards, including half of sentencing-guidelines jurisdictions. Five
4 states cancelled their parole boards' release authorities in the 1970s, four did so in the 1980s,
5 and seven more in the 1990s. Two states later reversed course.[16] In 1994, the American Bar
6 Association endorsed the trend, recommending that time served in prison should be
7 determined by sentencing judges subject to good-time reductions, all within a framework of
8 sentencing guidelines.[17]

9 This Study considers the question of parole-release discretion in light of accumulating
10 experience since the 1970s in the two-thirds of U.S. sentencing systems that have retained a
11 paroling authority, and the one-third that have not. The study first asks whether parole-release
12 systems better advance the goals of the sentencing system than determinate systems. It then
13 examines the procedural setting for parole-release decisions and the safeguards available to
14 prisoners, with reference to the procedural attributes of judicial sentencings. Last, the study
15 compares parole-release "abolition" jurisdictions with "retention" jurisdictions for their
16 differing experiences of prison population growth over the past three decades.

17 *Purposes of Sentencing and the Model Penal Code*

18 The revised Model Penal Code adopts a framework of utilitarian purposes within
19 limits of proportionality in sentence severity.[18] The next four sections will consider the
20 question of who—a court or a parole board—is best situated to set prison-release dates in light
21 of the Code's sentencing purposes.

22 The traditional view is that a parole board's release decisions should be made on
23 utilitarian grounds: *At what point has prisoner A been rehabilitated? Is prisoner B still too*
24 *dangerous to release, thus requiring further confinement on incapacitation grounds?* The
25 board's release authority was the centerpiece of the medical model of sentencing that took
26 root in American penality in the late 19th and early 20th centuries. The board was meant to

[16] Determinate systems currently exist in Arizona, California, Delaware, Illinois, Indiana, Kansas, Maine, Minnesota, North Carolina, Ohio, Oregon, Virginia, Washington, Wisconsin, the District of Columbia, and the federal system. Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 66-67 table 3.1. Colorado returned to an indeterminate system in 1985, while Mississippi moved to a mixed system in 2008—with determinate sentences still used for violent offenders. Pew Center on the States, Reforming Mississippi's Prison System (2010), at 2.

[17] American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standards 18-2.5, 18-3.21(g), and 18-4.4(c).

[18] Section 1.02(2)(a) (Tentative Draft No. 1, 2007).

1 determine if and when the "cure" of correctional treatment had taken hold upon individual
2 prisoners.[19]

3 It is conceivable, however, that the justifications for the board's powers have evolved
4 since parole release became established in the early 1900s. The following four sections
5 explore a number of possible rationales for the retention of substantial "back-end" prison-
6 release authority. They ask, in turn, whether a parole-release agency should be created in
7 order to revisit questions of sentence proportionality, general deterrence, incapacitation, and
8 offender rehabilitation.

9 *Proportionality in Sentencing*

10 Section 1.02 of the revised Code defines sentence proportionality with reference to
11 "the gravity of offenses, the harms done to crime victims, and the blameworthiness of
12 offenders."[20] American statutory schemes of parole release explicitly require, or tacitly allow,
13 parole boards to reassess the seriousness of the offense. They are not bound by the sentencing
14 courts' views of the matter, so long as they stay within the minimum and maximum terms of
15 confinement.[21] Studies of parole boards in action have found that they weigh the offense of
16 conviction, along with criminal history, most heavily of all considerations, with institutional
17 behavior secondary.[22] Occasionally, parole release has even been defended as a way to iron
18 out disparities in the punishments handed out by the trial courts.[23] The question is not whether
19 parole releasing agencies rule upon sentence proportionality, but whether it is desirable.

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[19] For a history of parole-release discretion from the 1890s to the 1960s, see Rothman, *Conscience and Convenience*, ch. 5 ("A Game of Chance: The Condition of Parole").

[20] Section 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

[21] In New York and a number of other systems, for example, the parole board must be satisfied that the release date "will not so deprecate the seriousness of his crime as to undermine respect for law." See Cons. Laws of N.Y. § 259-i(2)(c)(A); Tenn. Rules and Regulations § 1100-01-01-.07(4)(b); Wis. Admin. Code § PAC 1.04; accord Laws of R.I., § 13-8-14(a)(2). In other states, the board weighs the "sufficiency" of the amount of time that has been served by each prisoner, or is instructed to respond to the "severity" or "nature" of the offense for which the inmate is imprisoned. See Ala. Bd. of Pardons and Parole Pardons and Parole, Annual Report, Fiscal 2008-09 (2009), at 27; Ga. Code § 42-9-40(a); Iowa Admin. Code § 205-8.10(906); Tex. Gov. Code § 588.144(a)(2); Tex. Admin. Code § 145.2(b)(1). Boards also commonly consider the prisoner's criminal record, anything contained in the original presentence report, and victim impact information. See Tenn. Rules and Regulations § 1100-01-01-.07; Rev. Code Neb. § 83-192(1)(f)(v); N.H. Admin. Code Rules, Par. 301.03; Code of N.M. Rules, R. 22.510.3.8; N.D. Code § 12-59-05; R.I. Admin. Code, Rule 49-1-1:1.

[22] Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011); John C. Runda, Edward E. Rhine, and Robert E. Wetter, The Practice of Parole Boards (Association of Paroling Authorities International & Council of State Governments 1994); Rothman, *Conscience and Convenience*, at 166-168.

[23] Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of

The reference points of proportionality ordinarily do not change or become more knowable between the sentencing hearing and later parole-board hearings. It is thus difficult to explain why the parole board should be permitted to recast the proportionality judgment of the sentencing court—especially when, as in the Code's system, the judge's decision was informed by sentencing guidelines and subject to appeal. Indeed, it can seem pernicious to have the parole board second-guessing the courts in this way, given that the transparency and formalities of parole-board decisionmaking fall far short of those in the criminal courtroom (see discussion below).

If one takes the view that an offender's just punishment for a past crime should turn in part on his *postsentencing* behavior, or other postsentencing developments, then we have the seed of an argument that paroling authorities should share in ultimate judgments of proportionate prison terms. Some may believe, for example, that an inmate's behavior while in prison incrementally moves the inmate up or down on a gestalt scale of personal blameworthiness. This view would not support a vast power in the parole board to alter release dates, however. A more limited mechanism of credits for good behavior (as in § 305.1 of this draft) can also serve the function of penalizing or rewarding in-prison behavior.

The most forceful claim for the relevance of postsentencing developments to proportionality determinations rests on a belief in the possibility of human redemption. If we think that offender blameworthiness can diminish over time through the effects of remorse, empathy, religious conversion, or other processes of personal growth, then we may want to empower a sentencing agency with discretion to recognize these changes in an offender's moral identity. The authority to grant or withhold official dispensation on such open-ended and subjective grounds will strike many as troubling, however. Nor is it clear that parole boards, with their relatively poor history of dealing with more prosaic tasks, should be given this profound power. The revised Code takes the view that claims of dramatic human change should be available in limited circumstances, and should be heard by judicial decisionmakers, see § 305.6 (this draft) (judicial decisionmaker granted discretion to modify prison terms after period of 15 years), § 305.7 (this draft) (courts granted discretion to modify prison terms at any time for "compelling reasons" in light of purposes in § 1.02(2)).

A wholly different realpolitik argument is sometimes offered in favor of back-end release discretion: that final judgments of proportionality are best made only when considerable time has passed after the commission of offenses. On this view, judges are often disabled by being too close to their cases and the interested parties, and cannot free themselves from emotions and publicity that may surround a sentencing decision. Parole

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Research, vol. 12 (1990), at 339; Michael Tonry, Real Offense Sentencing: The Model Sentencing and Corrections Act, 72 J. of Crim. L. and Criminology 1550, 1588 (1981). Of course, the diametrically opposite claim is also made, that the boards' decisions themselves are inconsistent, inexplicable, or politically-driven. See Frankel, *Criminal Sentencing*, at 92-95; James J. Bagley, Why Illinois Adopted Determinate Sentencing, 62 Judicature 390, 392 (1979).

boards, in contrast, are portrayed as having greater detachment and the freedom of generally operating outside the glare of publicity. Months or years after an extremely disturbing event such as a serious crime, in other words, cooler heads can prevail.

This contemplates that the sentencing judge announce a penalty in open court that (by design) sounds much more formidable than the system will actually produce. The afterglow of the sentencing hearing, and the next day's headlines, will satisfy the appetite for a cathartic punishment, but neither the corrections system nor the defendant will really pay the advertised price. As Franklin Zimring has put it, "In a system that seems addicted to barking louder than it really wants to bite, parole (and 'good time' as well) can help protect us from harsh sentences while allowing the legislature and judiciary the posture of law and order."[24]

If we accept these claims, little weight should be given to the decisions of sentencing judges in emotionally charged cases. The true sentencer ought to be an entirely separate agency, with power to effect significant alterations in judicial penalties not only on proportionality grounds, but on all other grounds. If judges are too clouded by the pressures of the moment to adjudge proportionality, they should not be trusted to weigh utilitarian purposes, either.

To accept the realpolitik argument, we must endorse a courtroom process for sentencing that is symbolic but intentionally misleading. We must be prepared to believe that crime victims and the general public will not realize what is happening. None of this is palatable or realistic.

Finally, there is reason to doubt that parole boards are in fact politically insulated decisionmakers, and that the tugs of publicity and victim sentiment do not tell upon their actions. Over the past decades, parole boards nationwide have become visibly more risk averse in their release decisions, often jolted by a single but terrifying episode of criminality by a prison releasee. All systems of release will experience horrific failures in a small number of cases. Yet paroling authorities are poorly constituted to withstand the pressures of an impossibly difficult job.[25]

The above analysis suggests the following conclusions about the role of proportionality in the apportionment of prison-release discretion: The permissible range of proportionate prison sentences should usually be established at the front end of the sentencing process rather than the back end. The courts, in collaboration with a sentencing commission,

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[24] Franklin E. Zimring, A Consumer's Guide to Sentencing Reform: Making the Punishment Fit the Crime, 6 Hastings Center Report 13, 15 (1976).

[25] See Norval Morris, Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform (2002), at 183 ("[p]oliticians and parole boards dislike this game and its certain losses; the only figure in the criminal justice system who should properly consider such predictions [of an offender's ability to conform to the law], bounded of course by the gravity of the harm the prisoner has already encompassed, is the judge. The judge should be assisted in this task, but the ultimate responsibility should be that of the judge").

1 should have primary responsibility for such judgments. If there is a place for proportionality-
2 based adjustments of dates of release in the mine run of cases, those adjustments should be
3 responsive to postsentencing behaviors and events. The revised Code takes the position that
4 this is an incremental task best achieved through a routinized system of credits for good
5 behavior, together with judicial sentence-modification discretion for cases of extraordinary
6 postsentencing developments.

7 *General Deterrence*

8 The Code allows criminal sentences to vary within the range of proportionate severity
9 if there is a good utilitarian reason to move up or down within the range.[26] This Study will
10 consider each of the crime-reductive utilitarian goals of punishment in turn, beginning with
11 general deterrence. Although the proposition is debatable, the discussion below accepts
12 *arguendo* that general deterrence can be effected through variations in penalty severity.[27]

13 Deterrence, effected through communication to the society at large, would seem a
14 function best discharged through a judge's pronouncement of penalty in open court. The
15 formality and solemnity of most courtrooms, the public nature of their proceedings, the stature
16 of most judges, and the opportunities for participation extended to offenders, victims, and
17 other concerned parties—all augur in favor of a maximally effective deterrent message, at
18 least within the realm of what is realistically possible.

19 Is there any strong argument that an agency with back-end release authority should
20 share discretion over the length of prison terms in order to enhance the pursuit of general
21 deterrence? This seems unlikely. Such later-in-time discretion would tend to weaken the
22 postulated inhibitory force of judicial sentences once it is widely known that only a fraction of
23 sternly voiced prison terms will typically be served. Courtroom sentences without street
24 credibility may have insidious effects more widespread than those upon potential criminals
25 who are weighing their odds. General deterrence is sometimes allied with the idea that the

[26] If there is no utilitarian basis to move up or down in sentence severity, § 1.02(2)(a)(iii) (Tentative Draft No. 1, 2007) requires that a sanction near the low end of the range of proportionate punishments be chosen.

[27] Most criminologists agree that there is little or no evidence in support of this belief—although many caution that the absence of evidence is not the same thing as affirmative proof that severity-based deterrence does not occur. 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; arguing that it is time to accept the null hypothesis that incremental increases in punishment severity do not deter). Some economists assert that changes in punishment severity can exert a measurable influence upon the behavior of potential criminals, as the perceived costs of a criminal act increase in relation to perceived benefits. See Steven D. Levitt, Deterrence, in James Q. Wilson & Joan Petersilia eds., Crime: Public Policies for Crime Control (2002). There is wide agreement across disciplines that general deterrence is better effected through increases in the certainty of punishment following criminal conduct than through increases in the severity of threatened sanctions. See Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikstrom, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999), at 45, 47-48.

1 criminal law can have an educative effect on citizens at large, reinforcing beliefs that the legal
2 order must be respected.[28] Within this more diffuse understanding of general deterrence,
3 parole release can produce negative ripple effects among those who see it as a failure of the
4 legal system to keep its promises—or worse, among those who see it as a machinery for
5 deceiving the public.

