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The American Law Institute

MODEL PENAL CODE:
SENTENCING

Report
(April 11, 2003)

Submitted to the Members of The American Law Institute
for Discussion at the Eightieth Annual Meeting
on May 12, 13, and 14, 2003

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**Model Penal Code: Sentencing
Report**

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Model Penal Code: Sentencing

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Foreword

The Model Penal Code stands at the summit of the ALI's intellectual achievements. Chief Reporter Herbert Wechsler and Co-Reporter Louis B. Schwartz, with the support of a stellar team of Associates, Consultants, and Advisers, took 300 years of American criminal law and distilled a coherent and philosophically justifiable statement of the bounds and details of the criminal sanction.

Work on the Code was largely completed by 1962, although six volumes of updated and greatly expanded Commentaries on Parts I and II were published between 1980 and 1985. Notwithstanding the major changes that occurred in the late 20th century, partly because of the perceived and real growth in crime, the membership itself has not had occasion to consider any aspect of criminal law since it completed its work on the Institute's Model Code of Pre-Arrestment Procedure in the 1970s.

When I became Director in 1999, I asked my Columbia colleague Gerard Lynch to serve as Reporter for a new project on an important aspect of the criminal-law system, sentencing, one that would take into account the contemporary controversy about the length of American criminal sentences and the dissatisfaction with the rules and procedures used to determine them. The sentencing provisions of the original Model Penal Code were probably the Code's least influential portion, and their underlying assumptions have been widely rejected. Meanwhile, the federal sentencing guidelines have had little influence upon sentencing reform at the state level, where experiments far different from, and far more successful than, the federal example have been unfolding over the past 23 years.

Happily, Professor Wechsler blessed the new ALI project on sentencing shortly before his death. (Professor

Schwartz had been invited to serve as an Adviser, but his subsequent illness and death made it impossible for us to draw upon his long experience for this venture.) Happily also (but not for speedy achievement of our work), Jerry Lynch became a United States District Judge, stepping down as Reporter but remaining active as an Adviser. We then had the good fortune to persuade Professor Kevin Reitz of the University of Colorado to become our Reporter. Kevin is a major expert on sentencing and was Co-Reporter with his father, Curtis Reitz, for the Sentencing Chapter of the American Bar Association's Criminal Justice Standards. Kevin Reitz led first meetings with the project's Advisers and Members Consultative Group and with the ALI Council in 2002. The discussions were excellent and helped the Reporter refine his workplan.

This Report is a stimulating introduction to the work we hope to accomplish. It offers an explanation of "limiting retributivism" as the Model Penal Code's governing philosophy and a strong argument in favor of a commission-guidelines structure for making and implementing state sentencing policy. It also discusses resource management in prison systems and racial and ethnic disparities in punishment, and it includes a comparison of the proposed Model Penal Code system with the present federal guidelines system.

I am sure we will have excellent discussion at the Annual Meeting and that this will add momentum to an important and timely ALI effort.

LANCE LIEBMAN
Director
The American Law Institute

March 27, 2003

Model Penal Code: Sentencing Report

Table of Contents

	<i>Page</i>
Foreword	xi
Introduction	1
Partitioning the Code for Revision	6
A “Model” Code, Not a “Uniform” Code	13
Intended Audience	15
Sentencing Structure and the Role of Model Legislation	16
Structure and Purpose in the Original Code	18
Illustration	21
The Need to Reconsider Sentencing Purposes	28
A New Structural Design for the Code	41
The Minnesota Model	50
Illustration	57
The Desirability of a New Structure	63
The rule of law and the visibility of punishment decisions . . .	64
Systemwide policymaking	66
Resource management	72
Uniformity in sentencing	85
Racial and ethnic overrepresentations in punished populations	89
Improved information	106
Guideline structures and “mandatory” penalties	109
Guideline structures and drug sentencing	112
Major Points of Distinction Between Proposed Model Penal Code Sentencing System and the Federal Sentencing System	115
Conclusion	125

Appendices

Appendix A: Sample Black-Letter Proposal, Revised § 1.02(2) . . .129

Appendix B: American Sentencing Guideline Systems in 1999 . . .133

Appendix C: Daniel F. Wilhelm and Nicholas R. Turner,
*Is the Budget Crisis Changing the Way We Look at Sentencing
and Incarceration?*, 15 FED. SENT. RPTR. 41 (2002)137

Model Penal Code: Sentencing

Report

Kevin R. Reitz

Reporter

Introduction

This Report is submitted to acquaint the membership with the gathering shape of a major new project. The following pages give an early overview of the revision of the Model Penal Code's articles governing sentencing, which would be the first emendation of any part of the Code since its adoption in 1962. The discussion draws upon the Plan for Revision (January 29, 2002),¹ but has been expanded and updated in light of deliberations at the 2002 meetings of the Advisers, Members Consultative Group, and Council.²

Among the matters commonly embraced in American criminal codes, it would be difficult to find a subject of greater social importance than the laws concerning the sentencing of offenders. In the last three decades, it would likewise be difficult to identify an area of greater policy flux and legislative experimentation. The most visible signals of a changing punitive environment have included massive ex-

¹ The Plan for Revision may be viewed at <www.ali.org>, and will also be published in volume 6 of the Buffalo Criminal Law Review.