6 Parole-release discretion is not ordinarily defended as a way in which the general
7 deterrent powers of the criminal law can be strengthened. In order to find a comfortable
8 resting place for back-end release discretion as an aid to general deterrence, we would have to
9 return to the discomfiting "bark and bite" approach discussed earlier, in the hope that the
10 public can be dissuaded from crime by the pronouncement of tough sentences that the legal
11 system does not intend to carry out. The Institute, however, is unwilling to advocate a
12 program that relies on smoke and mirrors.

13 *Incapacitation (and Rehabilitation)*

14 Theories of incapacitation and rehabilitation, the traditional underpinnings of parole-
15 release discretion, are two sides of the same coin. The flip side of releasing prisoners when we
16 think they have been rehabilitated is continuing their confinement when we think they remain
17 crime-prone.[29] Under the revised Code, in a case where the prospects for an offender's
18 rehabilitation are slim, and the risks of future serious criminality are high, a policy of
19 incapacitation may push toward the longest prison term allowable within limits of
20 proportionality.[30]

21 Is a parole board with back-end release authority necessary or useful to the goal of
22 extended confinement of dangerous criminals? The answer depends on whether the parole
23 board, through observation of an offender during a prison term, is in a better position to
24 forecast postrelease recidivism than the sentencing court.

25 In research and practice, the most powerful known predictive risk factors for serious
26 criminality or violent behavior are all "static factors" about an offender. Static factors are
27 unchangeable during the incarceration term, or else are characteristics (like age) that move
28 along in a march-step fashion. They include the number and type of prior convictions,
29 juvenile adjudications, and incarcerations, employment history, marital history, history of
30 prior drug use, age of onset of criminal activity, gender, and current age. Attributes potentially

[28] See Johannes Andenaes, General Prevention—Illusion or Reality?, 43 J. Crim. L., Criminology & Police Science 176 (1952), at 179-180.

[29] See Herbert L. Packer, The Limits of the Criminal Sanction (1968), at 55.

[30] See § 1.02(2)(a)(i), (ii) (Tentative Draft No. 1, 2007); § 6B.09 and Comments *e* and *g* ("Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending") (this draft). See also Franklin E. Zimring and Gordon Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime (1995), chapter 4; Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry & Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985).

1 subject to change during the offender's term of imprisonment are termed "dynamic factors."
2 These include observations over time of such things as an offender's antisocial behaviors and
3 attitudes, social interactions, authentic (as opposed to grudging or feigned) participation in
4 treatment programming, work ethic, ability to regulate emotions, impulsivity, expressed
5 insights into violence, and compliance with terms of supervision.[31] Static factors tend to be
6 objectively knowable; dynamic factors usually require qualitative judgment calls.

7 Despite much intuitive appeal, the predictive value of the so-called dynamic factors
8 has yet to be demonstrated empirically. In 2002, Norval Morris wrote that "[t]he blunt truth is
9 that at the time of sentencing as good a prediction as to when the prisoner can be safely
10 released can be made as at any later time during confinement."[32] Although there has been
11 much hope for the development of statistical risk measures that incorporate consideration of
12 inmates' in-prison activities, to improve upon predictions prior to confinement, these
13 technologies remain unproven. Today, the most used and most successful risk-prediction
14 instruments rely heavily or exclusively on static factors.[33] In the research community, there is
15 disagreement over how close we are to valid dynamic models that may be applied to prison
16 inmates,[34] but consensus that the development of prediction models made better through the
17 use of dynamic variables remains a horizon for future research.[35]

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[31] See Stephen C. P. Wong & Audrey Gordon, The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool, 12 Psychology, Public Policy, and Law 279, 282 n.1 (2006) (listing 6 static and 26 dynamic predictive factors).

[32] Morris, *Maconochie's Gentlemen*, at 186. Morris added the qualification that "Those sentenced to long terms are exceptions, most of whom will pass through 'criminal menopause' during their late thirties or early forties, aging out of their criminous proclivities." See also Morris, *The Future of Imprisonment*, at 35 ("Protracted empirical analysis has demonstrated . . . that *predictions of avoidance of conviction after release are no more likely to be accurate on the date of release than early in the prison term.*") (emphasis in original).

[33] See Thomas P. LeBel, Ros Burnett, Shadd Maruna, and Shawn Bushway, The 'Chicken and Egg' of Subjective and Social Factors in Desistance from Crime, 5 European J. of Criminology 130, 133 (2008) ("There is 'no disagreement in the criminological literature' about the most powerful, static predictors of recidivism—age, gender, criminal history and family background factors . . . . On the other hand, the more dynamic factors related to success or failure after prison are less well understood and such variables are rarely included in predictive reconviction research") (citations omitted).

[34] For an optimistic view, see Paul Gendreau, Tracy Little, and Claire Goggin, A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!, 34 Criminology 575, 588 (1996) ("While very few studies have assessed how well changes over time within dynamic factors predict recidivism, the data suggest that changes in criminogenic needs may produce strong correlations in that regard.").

[35] See Anthony J. Glover, Diane E. Nicholson, Toni Hemmati, Gary A. Bernfeld & Vernon L. Quinsey, A Comparison of Predictors of General and Violent Recidivism Among High-Risk Federal Offenders, 29 Criminal Justice and Behavior 235, 236, 247 (2002) ("Most currently available actuarial approaches use primarily static or historical predictors . . . Future work could focus on dynamic factors (e.g., criminal attitudes, antisocial associates) relating to high-risk individuals"); Stephen C. P. Wong & Audrey Gordon, The Validity and Reliability of the Violence Risk Scale: A Treatment-Friendly Violence Risk Assessment Tool, 12 Psychology, Public Policy, and Law 279, 279 (2006) ("The development of risk assessment tools that use

1 Despite all of this, there is a resilient commonsense view that observable events during
2 a prison term *must* tell us something about an inmate's likely future conduct. In criminal
3 justice policy, such intuitions count for a great deal. On reflection, however, it is not
4 altogether paradoxical that a prisoner's ability to navigate in the disciplined and artificial
5 prison environment might not indicate very much about his functionality outside. As Hans
6 Mattick famously said, "It is hard to train an aviator in a submarine."[36] Prison is an
7 environment wholly unlike any free community, with its own norms, culture, economy, status
8 hierarchies, risks, and incentive systems. Above all, it is a highly-structured world in which
9 freedom of action is drastically curtailed. Once released, the former inmate is plunged back
10 into the world of temptations, personal deprivations, and criminogenic forces—probably more
11 acute than before confinement—that propelled him toward the penitentiary in the first place.

12 In sum, contemporary risk-prediction science lends slight support to an across-the-
13 board recommendation that parole-release discretion should be retained (where it exists) or
14 restored (where it has been extinguished). This picture could change with future research
15 breakthroughs, but it is unsound to design whole sentencing systems on knowledge we do not
16 yet possess. Years ago, Marvin Frankel wrote that he had no categorical objection to
17 indeterminate sentences for some offenders—but he believed they should be made available
18 only "where the system can claim the ability to identify successes and failures with a decent
19 approach to precision."[37] The revised Code echoes that sentiment, and disapproves of a broad-

dynamic variables to predict recidivism and to inform and facilitate violence reduction interventions is the next major challenge in the field of risk assessment and management"); Kevin S. Douglas & Jennifer L. Skeem, Violence Risk Assessment: Getting Specific About Being Dynamic, 11 Psychology, Public Policy, and the Law 347, 347, 349, 352, 358 (2005) ("[E]mpirical investigation of dynamic risk is virtually absent from the literature. . . . The field's next greatest challenge is to develop sound methods for assessing changeable aspects of violence risk. . . . To date, the scientific focus on dynamic risk and risk management has been more conceptual than empirical. . . . [I]t is unclear what the most promising dynamic risk factors are.").

[36] Quoted in Morris, The *Future of Imprisonment*, at 16. As Professor Jacobs has further explained:

> Prison is a quintessentially abnormal environment dominated by a prison subculture with its own norms and values. Some of the most sophisticated and powerful prisoners either are never driven to break prison rules; or, if they are, their violations are not discovered or punished. Some individuals, however, necessarily break the rules in order to survive; others do so regularly in response to the extreme social, material, emotional, physical, and sexual deprivations which attend maximum security prison life. Those individuals incapable of coping with the extraordinary pressures of prison life may cope well enough with the stresses of everyday life on the streets. On the other hand, there are many individuals who have learned to survive and even "prosper" in prison who cannot or will not adhere to the rules imposed by our larger society.

James B. Jacobs, Sentencing by Prison Personnel: Good Time, U.C.L.A. L. Rev. 217, 264 (1982) (footnotes omitted).

[37] Frankel, *Criminal Sentences*, at 98-100 (emphasis supplied).

based power to set prison-release dates, held by a parole board, without a better account of how the board is meant to exercise that authority.

Rehabilitation (and Incapacitation)

Under the revised Code, sentence severity may be allowed to vary in the pursuit of offender rehabilitation, so long as the resulting penalty is not disproportionate under § 1.02(2) (Tentative Draft No. 1, 2007). Consider, for example, the case of a repeat offender convicted of a violent crime in the middle range of seriousness, who has a history of severe drug and alcohol dependency. Research shows that a sentence of two or three years of confinement with intensive drug treatment (even if the offender does not participate voluntarily) stands a realistic chance of bringing the offender's addiction under control and reducing or eliminating his propensity for crime. The research also tells us that success rates in such programs are correlated with longer time periods of intervention. Three years would probably be better than two.[38] Finally, assume that the sentencing judge (possibly double-checked by an appellate court) has concluded on proportionality grounds that the penalty deserved by the offender falls somewhere in the range of one-to-three years of institutionalization. In such a case, the revised Code allows the sentencing court to select a three-year term at the high end of the range.

Does a back-end paroling authority have a role to play in weighing and applying such concerns? Much of this question was addressed in the preceding section, which examined the hypothesis that parole boards can detect when in the timeline of a prison sentence an inmate can safely be released into free society. The search for statistically powerful "dynamic factors" in risk prediction could be described as the quest for reliable markers of prisoner rehabilitation. While a determinate system can encourage enrollment in programs with good-time or earned-time credits—and the revised Code does so, see § 305.1 (this draft)—we cannot tell which individuals have reaped rehabilitative benefits from their participation.

A less individualized rehabilitation-based argument might still support the existence of parole release, however. Joan Petersilia and others have reasoned that it is important to give inmates incentives to commit themselves to reform, and that the general effectiveness of prison programs will be increased if prisoners believe that their early release depends on authentic engagement.[39] This argument supposes that: (1) holding dates of release in suspense

[38] See, e.g., M. Douglas Anglin and Yih-Ing Hser, Treatment of Drug Abuse, in Michael Tonry and James Q. Wilson eds., Drugs and Crime, Crime and Justice: A Review of Research, vol. 13 (1990), at 393-460.

[39] Petersilia, *When Prisoners Come Home*, chapter 2. See also Connie Stivers Ireland and JoAnn Prause, Discretionary Parole Release: Length of Imprisonment, Percent of Sentence Served, and Recidivism, 28 J. Crime & Justice 27 (2005) ("discretionary parole release is the best mechanism by which rehabilitation can be meaningfully achieved, as mandatory releasees are given an automatic release date and therefore have no system incentives to seek programs and treatment to facilitate change").

can help prisoners apply themselves more effectively toward positive change, and (2) prisoners will trust paroling authorities to recognize and reward their honest efforts.[40]

To the extent these are commonsense assertions about human nature (that positive incentives can bring about change, that people need to believe they have control over their futures), it is interesting to note that they are contrary to the observations of other experienced observers of the psychology of confinement. Norval Morris argued that the coercive edge of the parole board's release power actually destroys the best chances for obtaining inmates' genuine involvement in prison programming. In Morris's telling, a system of discretionary release is most likely to encourage play-acting, or other behavior designed to ingratiate the inmate with prison staff—not real commitment to change. Further, there is little in the annals of parole history to support the idea that prisoners have placed their trust in parole boards to make fair decisions on legitimate criteria. Quite the contrary—and prisoners' suspicions about the unlovely quality of the boards' deliberations have often been well founded.[41]

If the question were simply one of intuition, it would be hard to choose between the opposing views that parole release helps, or hurts, the chances of in-prison rehabilitation. Unfortunately, the empirical studies that have looked into the question do not get us past the need for speculation. They have produced conflicting results and are rooted in unacceptably weak data.[42]

In one study, for example, Connie Stivers Ireland and JoAnn Prause argue that there is empirical foundation for the belief that discretionary release is a more successful way to help prisoners transition to a law-abiding lifestyle than a system of determinate release.[43]

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[40] Note that both suppositions could be true even if the parole board has no real ability to detect rehabilitation or earnest effort. The important thing is that prisoners believe this to be so.

[41] See, e.g., Rothman, *Conscience and Convenience*, at 159-201; Wilbert Rideau and Ron Wikberg, Life Sentences (1992), at 124-147. Even strong proponents of parole-release discretion sometimes concede the point that decisionmaking in the past has been unsystematic, and that a structured approach would be something new. See Peggy B. Burke, Current Issues in Parole Decisionmaking: Understanding the Past; Shaping the Future (1988), at xiv-xv ("[P]arole board members have in the past operated primarily as individual decisionmakers. They considered a case and cast a vote. There was no need to be explicit with one's colleagues about why the vote was cast, what factors were considered, or what goals were sought. But times have changed. More structure, accountability, and scrutiny are required of parole").

[42] Two recent studies arrived at opposite conclusions when comparing recidivism rates in determinate and discretionary release settings, see Richard Rosenfeld, Joel Wallman, and Robert Fornango, The Contribution of Ex-Prisoners to Crime Rates, in Jeremy Travis and Christy Visher eds., Prisoner Reentry and Crime in America (2005); William D. Bales, Gerry G. Gaes, Thomas G. Blomberg, and Kerensa N. Pate, An Assessment of the Development and Outcome of Determinate Sentencing in Florida, 12 Justice Research and Policy 41 (2010).

[43] Stivers Ireland & JoAnn Prause, *Discretionary Parole Release*, supra.

Using data from the U.S. Justice Department's National Corrections Reporting Program (NCRP), collected from 30 states and the federal system, and multiregression analysis, the authors report that "those released from prison via a mandatory mechanism were less than half as likely to successfully complete parole than those released from prison under discretionary (parole board) systems." Without regression, mandatory releasees were 75 percent less likely to succeed on parole.[44] These findings give credence to the claim that back-end release discretion, as presently exercised in American jurisdictions, has a net positive effect on prisoner's behavior following release.

In fact, the results are highly suspect. The most evident problem with the study is the disproportionate importance of data from a single determinate state, California. Among the 30 jurisdictions in the NCRP sample, California supplied more than one-quarter of all prison releasees and more than one-half of all releasees from legal systems that had eliminated parole-release discretion.[45] The study's findings do not really tell us how determinate release is working in all 17 jurisdictions across the country that have such an arrangement. We are primarily seeing how it plays out in California.

This is an enormous problem because California, for idiosyncratic reasons, had the highest rate of revocation of postrelease supervision of any state in the union. In 1995, at the time of the Stivers Ireland-Prause study, parolees' failure rate in California was a staggering 77 percent. Among all other states, the average failure rate was 47 percent. Looking across all states that have abolished parole-release discretion, California is the only jurisdiction that has produced revocation practices well above national averages.

What happens to the study's main finding if we redact the anomalous California numbers? In 1995, using raw data, prisoners released by discretionary authorities nationwide succeeded on parole at a rate of 54.2 percent, while those released in "non-California" determinate systems succeeded at a rate of 64 percent. The removal of California does not simply soften the study's conclusions; it reverses them. Without California fouling the data, it could be argued that prisoners who have served time in determinate systems are in general *more* rehabilitated upon release than those who have languished in indeterminate systems.[46]

It is dangerous to draw policy conclusions from these statistics, however. Aside from allowing one outlier state to overwhelm the sample, Stivers Ireland and Prause's methodology labors under an important conceptual difficulty that plagues much of recidivism research. Simply put, it is a serious error to equate failure rates on postrelease supervision with the

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[44] Id. at 38.

[45] In 1995, only eight of the fourteen U.S. jurisdictions that had abolished back-end release discretion were included in the NCRP database. See id., at 34 table 1.

[46] In 1999, for example, an ex-prisoner was 18 percent more likely to succeed on postrelease supervision in a determinate regime than in an indeterminate system.

actual behavior of prison releasees. The states are far too different in their revocation practices to allow us to consider the data compatible from state to state. In any jurisdiction, the number and rate of revocations depends to some degree on the good or bad conduct of parolees, to be sure, but it also depends at least as much on what might be called the "sensitivity" of the supervision system to violations. Sensitivity varies with formal definitions of what constitutes a violation, the intensity of surveillance employed by parole field officers, the institutional culture of field services from place to place, and the severity of sanctions typically used after findings of violations. Judging by the great differences in revocation patterns found throughout the nation, it is hard to avoid the conclusion that high or low revocation rates are more the result of the system's sensitivity to violations than any demonstrated difference in the postrelease conduct of offenders from place to place. One must be supremely cautious about drawing conclusions from a methodology that equates low revocations in a state with successful in-prison rehabilitation, or vice versa.

There is a further conundrum, even if we had hard data that discretionarily-released prisoners offend less often than those who "max out" or are released per determinate formulas. Most parole boards use actuarial-risk-assessment scales when deciding which prisoners should be freed. If we assume that the boards make use of these measures with even rough precision, and bring a healthy attitude of risk aversion to bear to their jobs, then prisoners discretionarily released will on average be lower-risk individuals than those who serve their full terms, or releasees unsorted by risk in determinate systems. This posited effect would bear no connection to prisoner rehabilitation, however. The same identification of low-risk offenders could have been performed on the day of original sentencing.[47]

In summary, we possess no persuasive evidence that discretionary prison release, as opposed to determinate release, facilitates rehabilitation. This does not mean that a hypothesized connection between release mechanism and future behavior cannot exist or does not merit future study. But we should be wary of building important components of a sentencing system, especially rules and processes that apply indiscriminately to large numbers of prisoners, upon an absence of knowledge.

Procedural Protections at Sentencing and at Parole Release

The procedural safeguards that have traditionally attended judicial sentencing are notoriously inadequate.[48] Judge Gerard Lynch has dubbed sentencing a "second-string fact-

[47] See § 6B.09(3) (this draft) (proposing diversion of otherwise prison-bound defendants who are identified as posing an unusually low risk of serious reoffending; proposal includes judicial discretion to depart from mandatory-minimum penalties).

[48] Stephen Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733 (1980); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 548-549 (1993).

1 finding process."[49] If this is a fair assessment, then the procedural accoutrements of parole
2 release are of the third- or fourth-string variety.[50]

3 The release process is necessarily streamlined given small person-power and large
4 caseloads. Parole boards simply cannot marshal resources comparable to trial-court systems;
5 they are tiny agencies averaging a total of five or six members. The number of prisoners
6 considered for release by the average state parole board in 2006 was 8,355—about 35 cases
7 for each working day, and comprising only one part of a typical board's responsibilities.[51]
8 Kenneth Culp Davis reported that the well-resourced U.S. Parole Board, before abolition of
9 parole in the federal system, heard roughly 50 cases per day.[52] Studies of parole in its mid-
10 20th-century heyday found decisionmaking times of only 3 to 20 minutes per case.[53] With the
11 explosion in correctional populations since then, it is unlikely that greater attention is given
12 today.

13 Parole-release "hearings" are often no more than brief interviews of the prisoner,
14 sometimes convened without notice. The prisoner's role at the hearing varies quite a bit
15 among the states, but is often limited to responding to the board's questions. Sometimes there
16 is no right for the prisoner to be present at all; the case is decided solely on the papers.[54]

17 There is seldom a genuine adversarial process with the prisoner's interests effectively
18 represented. Few prisoners are competent to raise the strongest legal and factual arguments on
19 their own behalf. In court, defendants have or are provided lawyers, and sometimes expert
20 witnesses, but such assistance is far from the norm in the parole milieu. Some states bar

[49] Gerard E. Lynch, The Sentencing Guidelines as a Not-So-Model Penal Code, 10 Fed. Sent'g Rptr. 25, 27 (1997).

[50] As a matter of federal constitutional law, discretionary parole systems are not thought to create a liberty interest on the part of prisoners, so the Due Process Clause guarantees no minimum level of procedural regularity. See, e.g., Dopp v. Idaho Commission of Pardons and Parole, 84 P.3d 593 (Idaho App. 2004); Morales v. Michigan Parole Bd., 676 N.W.2d 221 (Mich. App. 2003); Barna v. Travis, 239 F.3d 169 (2d Cir. 2001) (reviewing N.Y. parole procedures); Weaver v. Pa. Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997); Quegan v. Mass. Parole Board, 673 N.E.2d 42 (Mass. 1996); Vice v. State, 679 So. 2d 205 (Miss. 1996); Saleem v. Snow, 460 S.E.2d 104 (Ga. 1995). A liberty interest does arise if state law requires release after a set period unless contrary findings are made by the parole board—but, even then, the safeguards mandated by the constitution are not impressive. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

[51] Susan C. Kinnevy and Joel M. Caplan, Findings from the APAI International Survey of Releasing Authorities (2008), at 9.

[52] Davis, *Discretionary Justice*, at 127.

[53] Rothman, *Conscience and Convenience*, at 164-165; Robert O. Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 Washington University Law Quarterly 243, 301 (1966).

[54] See Neil P. Cohen, The Law of Probation and Parole, Second Edition, vol. 1 (1999), at 6-27; Fla. Stat. § 947.06; Vt. Stat. § 502(a); Mahaney v. State, 610 A.2d 738 (Me. 1992).

representation by counsel outright.[55] Some permit only limited representation, such as allowing counsel to submit written statements—but even this assumes the prisoner has paid for a lawyer.[56] Only a tiny handful of states provide appointed counsel for indigent prisoners.[57]

Often, there is no formal burden of proof a parole board must apply for its factual determinations. For example, in Tennessee, release is permitted only when the board is "of the opinion that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner's release is not incompatible with the welfare of society."[58] Some states define the applicable burden as the "preponderance of the evidence" standard, but there is no enforcement mechanism to see that the standard is actually applied.[59] In addition, there is no requirement that the parole board's factfinding be consistent with the facts established when the prisoner was convicted, or those found by the sentencing court. Real-offense sentencing—punishment for crimes for which there has been no conviction—is the norm in parole proceedings.[60]

The rules of evidence, and protections against the use of hearsay evidence, are inapplicable to the parole process.[61] The lack of rigor in this regard should be considered in light of the usual contents of an inmate's dossier:

> Besides . . . hard data, the file may also contain "soft" information, such as observations of guards, counselors, and other corrections personnel. Even unsubstantiated rumors may appear. . . . [A]nything that an inmate may have done (and perhaps even some things that an inmate may not have done) in his or her life, but particularly while in prison, may be recorded in the file.[62]

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[55] See Code of N.M. Rules, R. 22.510.2.8(A)(3); Franciosi v. Mich. Parole Bd., 604 N.W.2d 675 (Mich. 2000); Holup v. Gates, 544 F.2d 82 (2d Cir. 1976).

[56] See Laws of R.I. § 13-8-26; Vt. Stat. § 502(d).

[57] See Hawaii Rev. Stat. § 706-670(3)(c); Mont. Code § 46-23-202. It is probably not a coincidence that these are states with very small prison populations.

[58] Tenn. Code § 40-28-117(a).

[59] See, e.g., N.H. Admin. Code Rules, Par. 210.02.

[60] See Dawson, The Decision to Grant or Deny Parole, 1966 Wash. U. L.Q. at 259; Michael Tonry, Real Offense Sentencing: The Model Sentencing and Corrections Act, 72 J. Crim. L. and Criminology 1550, 1557 (1981); Hemphill v. Ohio Adult Parole Authority, 575 N.E.2d 148 (Ohio 1991); Wis. Admin. Code § DOC 331.08.

[61] See Davis v. Brown, 311 F. Supp. 2d 110 (D.D.C. 2004); Hubbard v. Simmons, 89 P.3d 662 (Kan. App. 2004).

[62] See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-31.

1 Basic rights of confrontation of adverse witnesses are often nonexistent. For example,
2 a Vermont statute provides that "the inmate shall not be present when the victim testifies
3 before the parole board."[63] Indeed, the prisoner's ability to respond to damaging information
4 of any kind can be severely limited. Some states refuse the prisoner access to the contents of
5 his dossier,[64] some routinely permit it,[65] while most give the board discretion to disclose some
6 or all of the file on a case-by-case basis.[66] Court challenges to rules barring access have
7 generally failed.[67]

8 Fair process requires identifiable and enforceable decision rules. While some U.S.
9 jurisdictions have adopted statutory presumptions or guidelines that must be applied by
10 sentencing courts, there are no equivalent substantive directives for parole boards. Where
11 statutory criteria or parole guidelines exist, they are merely advisory; where risk-assessment
12 instruments come into play, it is entirely up to the parole boards to decide whether they should
13 be heeded or disregarded.[68]

14 Decision standards have little integrity without a meaningful review process. This is
15 lacking in virtually all American parole systems.[69] In some systems, administrative review is
16 technically available, but it almost never operates as a real check on the board's discretion.
17 Reversals of decisions rarely occur.[70] Oversight of any kind is hindered by the fact that many
18 states do not require a transcript or verbatim record of parole proceedings,[71] and by the
19 general absence of requirements of reasoned explanations for decisions.[72] Some jurisdictions

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[63] Vt. Stat. § 507(b).

[64] See Ga. Code § 42-9-53; Ky. Rev. Stat. § 439.510; S.D. Codified Laws § 24-15-1.

[65] See Ind. Code § 11-13-3-3(i)(2); Md. Code, Art. 41, § 4-505.

[66] See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-23, 6-32 to 6-33.

[67] See Jennings v. Parole Bd. of Virginia, 61 F. Supp. 2d 462 (E.D. Va. 1999); Ingrassia v. Prukett, 985 F.2d 987 (8th Cir. 1993); Counts v. Commonwealth, Pennsylvania Bd. of Probation and Parole, 487 A.2d 450 (Pa. Commw. 1985).