² To date, the Advisers have met twice to consider respectively the Plan for Revision (January 29, 2002) and Preliminary Draft No. 1 (August 28, 2002), in February and September 2002. Preliminary Draft No. 1 contained a number of black-letter proposals, which are now being revised for resubmission later in the year. The Members Consultative Group met to discuss both documents in September 2002. For informational purposes, both were presented to the Council at its October 2002 meeting. No black-letter proposals are expected to be brought to the membership for approval before 2004.

pansions of the nation's prison, jail, probation, and parole populations, increased severity in the sanctioning of some juvenile offenders, and the resurgence of the death penalty.³ Alongside such changes in gross outcomes, beginning in the mid-1970s, new sentencing provisions in diverse permutations have been enacted in many states and in the federal system. The products of such legislation have included "statutory determinate" sentencing systems, new patchworks of mandatory-penalty provisions, and a multiplicity of schemes (each different from the others) instituting sentencing commissions and sentencing guidelines. The trend of legislative experimentation continues to push forward in the early 2000s, into additional jurisdictions, and spawning an increasing heterogeneity of approaches.⁴

The sentencing articles of the Model Penal Code, drafted in the 1950s and early 1960s, have not been influential in the bulk of the sentencing code revisions undertaken since the mid-1970s. Although the Code's recommendations, in

³ See, e.g., U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2001 (Washington, DC: 2002), p. 1 (prison and jail inmate populations included 1,965,495 persons in June 2000). This was more than a fivefold increase over combined prison and jail populations in 1970 of 357,292. Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850-1984* (Washington, D.C.: BJS, 1986), pp. 32 table 3-4, 76 table 4-1. The growth in community corrections has been comparable to that in confinement. From 1976 to 2001, the numbers of probationers and parolees across the country ballooned from 1.5 to 4.7 million. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2001 (Washington, DC: 2002), p. 1; Cahalan, *Historical Corrections Statistics*, p. 180 table 7-8A.

⁴ Legislative interest in sentencing-reform proposals in the last year or two has been elevated by severe budgetary shortfalls nationwide. For a useful summary of unfolding developments in the states, including some increased movement toward commission-guideline

their day, were a vast improvement over preexisting American law, the sentencing articles were built upon assumptions that have since fallen into uncertainty or disfavor. These included beliefs that the overarching purpose of criminal punishment should be rehabilitation, and that judges and (especially) parole boards should be given far-ranging and unreviewable discretion to individualize sanctions to the specific needs of each offender. This basic approach, known as “indeterminate sentencing,” was the invention of Progressive reformers at the close of the 19th century.⁵ The Code was hardly revolutionary in working upon such foundations, which had achieved near-consensus status as at least the *stated* objectives of U.S. sentencing structures in the middle third of the 20th century.⁶

Regardless of its intellectual stature circa 1962, the existing Model Penal Code has carried limited relevance to the structural, substantive, and procedural issues that make up the contemporary debate of punishment law and policy. Forty years of upheaval have so changed American sen-

reforms as outlined in this report, see Daniel F. Wilhelm and Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT. RPTR. 41 (2002) [A copy of this article is reprinted with permission as Appendix C to this Report].

⁵ See generally DAVID J. ROTHMAN, JR., *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (Boston: Little, Brown and Company 1980).

⁶ Historians of indeterminate sentencing, as well as contemporary observers, have charged that the expressed ideal of rehabilitative treatment was seldom pursued with sustained commitment or adequate resources in U.S. justice systems. See ROTHMAN, *CONSCIENCE AND CONVENIENCE*, chapters 2 through 5; Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, in FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* (Chicago: Chicago University Press 1964).

tencing practices as to make them unrecognizable to the policymaker of 1962. Few in the 1960s could have foreseen the weakening of rehabilitation as the general justificatory aim of punishment, the invention in the 1970s of sentencing commissions and guidelines, the abolition of parole-release authority in 16 jurisdictions, the new ethos of experimentation with “intermediate punishments” that would gather momentum in the 1980s, or the unprecedented growth in incarcerated populations through the 1970s, 1980s, and 1990s.