[68] Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011). Parole guidelines are demonstrably weaker instruments than presumptive sentencing guidelines, such as those envisioned in the revised Code. But they also lack the indirect enforcement mechanisms of advisory sentencing-guidelines systems. No sentencing commission collects and reports upon release decisions to monitor compliance rates and the reasons given for noncompliant decisions, and no appellate court polices questions such as whether the parole guidelines were duly considered by boards, or whether there were errors in the guidelines' application or in the calculation of an offender's recidivism risk.

[69] See, e.g., Utah Code § 77-27-5(3); Vt. Stat. § 454.

[70] See Tenn. Code § 40-28-105(11); Davis, *Discretionary Justice*, at 130.

[71] See Cohen, *The Law of Probation and Parole, Second Edition*, vol. 1, at 6-52.

[72] See Glover v. Michigan Parole Board, 596 N.W.2d 598 (Mich. 1999); Freeman v. State, Comm'n of Pardons and Paroles, 809 P.2d 1171 (Idaho App. 1991).

1 do require that reasons be given, but are not rigorous about the content of the explanations.
2 Boilerplate, or a slight improvement on boilerplate, is often good enough.[73]

3 Shoddy process might, to some extent, be offset by well-qualified decisionmakers. A
4 highly professionalized model might insist that board members have expertise in corrections,
5 criminology, and prediction science.[74] Falling far short of this standard, formal requirements
6 for appointment to state parole boards are often minimal or nonexistent.[75] Even in the
7 minority of states that mandate a background in criminal justice, the prerequisites do not
8 address the core function of behavioral science or risk prediction.[76] For instance, in
9 Wisconsin, it is vaguely specified that: "Members shall have knowledge of or experience in
10 corrections or criminal justice."[77]

11 Instead of experience or training, political connections are often the main prerequisite
12 for appointment to a parole agency.[78] Public recruitment of board members is virtually
13 unknown in the United States; by and large, positions are doled out in a closed process
14 controlled by the governor.[79] There is little pretense otherwise. A member of the Arkansas
15 parole board recently told the press, "We are not talking rocket science here. The board jobs
16 are known to some degree [to be] political patronage, and they're not the most difficult jobs
17 for the pay [$70,000 per year]."[80]

18 Fair process also requires a neutral decisionmaker—and one component of neutrality
19 is the freedom to decide cases on the merits, without fear for one's job. Service on a parole
20 board is usually a full-time commitment, and so the primary source of members' livelihoods.
21 In nearly all states, the sole appointing authority is the governor,[81] which includes

[73] See Walker v. N.Y. State Div. of Parole, 610 N.Y.S.2d 397 (N.Y. App. Div. 1994); Goins v. Klincar, 588 N.E.2d 420 (Ill. App. 1992); N.M. Stat. § 31-21-25(C).

[74] See Model Penal Code, Complete Statutory Text § 402.1 (1985).

[75] See Rev. Stat. N.H. § 651-A:3; Fla. Stat. § 947.02(2); Miss. Code § 47-7-5(2); Neb. Stat. § 83-189; Texas Government Code §§ 508.032(b) & 508.033; Mich. Laws § 791.231a(2); Utah Code § 77-27-29(1); Rev. Stat. Neb. § 83-189; N.M. Stat. § 31-21-24 (D).

[76] See Colo. Rev. Stat. § 17-2-201(1)(a); Md. § 7-202(a)(3); N.D. Code § 19-59-0; Vt. Stat. § 451(a).

[77] Wis. Stat. § 15.145(1)(a). Nor do under-qualified appointees receive adequate training once they assume their posts. Mario A. Paparozzi and Joel M. Caplan, A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism, 89 The Prison Journal 401, 416, 418 (2009).

[78] See Rothman, *Conscience and Convenience*, at 162.

[79] Paparozzi and Caplan, *A Profile of Paroling Authorities in America*, 89 The Prison Journal at 411, 418.

[80] Dumond Case Revisited: A Reminder of Huckabee's Role in His Freedom, Arkansas Times, September 1, 2005.

[81] Susan C. Kinnevy and Joel M. Caplan, Findings from the APAI International Survey of Releasing Authorities (Center for Research on Youth and Social Policy, 2008), at 6-7.

1 reappointments at the expiration of members' terms. Also, in many states, members can be
2 removed from parole boards relatively easily, often at the discretion or instigation of the
3 governor.[82] One board member expressed the "most obvious" reality of the situation: "If the
4 governor likes you, you might get to keep your job."[83] Political pressure on a board to adopt
5 new practices is remarkably successful. It is commonplace across the United States for parole-
6 release policy to change abruptly and radically in response to a single high-profile crime in
7 the jurisdiction.[84]

8 The glaring weaknesses in American parole-release procedures stem, historically,
9 from a view of the benignity of government. The American Progressives who promoted
10 indeterminate sentencing reforms saw the state as a force with considerable resources that
11 could be turned to good purposes, and did not reflexively distrust state officials ceded with
12 fee-ranging discretion.[85] The shortfalls of the parole-release process have remained a blind
13 spot for lawmakers, courts charged with constitutional review, and many academics. The
14 stubborn belief that indeterminacy is at root a compassionate system still insulates it from
15 scrutiny.

16 *Does the Abolition of Parole-Release Discretion Contribute to Ungoverned Prison*
17 *Expansion?*

18 Unless the preceding discussion has taken a serious wrong turn, neither proportionality
19 concerns, nor any of the traditional utilitarian theories of sentencing, offer justification for a
20 sentencing system that places a large reservoir of discretion in a parole-release agency.
21 Likewise, legal-process values do not augur in favor of a powerful parole board.

22 The argument cannot end here, however, for it is possible to favor the existence of
23 discretionary release on other grounds. There is a romantic view of parole release that, despite
24 its defects, it can at least be relied upon to work in the direction of lenity for many individual

[82] See Miss. Code § 47-7-5(1); Fla. Stat. § 947.03(3); Utah Code § 77-27-2(2)(c).

[83] *Dumond Case Revisited*, supra.

[84] See Martin Finucane, In Wake of Officer's Slaying, Mass. Gov. Shakes up Parole Board, Boston Globe, January 13, 2011; Jeffrey A. Meyer and Linda Ross, Abolish Parole, New York Times, October 28, 2007; Martin Fish, Killing Led to Tougher Parole System: Ten Years After 'Mudman,' Pennsylvania Convicts Still Serve Some of the Longest Terms, Philadelphia Inquirer, June 6, 2005.

[85] Rothman, *Conscience and Convenience*, at 70. In contrast, the failure of indeterminate sentencing to gain a strong foothold in England and the Continent is explained in part by a fear of giving the government too much unstructured power over individual liberty. As one European scholar has argued, "the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative arbitrament of the prerevolutionary era, as if the storming of the Bastille had been fruitless." Michele Pifferi, Individualization of Punishment and the Rule of Law: Reshaping the Legality in the United States and Europe between the 19th and the 20th Century, (unpublished paper), ms. at 39, available: http://works.bepress.com/michele_pifferi/1/ (last visited Mar. 14, 2011).

1 prisoners, and the reduction of incarceration rates overall.[86] There are many who hold a
2 committed humanitarian view that the United States overincarcerates offenders by a large
3 margin, has done so for a long time, and that the problem has greatly worsened in the last 40
4 years.[87] Thus any device, even if clumsy, will find strong adherents if it is perceived to go
5 hand-in-hand with lenity in prison policy.

6 It is also argued that the abolition of back-end release authority allows pressures
7 toward prison growth to become ungovernable because there is no longer a flexible release
8 valve at the back door of institutions. Thus, we have become accustomed to hear charges that
9 determinate sentencing, where it has been adopted, has been a powerful contributor to late
10 20th-century prison growth.[88] This indictment is sometimes made specific to parole-release

[86] Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, Introduction to Articles 6 and 7 (1985), at 22-23; Douglas A. Berman, The Enduring (And Again Timely) Wisdom of the Original MPC Sentencing Provisions, 61 Florida Law Rev. 709, 724 (2009); Wilbert Rideau and Ron Wikberg, Life Sentences: Rage and Survival Behind Bars (1992), at 136; Leonard Orland, Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 49 (1978). Of course, parole is sometimes *condemned* on the same empirical assumption, when it is characterized as releasing criminals prematurely and sacrificing public safety. See Robert Emmet Long, Editor's Introduction, in Robert Emmet Long, Criminal Sentencing (1995), at 40; Rothman, *Conscience and Convenience*, at 159-161.

[87] See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010); Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse (2007); Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America (2006); Marc Mauer, Race to Incarcerate (rev. ed. 2006); Michael Jacobson, Downsizing Prisons: How to Reduce Crime and End Mass Incarceration (2005); Michael Tonry, Thinking About Crime: Sense and Sensibility in American Penal Culture (2004); David Garland ed., Mass Imprisonment: Social Causes and Consequences (2001); Joel Dyer, The Perpetual Prisoner Machine: How America Profits from Crime (2000); Elliott Currie, Crime and Punishment in America: Why the Solutions to America's Most Stubborn Social Crisis Have Not Worked—and What Will (1998). Even before the spectacular growth in American incarceration rates that occurred from the early 1970s through the early 2000s, distinguished commentators expressed the view that U.S. prison sentences were too numerous and too severe. See Morris, *The Future of Imprisonment*, at 7-8; Frankel, *Criminal Sentences*, at 58-59.

[88] See, e.g., David F. Weisman and Christopher Weiss, The Origins of Mass Incarceration in New York State: The Rockefeller Drug Laws and the Local War on Drugs, in Steven Raphael and Michael A. Stoll eds., Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom (New York: Russell Sage Foundation, 2009), at 76-77; Douglas A. Berman, Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines, 21 Fed. Sent'g Rptr. 182 (2009); Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse (2007), at 51-53; James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (2003), at 56-57; David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2002), at 60-61; Marc Mauer, Race to Incarcerate (1999), at 49, 56-58; David J. Rothman, More of the Same: American Criminal Justice Policies in the 1990s, in Thomas G. Blomberg and Stanley Cohen eds., Punishment and Social Control: Essays in Honor of Sheldon L. Messinger (1993); Franklin E. Zimring and Gordon Hawkins, The Scale of Imprisonment (1991), at 169-171; Edward E. Rhine, William R. Smith, and Ronald W. Jackson, Paroling Authorities: Recent History and Current Practice (1991), at 26; Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 12 (1990), at 342; Alfred Blumstein, Prison Populations: A System Out of

1 abolition, and is sometimes broadened to include sentencing guidelines and other determinate
2 sentencing laws as alleged engines of punitive expansionism.[89] On this view, the quintupling
3 of imprisonment rates that occurred nationwide from 1972 to 2009 would have been
4 ameliorated if all U.S. jurisdictions had retained their former indeterminate sentencing laws.

5 These speculations are invariably voiced without empirical support. They have entered
6 the conventional wisdom because they seem intuitively correct—and because they line up
7 with one conspicuous example of determinate sentencing reform gone awry. Most lawyers,
8 judges, and academics are aware that the federal sentencing system, which abolished parole
9 release in 1987 while instituting felony sentencing guidelines, has worked over the past 20
10 years to balloon the federal imprisonment rate. Per capita confinement in federal prisons grew
11 281 percent from 1987 to 2009—a near quadrupling—and a spectacular amount even when
12 compared with the swift nationwide growth among state prisons of 109 percent over the same
13 period.[90] There are obvious dangers in extrapolating from events in a single jurisdiction,
14 however. Too often, the federal experience is taken as conclusive evidence that all
15 determinate sentencing reforms produce the same results.[91]

16 If we broaden the inquiry from the 12 percent of prison inmates housed for federal
17 crimes to include the 88 percent under state jurisdiction,[92] observations about the effects of
18 parole-release abolition shift dramatically. Indeed, the federal criminal-justice system bears so
19 little resemblance to any state system that has abolished parole or has instituted guidelines for
20 sentencing, that it is the poorest of starting points for generalization.[93] When policymakers

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Control?, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 10 (1988), at 241.

[89] A frequent object of attack is the proliferation of mandatory-minimum penalties nationwide, which are the most extreme examples of determinate sentencing legislation. See Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings, in Michael Tonry ed., Crime & Justice: A Review of Research, vol. 38 (2009). Some mandatory-penalty laws have been directly linked to large upswings in prison growth. See Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001). The revised Code, like the original Code, takes a strong view that mandatory-minimum prison sentences should not be legislated for any offense, see § 6.06(3) and Comment *d* (this draft).

[90] U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009, available at http://www.albany.edu/sourcebook/pdf/t6292009.pdf (last visited Mar. 14, 2011).

[91] The published scholarship of sentencing law and policy exacerbates the problem of knowledge and perception focused too much on one system, by devoting nearly exclusive attention to federal law. See generally A Symposium on Sentencing Reform in the States, 64 U. Colo. L. Rev. 645-847 (1993).

[92] U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), at 19, app. table 4 (at yearend 2009 there were a total of 187,886 inmates in federal prisons and 1,360,835 in state prisons).

[93] See Model Penal Code: Sentencing, Report (2003), at 115-125; Kay A. Knapp and Denis J. Hauptly, State and Federal Sentencing Guidelines: Apples and Oranges, 25 U.C. Davis L. Rev. 679 (1992); American Bar

1 consider the future design of a state's sentencing system, the pertinent knowledge base should
2 be drawn from other states.