The design of a new sentencing system for the 21st century is a complex undertaking, and will occupy many years of study and intensive drafting effort. This document cannot presage all of the work still to come, but will focus on the large building blocks of the project as they have been debated among the Advisers, Members Consultative Group, and Council. These include new underpinnings of punishment theory and new institutional arrangements of sentencing authority. The most prominent features will include:

- A new vision of sentencing purposes, borrowing from Norval Morris’s theory of limiting retributivism, that organizes retributive and utilitarian goals and makes them applicable to decisionmakers throughout the sentencing system.
- The recommendation that every state should charter a permanent sentencing commission with authority to promulgate sentencing guidelines, using the better state commission-guideline systems as salutary models and avoiding the defects of the current federal sentencing system.
- Provisions to safeguard judicial discretion to individualize penalties within the structured context of guidelines, and to place the locus of sentencing authority in

the judiciary to a greater extent than the original Code.

- The introduction of balanced appellate sentence review that is deferential to trial-court discretion, but is sufficiently intense to ensure that sentencing guidelines are used as a starting point for principled decisions in individual cases.
- The reinvention of prison-release discretion, perhaps including the elimination of the prison-release authority of parole boards (but not reducing their responsibilities of postrelease supervision), and perhaps including new measures to regulate prison-release decisions.

It is not too early to stress that the sentencing structure contemplated for a new Model Penal Code will be dramatically different from the present federal regime. Some members may hold strong negative opinions of sentencing commissions and guidelines premised on their knowledge of the federal system. For such readers, it is essential to state at the outset that the proposals assembled here owe almost nothing to federal law, but are inspired by the more numerous and more successful commission-guideline structures at the state level. The Advisers, Members Consultative Group, and Council have overwhelmingly endorsed the view that the revised Code should not emulate the federal sentencing structure. (For ease of reference, a separate section at the end of this document highlights some of the major points of distinction between the Model Code proposals and current federal law.)

The following pages will speak to the scope of the intended revision of the Code's sentencing provisions. This will require an immersion into some of the particulars of the original Code's sentencing provisions, and a preliminary

portrait of an alternative structure for a revised Code. The final third of the report will speak to the demonstrated policy advantages of the proposed structure, based on two decades of experience in state commission-guideline jurisdictions. Care will be taken throughout to differentiate the federal approach, and to carve out mechanisms so that the revised Code may avoid the worst missteps of the federal system.

Partitioning the Code for Revision

The original Model Penal Code can be seen as breaking into two halves, one dealing with questions of liability (including general standards of culpability and the definitions of specific offenses) and the other with punishment (including sentencing dispositions and the administration of corrections).⁷ The two subjects, thus loosely classified, are segregated nearly entirely in the Code's organization. The Code's sentencing provisions are clustered in Part I, Articles 6 and 7, while the corrections articles occupy all of Parts III and IV at the end of the Code.⁸ With the exception of sev-

⁷ These are crude categorizations that ignore many interrelationships between crime definitions and punishment consequences. There is evidence, however, that the distinction between guilt determinations and decisions about penalty consequences was clearly drawn in the minds of the Code's original drafters. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFFALO CRIM. L. REV. 297, 309-311 (1998) (also raising questions of whether the special parts of criminal codes should remain aloof from the issue of penalty consequences as in the Code, particularly in an era of increasingly determinate sentencing).

⁸ Altogether, and depending on how one counts in doubtful cases, 140 of the Code's existing black-letter provisions deal primarily with liability, while 115 deal with punishment.

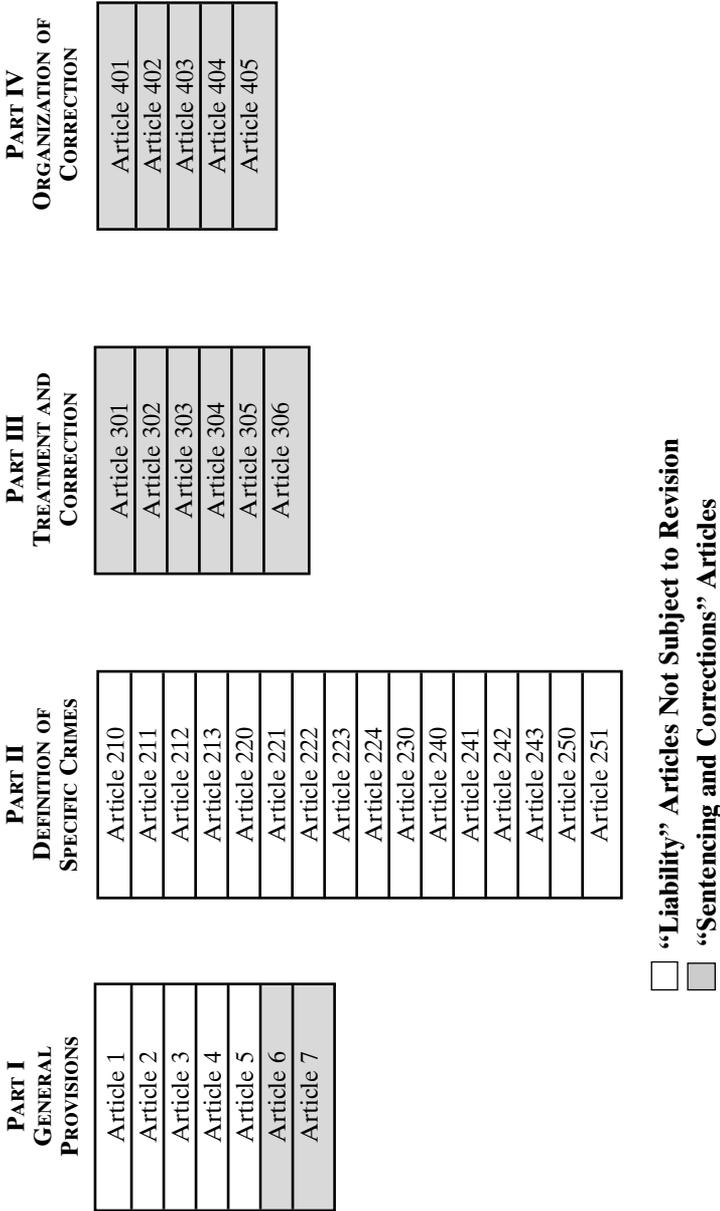
eral “stray” provisions, a sentencing revision may therefore be concentrated within two locations of the original table of contents.⁹ Figure 1 indicates graphically the areas of concentration.