3 *Indeterminacy, Determinacy, and the Expansionist Era*

4 Although it is frequently asserted today that determinate sentencing reform has been
5 an instrument of prison growth, there was a widespread belief mere decades ago that
6 *indeterminate* sentencing systems were peculiarly associated with prison expansionism.[94] It is
7 ironic that perceptions have flipped, but the kernel of wisdom here is that such broad-brush
8 statements are almost always oversimplifications. Historically speaking, it is clear that the
9 structural design of a sentencing system does not dictate by itself whether and how quickly
10 the prisons will grow. In the late 19th century and for the first 70 years or so of the 20th
11 century, American sentencing systems were increasingly taken over by indeterminate
12 sentencing reform (they were *all* indeterminate by the 1930s).[95] Across that period the
13 nation's prisons grew slowly but relatively steadily. From 1880 to 1980 the state prisons

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Association, Standards for Criminal Justice, Sentencing, Third Edition (1994), pp. xxv-xxvii; Michael Tonry, Sentencing Matters (1996), chapters 2 and 3.

[94] See Francis A. Allen, The Borderland of Criminal Justice (1964), at 34-35 ("The tendency of proposals for wholly indeterminate sentences . . . is unmistakably in the direction of lengthened periods of imprisonment"); Norval Morris, The Future of Imprisonment (1974), at 48 ("The tendency of parole boards to overpredict danger and to follow the politically safer path of prolonging incarceration . . . would lead one to suspect that parole may well have increased total prison time."); Sheldon L. Messinger and Philip E. Johnson, California's Determinate Sentencing Statute: History and Issues (1977), reprinted in Franklin E. Zimring and Richard S. Frase, The Criminal Justice System (1980), at 954 (reporting criticisms from "groups concerned with civil liberties and prisoners' rights" that California's indeterminate sentencing scheme "resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms"); American Friends Services Committee, Struggle for Justice A Report on Crime and Punishment in America (1971) ("During a period when the treatment ideal was maximized [in California] . . . more than twice as many persons served twice as much time."); Paul W. Tappan, Sentencing Under the Model Penal Code, 23 Law & Contemp. Prob. 528 (1958), at 531-532, 535 ("individuals in these [indeterminate] jurisdictions are subject to the possibility, and often to the fact, of greatly extended imprisonment. Elsewhere, much lower sentences are imposed for similar crimes.") (footnote omitted) (study finds time served 20 percent longer in indeterminate jurisdictions than in systems of "definite" sentences); John C. Coffee, The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice, 73 Mich. L. Rev. 1361, 1364-1365 n.8 (1975) (collecting studies); American Bar Association, Standards for Criminal Justice, Sentencing Alternatives and Procedures, Second Edition (1980), at 18·66 ("In general, the rehabilitative model appears also to have encouraged longer authorized sentences, and it is symptomatic that average sentence lengths have been longest in jurisdictions that have subscribed most thoroughly to the rehabilitative model"); Samuel Walker, Popular Justice: A History of American Criminal Justice (1998), at 120 ("The tendency of the indeterminate sentence to lengthen prison terms became one of the major criticisms of the practice voiced by liberals in the 1960s"); Rothman, *Conscience and Convenience*, at 194-197 (surveying state reports and concluding that "the bulk of the data does justify the conclusion that parole was not a matter of leniency").

[95] See Walker, *Popular Justice*, at 122.

1 enlarged by 832 percent compared to national population growth of 351 percent.[96] There were
2 brief periods of declining incarceration rates, however, most notably around World War II and
3 during the 1960s. Indeed, the performance of America's sentencing systems of the 1960s was
4 quite striking, and may have been etched indelibly in the minds of deincarceration advocates:
5 Prison rates went down in that decade despite skyrocketing crime rates and a boom economy.
6 The nation could have paid easily for more prisoners, but indeterminate sentencing systems
7 were (temporarily) not delivering that result.[97]

8 In studying the track records of indeterminate versus determinate punishment
9 structures, this section will focus on the current era of prison expansionism beginning in 1972
10 through 2009. During this period, state and federal prison counts swelled nearly eight times
11 over from a combined population of 196,092 to 1,548,721, and the national imprisonment rate
12 (corrected for population change) rose fivefold from 94 per 100,000 in 1972 to 504 in 2009.[98]

13 The main goal of the analysis below will be to refute the conventional wisdom that
14 determinate sentencing reforms such as parole-release abolition and sentencing guidelines
15 have fueled the incarceration explosion to any greater degree than "unreformed"
16 indeterminate systems. In the following pages, state-by-state analysis will support the
17 following conclusions:

18

19 • **Although all state prison systems have grown appreciably in the last four**
20 **decades, rates of imprisonment and prison growth vary widely**
21 **across jurisdictions.**

22 • **Prison growth has been most explosive in states that have retained**
23 **indeterminate sentencing structures, and the highest incarceration**
24 **rates nationwide are also found in indeterminate jurisdictions.**

25 • **On average, states that have abolished parole-release discretion have had**
26 **less prison growth than states that have retained such discretion.**

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[96] Margaret Warner Cahalan, Historical Corrections Statistics in the United States, 1850-1984 (1986), at 29, table 3-2; U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1988), at 13, table 1; U.S. Department of the Census, Historical Statistics of the United States: Colonial Times to 1970, Bicentennial Edition (1975), part 1, at 8 Series A 6-8; U.S. Bureau of the Census, Monthly Estimates of the United States Population: April 1, 1980 to July 1, 1999, with Short-Term Projections to November 1, 2000 (2001), http://www.census.gov/population/estimates/nation/intfile1-1.txt (last visited Mar. 16, 2011).

[97] The long-term history of U.S. incarceration policy is recounted at greater length in Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003), at 18-22, 77-80.

[98] U.S. Dept. of Justice, Bureau of Justice Statistics, *Historical Statistics*, at 11 table 1; U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2009*, at 19 app. table 4.

1 **• Prison growth has been most restrained in those states that have**
2 **abolished parole-release discretion in conjunction with the**
3 **adoption of sentencing guidelines.**[99]
4

5 Franklin Zimring and Gordon Hawkins, in their classic book, *The Scale of*
6 *Imprisonment*, pointed out that the punishment systems in the 50 states and U.S. federal
7 system were so markedly different from one another that they should be seen as "fifty-one
8 different countries." Working with figures from 1980, the state with the highest imprisonment
9 rate (then North Carolina) had more than 10 times the prison rate of the state with the lowest
10 rate (New Hampshire).[100] By 2009, decades of prison explosion had compressed the ratios a
11 little, but the state at the top of the scale (Louisiana with a prison rate of 881 per 100,000) out-
12 incarcerated the state at the bottom (Maine, 150 per 100,000) by nearly a factor of six.[101]
13 Looked at another way, there are some U.S. jurisdictions today whose incarceration practices
14 are roughly in the same ballpark as the most punitive Western European nations.[102] There are
15 other states, however, that outstrip any known standard of confinement on the planet, even in
16 the Third World.[103] When researchers point out that the United States is the world leader in
17 incarceration, the observation is driven by states like Louisiana and Texas, but the
18 characterization does not fit jurisdictions like Vermont and Minnesota.

19 It is therefore essential to study the prison-growth courses of individual states, and
20 compare the track records of states that have been using different types of sentencing systems.
21 From many different angles, this investigation absolves determinate sentencing reforms of
22 any special responsibility for the U.S. prison explosion.

[99] This is the type of sentencing system proposed by the revised Model Penal Code, see generally Tentative Draft No. 1 (2007); Model Penal Code: Sentencing, Report (2003), at 41-115.

[100] Zimring and Hawkins, *The Scale of Imprisonment*, at 137, 149.

[101] U.S. Dept. of Justice, Bureau of Justice Statistics, *Prisoners in 2009*, at 21, 19, app. table 4.

[102] The highest incarceration rate among Western European nations in 2009 was Luxembourg, with a rate of 155 per 100,000 population, followed closely by England and Wales with a rate of 153. See Roy Walmsley, World Prison Population List, 8th ed. (International Centre for Prison Studies, 2009), at 5 Table 4, available at http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8 (last visited Mar. 14, 2011). These high-end confinement nations line up with low-end imprisonment states in the United States for the same time period (e.g., Maine with a prison rate of 150 per 100,000), although a truer comparison between European and American practices should refer to total confinement rates that incorporate jail as well as prison. While state-by-state total incarceration counts are not annually compiled, the low-end states in 2001 were Maine (222 per 100,000) and Vermont (226). U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001* (2002), at 13 table 16.

[103] In 2009, the U.S. total confinement rate was 756 per 100,000. The nearest competitor worldwide was Russia with a rate of 629 per 100,000. See Walmsley, *World Population List*, at 1. In 2001, 13 U.S. states surpassed the Russian standard in total confinement per capita—some by as much as 40-to-50 percent. U.S. Dept. of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, at 13 table 16.

1 While it is true that determinate sentencing system reforms originated during, or
2 overlapped with, the expansionist period, it is a logical fallacy to equate temporal coincidence
3 with causation.[104] The years of burgeoning incarceration in America have been for the most
4 part years in which indeterminate sentencing remained the structure of choice nationwide.
5 Indeterminate systems were in use in more than 80 percent of all "jurisdiction-years" during
6 the period.[105] It is highly unlikely that determinate reforms could have been a major
7 contributor to any nationwide trend. They were of too recent origin, and are insufficiently
8 widespread, to have massed into a dominant force behind national prison growth.

9 Looking to individual jurisdictions, suspicion quickly shifts to indeterminate systems.
10 Nine of 10 states with the highest standing imprisonment rates at yearend 2009 were
11 indeterminate jurisdictions. The 10th state, Arizona, experienced most of its prison expansion
12 prior to 1994, when it too was an indeterminate state.[106] The five states with the largest per
13 capita prison rates in 2009 included carceral powerhouses Louisiana, Texas, Oklahoma, and
14 Georgia—all indeterminate jurisdictions. The fifth state among the top five, Mississippi, used
15 an indeterminate system from 1972 through 1995, and the state's per capita prison rate more
16 than quintupled during that 23-year period.[107]

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[104] See David Hackett Fischer, Historians' Fallacies: Toward a Logic of Historical Thought (1971), 164-186 (on "fallacies of causation"). Indeed, if there is a causal link, it is more likely that prison growth caused state sentencing reforms than the other way around. The most frequently-discussed motivation for state reforms since the 1980s has been the desire to contain ungoverned prison growth, largely for fiscal reasons. Rachel Barkow and Kathleen M. O'Neill, Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation, 105 Colum. L. Rev. 1973, 1985-1990 (2005); Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Systems, 64 U. Colo. L. Rev. 679 (1993); Leonard Orland and Kevin R. Reitz, Epilogue: A Gathering of State Sentencing Commissions, 64 U. Colo. L. Rev. 837 (1993).

[105] See Kevin R. Reitz, Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven By Other Forces, 84 Tex. L. Rev. 1787, 1795 (2006) (calculating, for all 50 states, the District of Columbia, and the federal system, there were a total of 1664 jurisdiction years during the high-prison-growth period from 1972 to 2004; only 288 of these jurisdiction years, or 17 percent of the total, were jurisdictions with determinate sentencing systems).

[106] Arizona's prison rate grew more than six fold from 1972 through 1994, when it still retained an indeterminate sentencing system. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, table 6.29.2009; U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990 (1991), at 605 table 6.56. Arizona abolished parole-release discretion in 1994. Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry (2003), at 66–67. From 1994 through 2009, the state's prison rate increased by only 26 percent. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, table 6.29.2009.

[107] See U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990, at 605 table 6.56 (providing state-by-state prison rates from 1971 to 1989); U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online (2005), table 6.29.2004 (providing state-by-state prison rates from 1980 to 2004). Mississippi currently has a split system (determinate prison terms for violent offenses only). See JFA Institute, Reforming Mississippi's Prison System (2010), available at http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=56957 (last visited Mar. 14, 2011).

If we ask which states have had the most per capita prison *growth* over time, the track record of indeterminate states is equally un-lenient. From 1980 to 2009, 9 of the "top" 10 prison-growth states were indeterminate jurisdictions.[108] The top 10 prison-growth states were Louisiana, Mississippi, Oklahoma, Texas, Alabama, Connecticut, Missouri, Idaho, California, and Colorado. Of these, only California currently has a determinate sentencing system.

It is revealing to compare changes in prison use over time, categorizing states according to the type of sentencing system they use. It would not be sensible, however, to compare one state with another (or with a nationwide average) in terms of raw growth in prison populations. For instance, the state of Maine has seen its prison populations increase by 1370 inmates since 1976, when Maine became a determinate sentencing state through the abolition of its parole board's prison-release discretion. In the same period from 1976 to 2009, the state of Texas, working with an indeterminate sentencing structure that included parole-release discretion, added 141,469 inmates to its prison populations.[109] A Maine–Texas comparison based on these statistics alone tells us almost nothing useful for evaluating the relative incarceration histories of the two jurisdictions. To make a gross comparison on a common scale, we must correct for the different populations of the two states, and for population change over time.