The separation of liability and punishment materials in the original Code suggests that a sentencing-only revision may be accomplished without inflicting undue confusion upon future users of an updated edition. It should be fairly easy for readers to collate areas of new drafting with areas left untouched. Just as importantly, it will be possible to rework the sentencing and corrections articles without greatly disturbing the “general” and “special” parts of the existing Code, which include the Code’s best known and most influential provisions. Confidence on this score rests on more than conjecture. A number of jurisdictions have accomplished sentencing reform, on a program similar to the one sketched in this document, building upon substantive criminal codes based in whole or in part on the Model Penal Code.¹⁰

⁹ The “stray” provisions include, potentially, § 1.02(2) (legislative purposes of sentencing); § 4.10(2) (transfer of proceedings to juvenile court); and § 210.6 (sentence of death).

¹⁰ See Kay A. Knapp and Denis Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 689 (1992).

Figure 1. Main Areas of a Sentencing Revision of the Model Penal Code



Two significant questions have arisen in early meetings concerning the scope of the revision project. Their resolution need not be immediate, but the membership should be alerted to areas of potential controversy. Advance input would be welcome.

Charging and bargaining discretion. In early discussions of the Advisers, the Members Consultative Group, and the Council, the subjects of prosecutorial charging discretion and the plea-bargaining discretion shared by prosecution and defense were invariably mentioned as matters of high priority affecting the Code revision. The original Code made no attempt to address these important decision points. It is fully appropriate to see charging and bargaining discretion as forms of sentencing discretion, and therefore within the purview of the revision project. On the other hand, it is difficult to find examples of the successful regulation of charging decisions or plea negotiations across U.S. criminal-justice systems today.¹¹ Even more fundamentally, opinions differ concerning the desirability of such regulation.¹²

¹¹ Useful but inconclusive studies include Ronald Wright and Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); Wayne Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOCIETY 349 (1979). Washington State developed charging and bargaining standards in conjunction with the state's sentencing guidelines, but the product was a vague and non-binding set of aspirations. See DAVID BOERNER, *SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981* (Seattle: Butterworth, 1985), appendix 6.

¹² See Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO STATE L.J. 1325 (1993).

Initiatives into these areas would move the Model Penal Code into new territory, and there will be scant opportunity to propound recommendations with the degree of confidence usually associated with model legislation. Still, the problem of prosecutorial authority may be sufficiently important, and sufficiently neglected in American law, to prompt the Institute to contemplate groundbreaking action (perhaps including original research into the effects of charging and bargaining discretion across different sentencing structures¹³). Those who favor such a course, however, must be ready with specific and workable suggestions.

Death-penalty provisions. Some advisers have urged that the current revision project should or must reexamine the Model Code's original death-penalty provision in § 210.6.¹⁴ Clearly, the nation's ongoing struggle with capital punishment has only intensified since 1962. In the 1940s,

¹³ The original Model Penal Code project included commissioned research on subjects including the death penalty and young-adult sentencing and treatment. See Model Penal Code, Tentative Draft No. 3 (1955) and Tentative Draft No. 9 (1959).

¹⁴ Professor Franklin E. Zimring, an Adviser and author of *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (New York: Oxford University Press, 2003), has offered the following statement:

There are many reasons why American capital punishment is a compulsory stop on the American Law Institute tour of the sentencing landscape. The death penalty is the most controversial and most visible issue of criminal punishment in the United States. The ALI's previous death penalty standards have been all but constitutionally mandated and are more prominently a part of current sentencing practice than any other aspect of the Model Penal Code. But the world has changed since these standards came into existence. In

1950s, 1960s, and early 1970s, the number of executions nationwide was in steady decline — a trend that reversed dramatically beginning in the late 1970s.¹⁵ New evidence of racial inequities in death-penalty administration emerged in the 1980s (based on the race of the victim),¹⁶ and the increasing availability of DNA analysis of physical evidence in the 1990s and 2000s helped uncover a disquieting number of wrongful convictions among inmates on America’s death rows.

1962, the death penalty was part of the penal code of every nation in the Commonwealth except New Zealand, and all the major Western European nations except Germany and Italy. By 2002, the death penalty has been long forbidden in Western Europe, abolished in all 12 nations in Central Europe and suspended in Russia. Well over half the world’s governments ban capital punishment and only the United States and Japan among the fully developed nations have any claim to execution as an act of government. In the United States, every major Supreme Court decision (McGautha, Furman, Gregg, *ad infinitum*) comes after the ALI standards. As does the experience of a quarter-century of the new American death penalty. There is no way to reopen any significant aspect of the Institute’s sentencing portfolio and exclude the death penalty.

Franklin Zimring correspondence, July 2002.

¹⁵ The turnaround in the 1970s took place against the backdrop of major U.S. Supreme Court decisions in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). In between these two decisions, nearly three dozen states rewrote their death-penalty provisions, many borrowing heavily from Model Penal Code § 210.6. See Model Penal Code and Commentaries, Part II, § 210.6 and Comment, pp. 167-171 (concluding that Model Penal Code § 210.6 has become “the constitutional model for capital sentencing statutes”).

¹⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); Jon Sorenson, Donald H. Wallace, and Rocky L. Pilgrim, *Empirical Studies on Race and Death Penalty Sentencing: A Decade After the GAO Report*, 37

There can be no doubt of the moral and political importance of the death penalty as an issue of domestic criminal justice and international relations. The primary question for the Institute, however, is whether it is capable of adding to the debate in a credible, constructive, and effective way. In earlier materials, the Reporter has taken the position that the death-penalty provision should not be revisited, in part because a strong abolitionist statement by the Institute would be perceived as a political act rather than an expression of special competence or legal expertise,¹⁷ and in part because a foray into the explosive area of capital punishment would subtract from the influence of the remainder of the Code revision. The issue is far from closed, however.¹⁸ Wisdom and advice from the membership is solicited.

CRIM. L. BULL. (2001), pp. 395-408 (meta-analysis of studies of victim-based racial disparities in the use of capital punishment).

¹⁷ See Kevin R. Reitz, *A Proposal for Revision of the Sentencing Articles of the Model Penal Code* (working draft submitted to The American Law Institute, April 16, 2001), pp. 23-24. There is of course no guarantee that the Institute would arrive at an abolitionist position (which would be the Reporter's preference). In the course of drafting the original Code, the Advisory Committee voted 18-2 to recommend elimination of the death penalty, in agreement with the position of all Reporters, but this recommendation was overruled by the Institute's Council and membership. The Institute instead asserted no official position on the death penalty, but propounded § 210.6 as a model for those states retaining the sanction. See Model Penal Code and Commentaries, Part II, § 210.6, p. 111; FRANKLIN E. ZIMRING, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* (Cambridge: Cambridge University Press, 1986), p. 82.

¹⁸ To underscore the point with a personal note, the Reporter discloses that his father, Curtis R. Reitz — also an Adviser — is among the noteworthy persons who urge that the Institute should enter the capital-punishment debate and throw whatever weight it can on the side of abolition.

A “Model” Code, Not a “Uniform” Code

The Model Penal Code, in its original incarnation, was never intended to serve as uniform legislation. Its authors recognized that conditions, needs, and preferences in criminal justice varied widely across the nation, and that criminal law had historically been the province of state governments. They also knew that uncertainties in the behavioral sciences relevant to penology precluded a single template for utilitarian responses to crime. Chief Reporter Herbert Wechsler, writing in 1961, explained the attitude of the original drafters as follows:

Familiar though the point must be, it bears repeating that this enterprise has differed in its object from most of those previously undertaken by the Institute. Unlike the Restatements, we are not attempting to articulate prevailing law, although the actual has normative significance for all of us, as we repeatedly have found. Unlike the Commercial Code, promoting uniformity of law throughout the country has not appeared to us to be a major value; differences in social situation or point of view among the states are bound to be reflected in their penal laws. Unlike the Tax Code, we have not been focusing upon the law of any single jurisdiction; nor have we dared to hope the draft will be enacted as a whole. . . .

I can perhaps describe our purpose best by saying that we aim to build the source materials required for the reexamination and revision of our penal codes that is so badly needed throughout the country. Such efforts typically must be made — if they are made at all — by committees

armed with totally inadequate appropriations, working under pressure as to time. We hope that our formulations will advance the starting point of projects of this kind, whether they are limited as many are to discrete problems we have dealt with or extend to the entire penal field.