In an attempt to make such corrections, Figure 1 charts the experience of all states that have abolished the parole board's release authority, using the states' pre-abolition prison rate as a common baseline.[110] For each state, the chart displays the *increment of growth* in the state's imprisonment rate (prison population against general population) from the effective date of parole abolition through 2009. For comparison, the chart also provides the national baseline (total marginal growth in state-prison populations against total U.S. population) for the identical time period—displayed separately for each state. Thus, Figure 1 asks, "How many inmates has each state added since removing parole-release discretion from its sentencing system?" and gives an answer on a per capita basis.

For example, assume that *State A* eliminated the release discretion of its parole board in 1985. If *State A* had a prison rate of 100 per 100,000 in 1985 and a prison rate of 300 per

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[108] U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009.

[109] The changes in absolute prison populations in both states were calculated from U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1988), at 12 table 1, and U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 2009 (2010), at 19 table 4.

[110] The sources for Figures 1, 2, and 3 are: U.S. Dept. of Justice, Bureau of Justice Statistics, Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86 (1988) (for rate calculations before 1980); U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990 (1991), at 605 table 6.56 (for 1981 through 1983); U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009 (for all other years through 2009).

100,000 in 2009, the increment of change in the state's prison rate over that full-time period would be displayed as 200. This state-specific increment of change would also be paired in Figure 1 with the incremental change in the national prison rate among all states over the same period, 1985 to 2009. Thus, the figure makes a series of apples-to-apples comparisons while holding the time frames for comparisons constant.

Figure 1 delivers a surprising message. Of the 14 parole-abolition states, only three (California, Indiana, and Arizona) have experienced growth in prison rates that has outstripped that among all states in the years since abolition took effect. Eleven of the determinate states fall below the national average, and 2 of them (North Carolina and Wisconsin) have experienced net reductions in their imprisonment rates since the discontinuation of parole release.[111]

Figure 1 is at odds with the common wisdom that parole release promotes lenity, but its findings would not shock all observers of the parole process in America. The most sophisticated proponents of discretionary release have long asserted that determinate sentencing structures tend to deliver shorter prison terms than parole-release systems. Indeed, a central argument raised by advocates of parole-release retention is that indeterminacy permits tougher sentences for offenders identified as dangerous by parole boards. Peggy Burke wrote in 1995 that "in every state that has abolished parole, the alternative has resulted in shorter, definite sentences."[112] In their 2005 study of 33 jurisdictions, Ireland and Prause found that time served for most offenses was longer in indeterminate than in determinate systems:

> Determinate sentencing and the accompanying mandatory release mechanism have not delivered the increased punitiveness and public safety promised with the tough-on-crime movement. Instead, the data indicate discretionary release may be more "tough" than mandatory release.[113]

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[111] Florida operated with a determinate system from 1983 to 1997, and experienced 16 percent less prison growth than the national average during that period. Since reinstating an indeterminate system in 1997, Florida's prison rate has grown by an increment of 121 prisoners per 100,000 population, while state prisons as a whole grew by only 37 per 100,000—or more than three times the national increase. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 6.29.2009; U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1990, at 605 table 6.56 (for 1983 rates).

[112] Peggy B. Burke, Abolishing Parole: Why the Emperor Has No Clothes (1995), at 14 (Burke argued that the relatively fixed sentences in determinate systems were undesirable because the system had "no ability to extend sentences to reflect the risk of the offender").

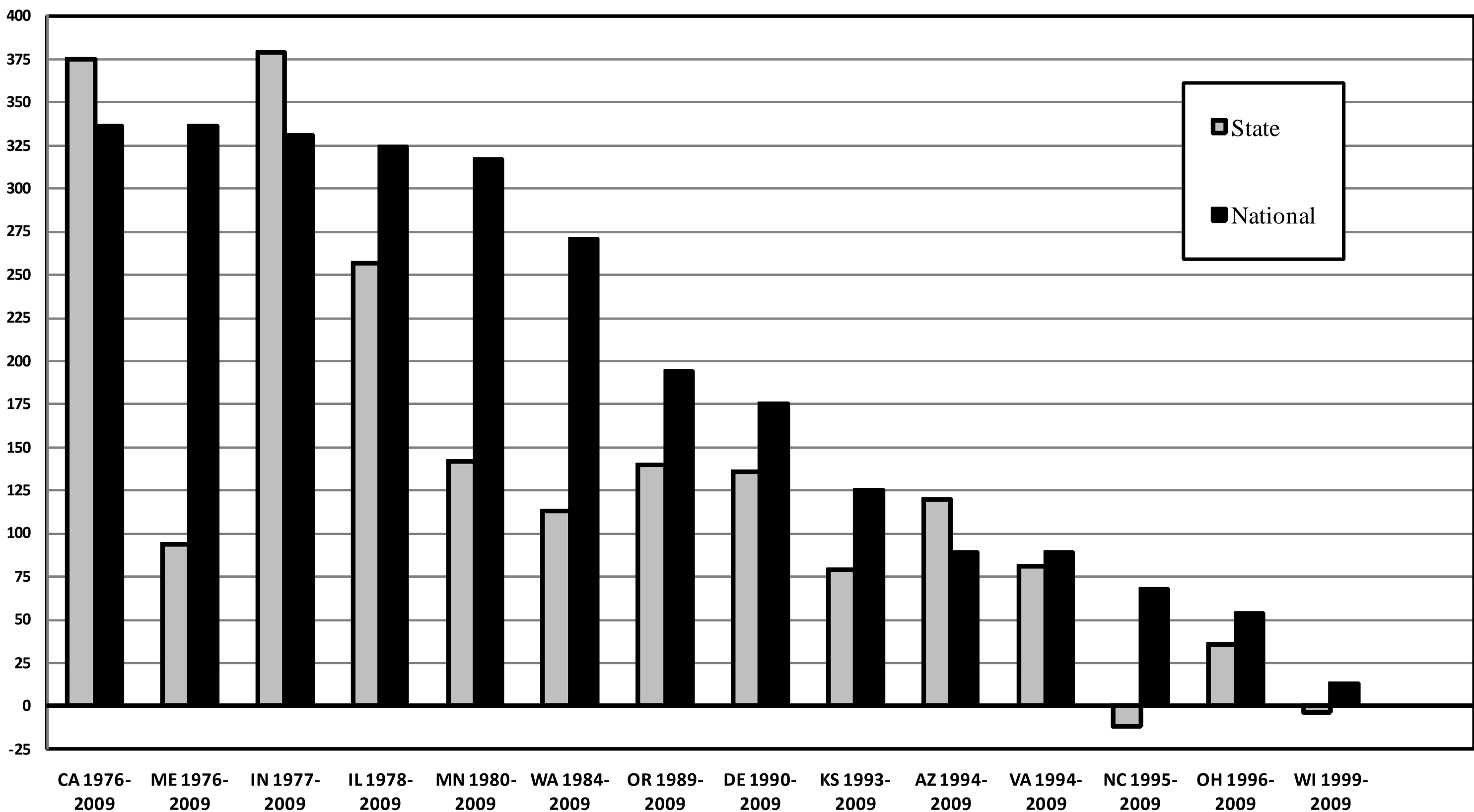
[113] Stivers Ireland and Prause, *Discretionary Parole Release*, at 45. For example, homicide offenders spent on average 8 months less time in prison in determinate states; rape offenders 2 months less; robbery offenders 3 months less; burglary offenders 8 months less; assault offenders 6.5 months less; drug-possession offenders 6 months less, and petty-theft offenders 6.5 months less. For a handful of offenses, it appeared that time served tended to be longer in determinate jurisdictions than in parole-release jurisdictions. For instance,

Parole Abolition and Sentencing Guidelines

Beginning with Minnesota in 1980, a total of nine guidelines states have deliberately reapportioned sentencing authority over prison durations by removing it entirely from parole boards at the back end of the decisional chronology and repositioning it at the front end of the system, where it is now concentrated in the sentencing commission and the courts. If the guidelines are not too restrictive, the judiciary acquires a substantial amount of new authority in such a system, since judicial sentences will now bear close resemblance to the punishments actually experienced by offenders. If sentencing courts comply with guidelines most of the time, either voluntarily or because the guidelines have a degree of legally binding force, the sentencing commission also inherits some of the discretion formerly possessed by a parole-release agency.

drug-sale offenders spent on average 1 month more time in prison in determinate states; weapons offenders 3 months more; and DUI offenders 2 months more. Id. at 41 table 4. Stivers Ireland and Prause argued on policy grounds: "In sum, mandatory release may not only be more 'soft' on crime than discretionary release, it may also prevent paroling authorities from ensuring that the most dangerous offenders are retained in prison." Id. at 45.

Figure 1. Per Capita Prison Growth in States with No Parole Release Discretion From Date of Parole-Release Abolition Through 2009



1 We are here concerned with the impact of sentencing reforms on the course of prison
2 population growth. Figure 2 speaks directly to that issue, using the same methodology as
3 Figure 1. It charts the histories of prison expansion in nine determinate-guidelines states with
4 more than five years of operation, from the date of reform through 2009, and compares those
5 states against national trends over the same time. Florida, the only state to have instituted such
6 a system and abandon it later, is included in Figure 2 for the years in which it operated with
7 the determinate-guidelines structure.[114]

8 The major finding in Figure 2 is that nine out of nine determinate-guidelines states
9 have experienced post-reform prison expansion, corrected for population, below the national
10 benchmarks for equivalent periods.

11 Figure 3 then groups all 50 states into 4 basic sentencing-system types, according to
12 the system in operation in 2009, and shows the average growth in prison rates for each group
13 since 1995. Determinate states have experienced less prison buildup than their indeterminate
14 counterparts, with the least occurring in determinate states with sentencing guidelines.
15 Substituting data back to 1980 yields the same rank ordering.[115]

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[114] Since abandoning the determinate-guidelines structure, Florida has had higher prison growth than the average among other states. See note 111, supra.

[115] From 1980 to 2009, the per capita increment of prison population growth (per 100,000 general population) among indeterminate-guidelines states was 330; for traditional indeterminate states it was 301; for determinate-no-guidelines states it was 281; and for determinate-guidelines states it was 227. One problem with this crude measurement over the longer period is that so many states have changed their sentencing systems since 1980, so net prison growth for many states occurred under two or more different schemes. This difficulty is not nearly so great when going back to 1995. Other studies have addressed the issue of changing systems with more sophisticated methodologies, but their results lend credence to the gross observations reported here. See Don Stemen and Andres F. Rengifo, Policies and Imprisonment: The Impact of Structured Sentencing and Determinate Sentencing on State Incarceration Rates, 1978–2004, 28 Justice Quarterly 174 (2011); Reitz, *Don't Blame Determinacy*, 84 Tex. L. Rev. at 1794-1801.

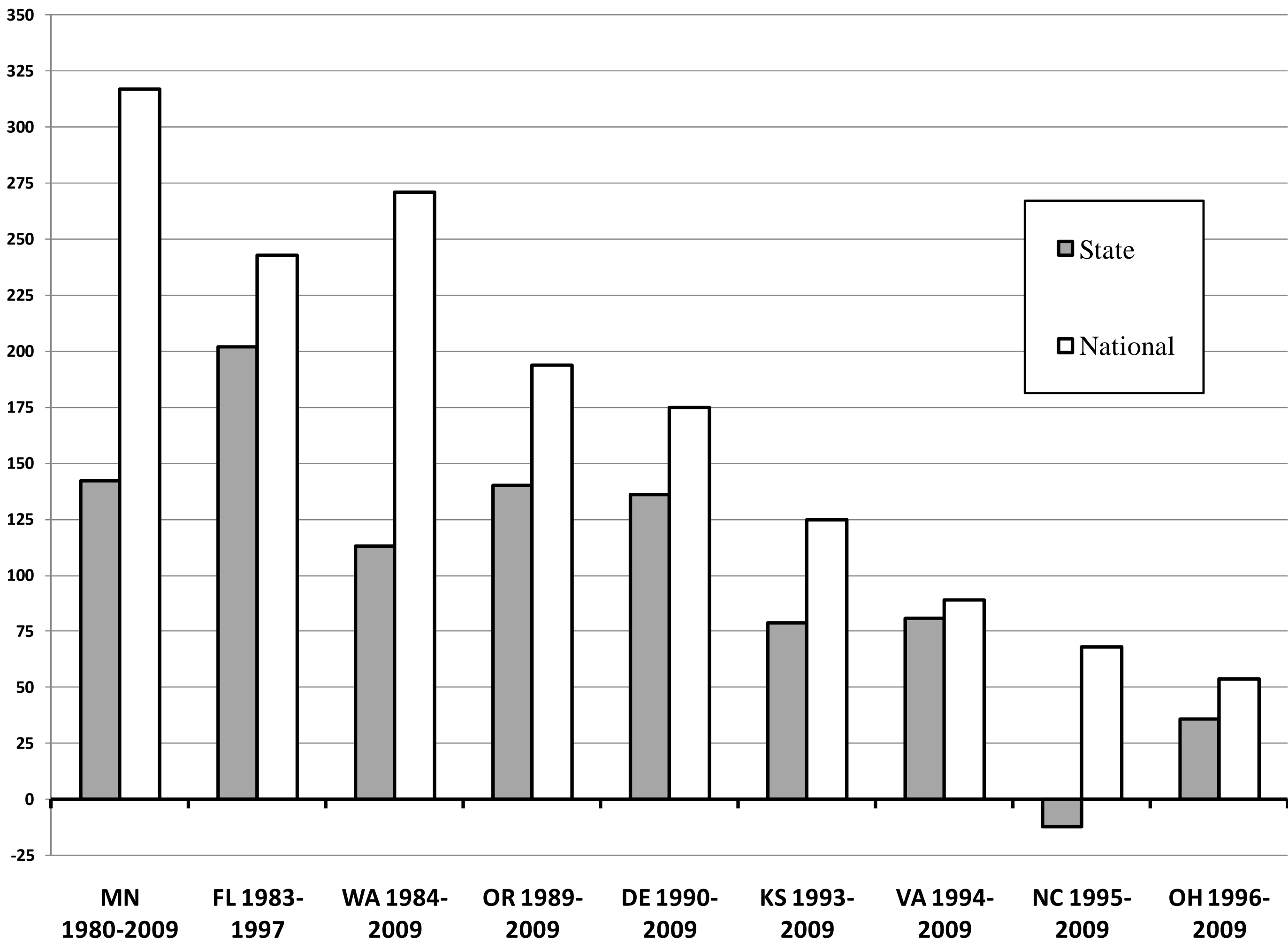
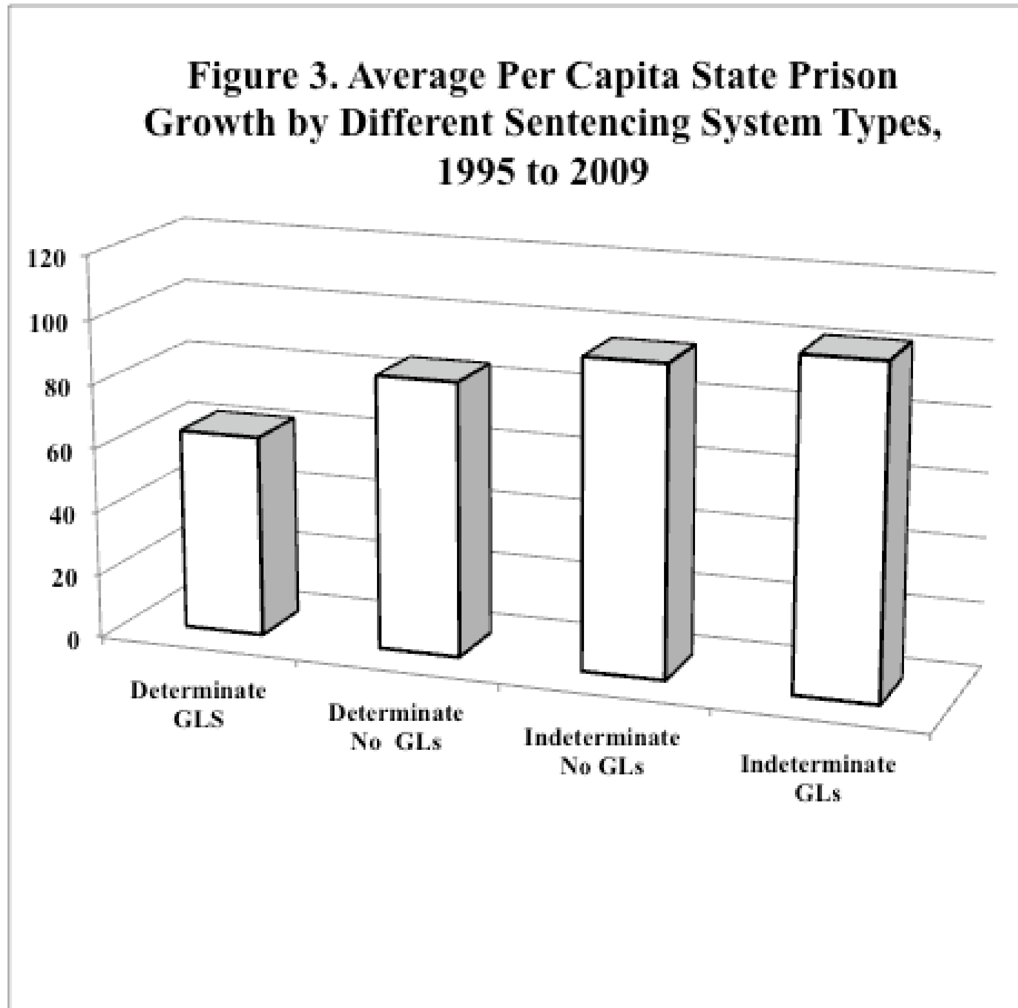


Figure 2. Per Capita Prison Growth in Guidelines States with No Parole Release Discretion From Date of System AdoptionThrough 2009
350
325
300
275
250
225
200
175
150
125
100
75
50
25
0
-25
State
National
MN 1980-2009
FL 1983-1997
WA 1984-2009
OR 1989-2009
DE 1990-2009
KS 1993-2009
VA 1994-2009
NC 1995-2009
OH 1996-2009



Among social scientists, using a variety of statistical methods, there is an emerging consensus that determinate sentencing reforms, presumptive sentencing guidelines, and especially systems that combine the two, have been associated with lower incarceration rates and less prison growth over the past three decades than other sentencing system types.[116] In a 2005 study sponsored by the Vera Institute of Justice, principal investigator Don Stemen and his coauthors concluded:

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[116] Stemen and Rengifo, *Policies and Imprisonment*, at 190-194; William Spelman, Crime, Cash, and Limited Options: Explaining the Prison Boom, 8 Criminology & Public Policy 29 (2009); Kevin G. Smith, The Politics of Punishment: Evaluating Political Explanations of Incarceration Rates, 66 The J. of Politics 925, 933-935 (2004); Sean Nicholson-Crotty, The Impact of Sentencing Guidelines on State-Level Sanctions: An Analysis Over Time, 50 Crime and Delinq. 395 (2004); David F. Greenberg and Valerie West, State Prison Populations and Their Growth, 1971-1991, 39 Criminology 615, 638 (2001); David Jacobs and Jason T. Carmichael, The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates, 80 Social Forces 61, 81 (2001); Thomas B. Marvell and Carlisle E. Moody, Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime, 34 Criminology 107, 120, 122 (1996).

> 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.[117]

Such findings have been heralded by one seasoned researcher as "a refreshing departure from the usual negative results when evaluating criminal justice reforms."[118]

Past experience does not guarantee that parole-release abolition has an inherent tendency to push inmate counts up or down. It appears that either outcome is possible, and many factors other than the state's prison-release mechanism are surely at work. The history of determinate sentencing in America over the last 30 years, however, is wholly *unsupportive* of the claim that parole-release abolition always, or usually, speeds up incarceration growth when compared against systems of parole-release retention. The general drift of things over several decades has been in the other direction.

Both history and data suggest that the abolition of parole-release discretion has been a particularly important component of the success of some sentencing commissions in deliberately managing the use of correctional resources. Why should this be so? Part of the answer is the happenstance of policy preferences in determinate-guidelines states. Most jurisdictions that have created such systems have done so in the hope of slowing or stopping preexisting cycles of incarceration expansion, prison construction, and spiraling correctional expenditures.[119] But there is no necessary connection between the determinate-guidelines machinery and restraint in the use of confinement. If the same states had chosen to use an identical framework to accelerate their use of incarceration, they likely would have succeeded in that goal as well.[120]

Still, it is important to emphasize that determinate-guidelines reforms, in most of the places they have taken root, including a majority of all parole-release abolition states, have not

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[117] Don Stemen et al., Vera Inst. of Just., Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975–2002 (2005), at 143.

[118] Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. of Crim. L. and Criminology 696, 707 (1995).

[119] See Leonard Orland and Kevin R. Reitz, Epilogue: A Gathering of State Sentencing Commissions, 64 U. Colo. L. Rev. 837, 839-840 (1993).

[120] See Michael Tonry, The Success of Judge Frankel's Sentencing Commission, 64 U. Colo. L. Rev. 713 (1993) (arguing that federal and state sentencing commissions have had markedly different policy goals, but they have largely succeeded in achieving those goals). There are only two sentencing-guidelines systems that were created deliberately to work sharp increases in aggregate punishments—the federal system and the guidelines system in Pennsylvania. Both succeeded, although the Pennsylvania commission turned its efforts to managing and rationing prison growth in later years. See Kevin R. Reitz, The Status of Sentencing Guideline Reforms, in Michael Tonry ed., Penal Reform in Overcrowded Times (2001).

been intended to accelerate the growth of incarceration or push up the average length of prison stays. The academic literature often gets this wrong. Indeed, the Reporter knows of no determinate-guidelines reform propelled by such a policy goal except the federal system.

From a deincarceration perspective, this may not be reassuring, since the policymakers who brought in determinate-guidelines reforms with one set of expectations may easily change their minds in later years—or be replaced by other officials who decide to turn the system toward greater severity. In 1976, before any American sentencing-guidelines system had taken effect, Franklin Zimring noted that the character of determinate sentencing systems could be changed in an instant by erasing one set of sentence prescriptions and substituting larger numbers. Zimring thought this was likely to happen, given political pressures on criminal-justice decisionmakers and the acute temptation to make sweeping "get-tough" changes in law.[121] The hypothesized vulnerability of determinate punishment systems to punitive policy shifts is sometimes abbreviated as "Zimring's eraser."[122]

There is no way to refute suspicions about the possible future, but we now have 35 years of experience since Zimring coined the eraser metaphor, and these were decades of unprecedented toughness in crime response. Even during the expansionist period, however, the vast majority of determinate-guidelines systems were not visibly overwhelmed by draconian impulses when compared with other system types.

History is always complicated, so it is important to qualify the above statement. The typical state that has employed a determinate-guidelines structure for any length of time has experienced some years in which state policymakers wanted to turn the system toward greater severity, and other years in which different priorities have prevailed. In Minnesota, for example, in the late 1980s, three high-profile crimes in Minneapolis parking lots caused the legislature to instruct the sentencing commission to ratchet up guideline penalties for serious violent offenses. The changes were dramatic, doubling presumptive sentence ranges in some categories.[123] For some years following the amendments, the rate of growth in the Minnesota prisons outstripped national averages. On the other side of the coin, however, many years under the Minnesota guidelines have been periods of relative restraint in the use of prison resources. The sentencing commission, in Minnesota as in other determinate-guidelines states, provides the legislature with correctional population projections on a periodic basis, and these also accompany proposed

[121] See Zimring, *Consumer's Guide to Sentencing Reform*, at 16-17 (with determinate sentencing legislation, "it takes only an eraser and pencil to make a one-year 'presumptive sentence' into a six-year sentence for the same offense").

[122] See Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 933-934 (1991).

[123] See Richard S. Frase, The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines, 28 Wake Forest L. Rev. 345, 359-360 (1993).

changes in sentencing legislation or guidelines.[124] Legislatures have been known to balk at the high-cost forecasts that can attend new laws, or to soften the laws' terms before they are enacted. Or else they have found ways to offset punishment increases in one part of the criminal code with a lightening of penalties elsewhere.[125] During some years, therefore, the determinate-guidelines systems provide effective tools to retard punitive expansionism that would otherwise occur—and this ends up being significant even if it does not happen every year. Over the long term, the broken cadence of punitiveness in some years, and restraint in others, seems to yield a pattern of slower prison growth than in indeterminate jurisdictions that always, year-in and year-out, lack the systemic controls of the determinate-guidelines system. Despite intermittent stretches of rapid prison growth, Minnesota remains 49th out of all states for its prison rate (and 49th for its combined prison and jail rate).[126]

As a matter of abstract theory, a parole board could be just as effective at managing the use of prison resources as a sentencing commission, but this has not often happened in practice over the past 35 years.[127] Part of the reason, noted by Michael Tonry, is that sentencing commissions are able to address "in-out" decisions as well as sentence durations. Parole boards, in contrast, have no say over who comes into the prisons in the first place, and thus are lacking one critical lever for the management of prison use.[128] An even more important concern may be the susceptibility of parole boards to political influence and a natural institutional drift toward severity in practice. There is no catchy term like "Zimring's eraser" to describe the phenomenon, but most parole boards since the 1980s have become stingier in their release decisions.[129]

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[124] This mechanism has been made a part of the revised Code. See § 6A.07 (Tentative Draft No. 1, 2007).

[125] For detailed state-specific discussions, see Richard S. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 32 (2005), at 131-219; 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), at 39-112; 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 71-136.

[126] See Frase, *Sentencing Guidelines in Minnesota*.

[127] For one plausible account, see Note, A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1840 (2006) (footnotes omitted):

> Since its beginnings, however, parole has had unforeseen repercussions for prisoners. Dating back to the turn of the century, effective prison sentences in states that adopted parole grew longer rather than shorter. Two phenomena help explain this seeming paradox. First, legislatures and judges felt free to impose higher sentences when they knew that those sentences might not be served in full. Second, staying on good behavior during parole is no easy task . . . . The end result is often that the creation of parole leads to the imposition of longer sentences.

[128] Tonry, *Sentencing Matters*, at 27. An important part of the prison-resource control strategy in North Carolina, for example, has been to make slight reductions in the probability of incarceration following a conviction at the low end of the felony scale, while increasing the probability of a prison term for more serious felonies. Presentation of Thomas Warren Ross, Meeting of ALI Advisers, Model Penal Code: Sentencing Project, September 20, 2002 (data on file with author).