Having assumed the discipline of drafting, we are not without ambition that our models will seem worthy of adoption or at least of adaptation. The work consists, however, not alone of the suggested statutory text but also of extensive comments canvassing existing law and practice, formulating legislative issues, and analyzing possible solutions. Hence, even if our drafting or our view of proper legislative policy should be rejected on a given point, the work may still be useful in informing legislative choice. That is, in any case, the faith that animates the undertaking.¹⁹

¹⁹ Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 466-467 (1961). Paul Tappan, Associate Reporter for the sentencing and treatment articles of the original Code, expressed a similarly measured view of the Code's role within a field of disagreement:

In light of the diversity of law and practice that has been noted and the disparity of views that have been expressed, the complexity of the issues that are involved in sentencing and parole should readily be appreciated. While there is widespread dissatisfaction with prevailing legislation and administration, there is little inclination among authorities either to agree on solutions or to look favorably upon innovations. The Code proposals will be controversial, therefore, but it is hoped that they may play some significant role in

A similar faith, laced with realism, should undergird the present revision effort.

Intended Audience

A Code revision should be addressed primarily to state legislatures, particularly in those 40 states that have adopted criminal codes based in whole or in part on the original Model Penal Code. A revised Code may also be expected to speak to jurisdictions that subsist with substantive provisions far different from the Model Penal Code, although the fit between the Institute's recommendations and the needs of those criminal-justice systems will be less exact.

In the initial meetings of the Advisers, Members Consultative Group, and Council, a recurring area of discussion was whether, and to what extent, the Model Code revision should seek to catalyze improvements in federal sentencing law. This cannot be the first priority of a revision project addressed to state legislators. In many ways the federal criminal-justice apparatus is fundamentally dissimilar to those in the states. The reach of federal jurisdiction, while expanding, still results in a specialized case mix with minimal emphasis on common-law crimes. This allows for dramatic shifts in federal enforcement priorities not open to state and local officials. Further, the federal criminal code — a notorious example of unreformed substantive law — presents a quagmire of broad, vague, and overlapping offenses.

our common efforts to achieve the multiple ends of correction more effectively.

Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528, 543 (1958).

For all of these reasons, sentencing reform in the federal sentencing system encounters sizeable and idiosyncratic problems not shared elsewhere.²⁰ All this having been said, however, many of the basic policy choices reflected in a revised Model Penal Code could be adapted to the current federal guideline structure, and might amass into a powerful collection of structural recommendations borrowed from the more numerous and successful state guideline systems. The most likely areas of concern are discussed in the final section of this Report.

Sentencing Structure and the Role of Model Legislation

One major contribution of a revised Code will be its specification of an institutional architecture for American sentencing systems, together with suggested legislation to govern the distribution of punishment discretion across multiple decisionmakers. The apportionment of such responsibility was a foundational concern of the original

²⁰ See Lynch, *Towards a Model Penal Code, Second*, at 315-316, 336. Kay Knapp and Denis Hauptly have observed:

The vast majority of states have enacted the Model Penal Code. While this fact presents some problems [for sentencing reform], the Model Code is a tidy and relatively coherent structure. The federal criminal code, on the other hand, is simply the worst in the United States, if not in the world. It is a hodgepodge of inconsistent, archaic, overlapping, poorly drafted, and sometimes downright silly provisions. Imposing any sentencing structure on top of a statutory structure that no one defends is a nearly hopelessly complex task.

Knapp and Hauptly, *Apples and Oranges*, 25 U.C. DAVIS L. REV. at 689 (footnotes omitted).

Code's drafters, and understandably so.²¹ Anterior decisions about structural design provide the framework within which all particularized substantive and process choices can then be addressed.

In assembling the building blocks of a sentencing system, the revised Code must reflect a considered philosophy of those choices that are properly legislative, and those that should be left open to other systemic actors. As explained in more detail below, the Code should leave substantial latitude for administrative and judicial discretion within a basic statutory framework. The primary subject matters for black-letter provisions include institution-building and the allocation of sentencing authority within the statutory grading scheme. They also include policy and process pronouncements of how and to what ends the system should operate, but only when these may be stated with a high measure of confidence. With a legislative mission so defined, a revised Code can accommodate substantial jurisdictional variation and experimentation within its general outlines. Further, a revised Code can and should encourage flexibility and adaptation over time within individual jurisdictions, as conditions change and knowledge about crime and punishment evolves.

The revised Code should also tread lightly when it comes to the specification of many of the detailed provi-

²¹ See Model Penal Code and Commentaries, Part I, Vol. 3, Introduction to Articles 6 and 7: The Model Penal Code's Sentencing System, p. 4. For scholarly discussions of the complexity and importance of sentencing-structure design, see Franklin E. Zimring, *A Consumer's Guide to Sentencing Reform*, 6 HASTINGS CENTER REPORT 13 (1976); Louis B. Schwartz, *Options in Constructing a Sentencing System: Sentencing Guidelines Under Legislative or Judicial Hegemony*, 67 VA. L. REV. 637 (1981); Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. COLO. L. REV. 679 (1993); Kevin R. Reitz, *Modeling Discretion in American Sentencing Systems*, 20 LAW & POLICY 389 (1998).

sions that must be included in any comprehensive package of legislative sentencing reforms. A multitude of decisions must be taken whenever legal institutions are created or their roles newly calibrated. One example may be drawn from early meetings on the project. If the revised Code is to recommend that a sentencing commission be chartered in every state, it becomes necessary for the Code to speak to fine-grained questions such as the commission's membership: How many members should there be, from what branches of government and the criminal-justice system, and how should they be appointed? What length of term should they serve? How should a chair be designated? Questions like these have no single or best answer — and yet every legislature will encounter them, and may find benefit in a suggested template supplied in the Model Code. In such instances, the Code must offer flexible recommendations with the chief aim of alerting legislatures to the full range of issues they can expect to confront.²² To this end, alternative black-letter provisions will sometimes be helpful, or the use of bracketed language, and the official commentary should contain appropriate disclaimers where black-letter language should be understood as an “example” rather than a “model.” The states will then be assisted in a process of informed customization.

Structure and Purpose in the Original Code

The original Model Penal Code's sentencing structure was fashioned upon the indeterminate-sentencing system,

²² See Preliminary Draft No. 1 (August 28, 2002), New Section 6A.01 and Comments at pp. 42-53. The Advisers, Members Consultative Group, and Council were uniformly of the view that the first draft of this new provision should be reworked so as to be more open-ended in its terms, and that the Comment should stress that states are invited to adapt its particulars to their local conditions.

which was the dominant sentencing structure in 1950s America,²³ although the Code also sought to work improvements upon the traditional scheme. Compared with most existing systems at mid-century, the Code recommended that the legislature's authority be expanded through such means as: (1) a statutory articulation of the authorized goals of criminal sentencing; (2) a narrowing of statutory sentencing ranges for graded offenses, with the ranges to be variable in some circumstances based on criteria established by the legislature; and (3) the statutory enunciation of principles for discretionary actors to consider when making individualized decisions within permissible punishment ranges. On the whole, however, these recommended changes did not cede legislatures much power to influence sentences in specific cases. The ranges of authorized penalties, especially for serious crimes, remained very broad under the Code's grading scheme, and the important legislative statements of goals and guiding principles were, almost universally, advisory in impact.

²³ The indeterminate systems of the day varied in many respects from one to another. See Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROBS. 528 (1958) (surveying features of various state systems, including different statutory authorizations concerning trial-court discretion to set minimum and maximum sentences, and sharp jurisdictional variations in the ratios between prison sentences imposed in courtrooms and terms actually served by offenders). Still, the essential institutional arrangements belonging to American indeterminate structures were ubiquitous into the 1970s. These included very broad legislative ranges of permissible punishments for most offenses, unguided and unreviewable trial-court discretion to pronounce sentences within permitted statutory ranges, and appreciable powers (also unguided and unreviewable) vested in parole and corrections officials to determine prison-release dates. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (New York: Hill & Wang, 1973), p. 26 (commenting on similarities across U.S. sentencing schemes in the early 1970s).

The original Code also sought to diminish judicial sentencing discretion, while carrying forward many features of indeterminate-sentencing systems that already worked to limit trial courts' authority to influence the lengths of incarceration terms. Some of the Code's new constraints upon judges' authority were quite significant. (An Illustration will follow in short order.) For prison cases, parole boards and corrections officials were the great beneficiaries of the original Code's plan, measured by their enhanced powers to determine actual punishments. Indeed, the single largest thrust of the Code's structural innovations was to shift sentencing discretion away from trial judges and toward the "back end" of the system for choices going to durations of confinement.

The Code's strong preference for back-end authority grew from widely accepted policy judgments of the 1950s, many of which have become discredited or heavily qualified in the intervening years. For the majority of imprisoned offenders, the Code assumed that rehabilitation should be the chief goal of applied sanctions, that rehabilitation would in fact occur for large numbers of inmates, and that parole and prison officials could organize their efforts to watch over prisoners, sometimes for many years, and sort those who had been reformed from those who had not.²⁴

²⁴The Code relied on the presence of qualified experts and treatment professionals to serve within the correctional system, not only on parole boards themselves, but also on such groups as "Reception Classification Boards," see § 304.1, and "Treatment Classification Committees," see § 304.3. When it came time to speak to the content of effective treatment programs themselves, however, the Code demurred. See Model Penal Code, Tentative Draft No. 12 (1960), p. 49 (The design of a treatment plan for individual inmates was not addressed by the Code; "This is especially a problem for the art and science of correction, to be dealt with in the process of administration, with the flexibility required for progressive change").