Sometimes parole-release practice has changed dramatically in reaction to a single publicized incident, as in Pennsylvania following the police killing committed by parolee Robert "Mud Man" Simon in 1995, or the 2007 Petit family murders in Connecticut.[130] Parole boards have become more risk averse than they used to be, and are aware that they will seldom draw criticism for holding someone in prison too long.[131]

Beyond the parole boards, other government officials in indeterminate systems may face subtle encouragement to act in ways that contribute to prison growth. Legislators may feel little reluctance to enact new laws providing for draconian maximum penalties—thus winning public approval for their "toughness" on crime—on the supposition that the parole board will soften the law's effects by releasing most prisoners far short of the new maximum. Similar thinking could lessen a sentencing judge's qualms over imposition of a high maximum term—also on the theory that the parole board is the real decisionmaker, and will act with appropriate restraint when the time comes. The question of whether the parole board will deliver on its expected part of the bargain will not be answered for many years, when the offenders in question reach their parole-eligibility dates. If release rates drop markedly in the intervening period, if the parole process is subjected to increased scrutiny, if fear of crime rises on the political agenda, if boards come to place greater premium on risk-averse decisions—all of which happened in the United States of the 1980s and 1990s—then the psychological freedom to be severe at the front end will have no genuine offset at the back end. The pleasant illusion of indeterminacy as a pro-lenity program, with more "bark" than "bite," could itself be one cause of swelling prison populations.

In contrast, most parole-release abolition jurisdictions, including all determinate-guidelines states, decided to build in the "early release" probabilities of a discretionary release system when they moved to determinate release. The expected behavior of a parole board was incorporated into the new determinate or guideline sentences when the systems were redesigned. This requires considerable explanation to the public, who have to be made to understand that a two-year prison sentence under the new regime is actually more severe than, say, a five-year sentence under the former law. Provided this hurdle can be surmounted, the release assumptions embedded in the typical guidelines system are harder to erode than are the behaviors of line officials who make discretionary release decisions. In the latter instance, a telephone call from the governor would probably suffice. In a sentencing-commission state, meetings, public notice,

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[129] See James Austin, The Need to Reform Parole Board Decision-Making (2002), at 3.

[130] See Pennsylvania Gov. Ridge Announces Probation and Parole Reforms; New Mission Community Safety, PR Newswire, June 27, 1995; Judge: Inmates are Unfairly Denied Parole, Pennsylvania Law Weekly, October 26, 1998, at 2 (citing statistics that 77 percent of prisoners eligible for parole release were given parole in the early 1990s before the Mud Man case, but this had dropped to 44 percent of eligible prisoners by 1997); Alison Leigh Cowan, Path to Parole Becomes Issue in [Petit] Murder Case, New York Times, July 31, 2007; Christine Stuart, [Connecticut] Gov. Rell Bans Parole for Crimes of Violence, New York Times, Sept. 23, 2007.

[131] These are not new observations. Norval Morris noted the same dynamic many years ago in *The Future of Imprisonment*, at 48.

fiscal-impact projections, and open debate must precede any change of similar consequence—and representatives from all sectors of the criminal-justice system and across the political spectrum will have the opportunity to weigh in. Determinacy, with its concomitant advantages of systemic planning, may not be severity-prone by nature. And Zimring's eraser is perhaps not so worrisome an office supply as may have appeared 35 years ago.

Conclusion

This Study has suggested that, based on the underlying goals of the sentencing system, and values of fair legal process, it is difficult to justify the routine allocation of large authority over prison durations to a parole board. The Study has further shown that common preconceptions that parole release inclines toward lenity in prison sentences, and that parole-release abolition goes hand-in-hand with greater severity, are not supported by actual experience. Prison populations have grown more slowly in parole-release-abolition jurisdictions than elsewhere, and the slowest growth patterns among all American sentencing system types in recent decades have been found in parole-abolition states that have also instituted sentencing guidelines.

The Code's preference for a determinate sentencing structure is not absolute—when good reasons for a different approach exist. The availability of good-time credits for most prisoners is a routine departure from pure determinacy, but is justified by the needs to maintain prison discipline and encourage inmate participation in rehabilitative programming. See § 305.1 (this draft). Provisions for the "compassionate release" of elderly inmates, or physically or mentally infirm prisoners, are commonplace in jurisdictions that otherwise adhere to determinate sentencing principles. The revised Code recognizes the propriety of both of these familiar qualifications to a determinate framework. Indeed, the Code includes a "compassionate release" provision that is broader than any existing provision of the kind. See § 305.7 (this draft). In addition, there was consensus among the Advisers, Members Consultative Group, and Council that extremely long prison sentences (measured in decades rather than years) present unique concerns even if one has concluded that parole-release discretion, as it has existed in the past, does not belong in the criminal-justice system. Societal conceptions of proportionate punishments can change over the course of a generation (or comparable period); and the technologies of utilitarianism—one hopes—are constantly evolving. Very long sentences ought to inspire humility that premises that appear justified in one era may be doubted in the next. For the limited group of prisoners serving extremely long terms, the revised Code allows for reexamination of their sentences under § 305.6 (this draft) after they have spent 15 years in confinement. With these exceptions, however, it is a cornerstone philosophy of the revised Code that sentencing courts should have discretion to individualize penalties in specific cases, and should know to a reasonable approximation what the severity of their chosen sentences will be.

APPENDIX C

Black Letter of Tentative Draft No. 2

<u>§ 6.01. Grading of Felonies and Misdemeanors.</u>

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

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree;

(d) felonies of the fourth degree;

(e) felonies of the fifth degree.

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

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

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

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

(a) misdemeanors; and

(b) petty misdemeanors.

<u>§ 6.06. Sentence of Imprisonment.</u>

(1) A person who has been convicted of a felony may be sentenced by the court, subject to Articles 6B and 7, to a prison term within the following maximum authorized terms:

(a) in the case of a felony of the first degree, the prison term shall not exceed life imprisonment;

(b) in the case of a felony of the second degree, the prison term shall not exceed [20] years;

(c) in the case of a felony of the third degree, the prison term shall not exceed [10] years;

(d) in the case of a felony of the fourth degree, the prison term shall not exceed [five] years;

(e) in the case of a felony of the fifth degree, the prison term shall not exceed [three] years.

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

(2) A person who has been convicted of a misdemeanor or petty misdemeanor may be sentenced by the court, subject to Articles 6B and 7, to a prison term within the following maximum authorized terms:

(a) in the case of misdemeanor, the prison term shall not exceed [one year];

(b) in the case of petty misdemeanor, the prison term shall not exceed [six months].

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

(4) Offenders sentenced to a term of imprisonment shall be released after serving the prison term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 6.06A and 305.1, unless sentence is modified under §§ 305.6 and 305.7.

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

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

The following provisions shall apply to the sentencing of offenders under the age of 18 at the time of commission of their offenses:

(a) When assessing an offender's blameworthiness under § 1.02(2)(a)(i), the offender's age shall be a mitigating factor, to be assigned greater weight for offenders of younger ages.

(b) Priority shall be given to the purposes of offender rehabilitation and reintegration into the law-abiding community among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii), except as provided in subsection (c).

(c) When an offender has been convicted of a serious violent offense, and there is a reliable basis for belief that the offender presents a high risk of serious

violent offending in the future, priority may be given to the goal of incapacitation among the utilitarian purposes of sentencing in § 1.02(2)(a)(ii).

(d) Rather than sentencing the offender as an adult under this Code, the court may impose any disposition that would have been available if the offender had been adjudicated a delinquent for the same conduct in the juvenile court. Alternatively, the court may impose a juvenile-court disposition while reserving power to impose an adult sentence if the offender violates the conditions of the juvenile-court disposition.

(e) The court shall impose a juvenile-court disposition in the following circumstances:

(i) The offender's conviction is for any offense other than [a felony of the first or second degree];

(ii) The case would have been adjudicated in the juvenile court but for the existence of a specific charge, and that charge did not result in conviction;

(iii) There is a reliable basis for belief that the offender presents a low risk of serious violent offending in the future, and the offender has been convicted of an offense other than [murder]; or

(iv) The offender was an accomplice who played a minor role in the criminal conduct of one or more other persons.

(f) The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.

(g) No sentence of imprisonment longer than [25] years may be imposed for any offense or combination of offenses. For offenders under the age of 16 at the time of commission of their offenses, no sentence of imprisonment longer than [20] years may be imposed. For offenders under the age of 14 at the time of commission of their offenses, no sentence of imprisonment longer than [10] years may be imposed.

(h) Offenders shall be eligible for sentence modification under § 305.6 after serving [10] years of imprisonment. The sentencing court may order that eligibility under § 305.6 shall occur at an earlier date, if warranted by the circumstances of an individual case.

(i) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, for the sentencing of offenders under this Section.

(j) No person under the age of 18 shall be housed in any adult correctional facility.

[(k) The sentencing court may apply this Section when sentencing offenders above the age of 17 but under the age of 21 at the time of commission of their offenses, when substantial circumstances establish that this will best effectuate the purposes stated in § 1.02(2)(a). Subsections (d), (e), and (j) shall not apply in such cases.]

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

(1) The sentencing commission shall develop instruments or processes to assess the needs of offenders for rehabilitative treatment, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(2) The commission shall develop actuarial instruments or processes, supported by current and ongoing recidivism research, that will estimate the relative risks that individual offenders pose to public safety through their future criminal conduct. When these instruments or processes prove sufficiently reliable, the commission may incorporate them into the sentencing guidelines.

(3) The commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

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

(1) Prisoners shall receive credits of [15] percent of their full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A. Prisoners' dates of release under this subsection shall be calculated at the beginning of their term of imprisonment.

(2) Prisoners shall receive additional credits of up to [15 percent of their full terms of imprisonment as imposed by the sentencing court] [120 days] for satisfactory participation in vocational, educational, or other rehabilitative programs.

(3) Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.

(4) Credits under this provision may only be revoked upon a finding by a preponderance of the evidence that the prisoner has committed a criminal offense or a serious violation of the rules of the institution, and the amount of credits forfeited shall be proportionate to that conduct.

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

> ***The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language below sets out principles that a legislature should seek to effectuate through enactment of such a provision.***

1. The legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.

2. After first eligibility, a prisoner's right to apply for sentence modification shall recur at intervals not to exceed 10 years.

3. The department of corrections shall ensure that prisoners are notified of their rights under this provision, and have adequate assistance for the preparation of applications, which may be provided by nonlawyers. The judicial panel or other judicial decisionmaker shall have discretion to appoint counsel to represent applicant prisoners who are indigent.

4. Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing in § 1.02(2) would better be served by a modified sentence than the prisoner's completion of the original sentence. The judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face under this standard.

5. The judicial panel or other judicial decisionmaker shall be empowered to modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law.

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

7. An adequate record of proceedings under this provision shall be maintained, and the judicial panel or other judicial decisionmaker shall be required to provide a statement of reasons for its decisions on the record.

8. There shall be a mechanism for review of decisions under this provision, which may be discretionary rather than mandatory.

9. The sentencing commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by the judicial panel or other judicial decisionmaker when considering applications under this provision.

10. The legislature should instruct the sentencing commission to recommend procedures for the retroactive application of this provision to prisoners who were sentenced before its effective date, and should authorize retroactivity procedures in light of the commission's advice.

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

(1) An offender under any sentence of imprisonment shall be eligible for judicial modification of sentence in circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warranting modification of sentence.

(2) The department of corrections shall notify prisoners of their rights under this provision when it becomes aware of a reasonable basis for a prisoner's eligibility, and shall provide prisoners with adequate assistance for the preparation of applications, which may be provided by nonlawyers.

(3) The courts shall create procedures for timely assignment of cases under this provision to an individual trial court, and may adopt procedures for the

screening and dismissal of applications that are unmeritorious on their face under the standard of subsection (7).

(4) The trial courts shall have discretion to determine whether a hearing is required before ruling on an application under this provision.

(5) If the prisoner is indigent, the trial court may appoint counsel to represent the prisoner.

(6) The procedures for hearings under this Section shall include the following minimum requirements:

> **(a) The prosecuting authority that brought the charges of conviction against the prisoner shall be allowed to represent the state's interests at the hearing;**
>
> **(b) Notice of the hearing shall be provided to any crime victim or victim's representative, if they can be located with reasonable efforts;**
>
> **(c) The trial court shall render its decision within a reasonable time of the hearing;**
>
> **(d) The court shall state the reasons for its decision on the record;**
>
> **(e) The prisoner and the government may petition for discretionary review of the trial court's decision in the [Court of Appeals].**

(7) The trial court may modify a sentence if the court finds that the circumstances of the prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons, justify a modified sentence in light of the purposes of sentencing in § 1.02(2).

(8) The court may modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence. The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law.

(9) When a prisoner who suffers from a physical or mental infirmity is ordered released under this provision, the department of corrections as part of the prisoner's reentry plan shall identify sources of medical and mental-health care available to the prisoner after release, and ensure that the prisoner is prepared for the transition to those services.

(10) The Sentencing Commission shall promulgate and periodically amend sentencing guidelines, consistent with Article 6B of the Code, to be used by courts when considering the modification of prison sentences under this provision.