In addition to its rehabilitative orientation, however, the Code's justificatory program had a darker flip side. Both in sentencing and corrections provisions, the Code assumed that certain criminals could be identified, with tolerable accuracy, as especially dangerous or resistant to correctional treatment. Such persons were to be observed over long periods of time just like offenders on the road to rehabilitation. If, however, in the judgment of government officials at interspersed decision points (at sentencings, at probation revocation hearings, at parole-release or revocation hearings, and in later civil commitment proceedings), a criminal was viewed as dangerous and unreformed, the original Code contemplated an array of long-term confinement options for purposes of incapacitation.²⁵

Illustration

The operation of the original Code's structure for the distribution of sentencing discretion may be illustrated through a hypothetical case of an ordinary sentence following an offender's conviction of a felony of the second degree. Under the Code's recommended grading assignments, second-degree offenses included nighttime burglary of a dwelling under § 221.1(2), aggravated assault under § 211.1(2)(a), some robberies under § 222.1, and manslaughter under § 210.3. The paragraphs below explore the Code's allocation of punishment authority for a modal case following such a conviction.²⁶

²⁵ For a discussion critical of the original Code's emphasis on incapacitation theory, see Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns*, 19 RUTGERS L.J. 811, 812 (1988).

²⁶ In working through this Illustration, the text will assume that the case falls within the parameters of an "ordinary" case within the terms of § 6.06. The Code provided a number of alternatives for unusual cir-

In one respect, trial courts remained quite powerful under the original Model Penal Code punishment scheme, for second-degree felonies as for most other crimes. The sentencing judge enjoyed near-total discretion to select between custodial and noncustodial sanctions. The original Code took the view that legislatures should not mandate the use of incarceration for any crime, with the possible exception of murder. To this extent, then, judicial discretion over the “in-out” decision was to be unfettered. Section 7.01 (“Criteria for Withholding Sentence of Imprisonment and for Placing Defendants on Probation”) articulated standards and criteria to guide sentencing courts in the selection among sanctions of incarceration, probation with conditions, and the suspended imposition of sentence without conditions — but the terms of § 7.01 were advisory and not made subject to appellate review or other enforcement.

Once a sentencing judge had elected to impose a prison term under the Code, however, the judge could exert only limited influence over the *duration* of confinement. For felonies of the second degree, § 6.06(2) provided a uniform maximum term of 10 years, unalterable by the judge.²⁷ The

cumstances, including the “extended term” provisions of §§ 6.06 and 7.03, and the little-used “reduction of conviction” provision in § 6.12. Such mechanisms will be acknowledged in footnotes, but the Illustration is fashioned as a run-of-the-mill scenario.

²⁷ The Code’s specification of available maximum and minimum terms for second-degree felony offenders in § 6.06 was supplemented by elevated maxima and minima available under the “extended-term” provisions of § 6.07, applicable only to “persistent offenders,” “professional criminals,” “dangerous, mentally abnormal persons,” or “multiple offenders” as defined in § 7.03. The Illustration pursued in text will assume a case in which the prosecutor and the judge have not opted to invoke the extended-term provision.

An alternative version of § 6.06 ceded greater discretion to the sentencing court, allowing the court to fix a maximum term as well as a

sole discretionary decision vested in the court under § 6.06(2) was the selection of a minimum prison term between one and three years. Viewed from this provision alone, the sentencing court was given power to affect at most 24 months of an authorized 120-month prison term, as part of the following breakdown of discretionary powers: The first 12 months were already set by the legislature, the next 24 were potentially fixed by the court, and the remaining 84 were to be governed by the parole board. It should be noted, however, that judges' authority over months 13 to 36 was incomplete and unidirectional. A sentencing court's decision to select a minimum term at the low end of the statutory range had no binding force over later-in-time decisionmakers; it worked merely as a transfer of discretion to them. For example, an offender sentenced to the lowest one-year minimum might nonetheless be held by parole officials for the full statutory maximum term of 10 years. In such a case, discretion over time served might be quantified as follows: Legislature (12 months), sentencing judge (0 additional months), parole board (up to 108 months).

The discussion above illuminates the back-end tilt of discretionary arrangements favored in the original Code, and the surprisingly low quotient of judicial discretion over prison durations. In two important respects, however, the analysis has actually overstated the judicial share of sentencing authority in the Code's framework.

First, the Code ceded power to prison officials to award good-time credits against both the minimum and maximum

minimum term between one and three years. However, Alternative § 6.06 ensured that a large measure of back-end discretion would be preserved by providing, "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."

terms imposed by judges. The Code's normal expectation was that these credits would subtract 20 percent from both the minimum and maximum sentences but, in exceptional cases, prison officials could award credits of up to 40 percent.²⁸ Thus, a pronounced sentence of 36 to 120 months could be modified by correctional officials, at the extreme, to a discounted range of approximately 22 to 72 months. In the more commonplace scenario of good-time credits amounting only to 20 percent, the same sentence would be translated into an operative range of roughly 29 to 96 months. Looking back to the original 120-month ceiling in § 6.06(2), and assuming good-time credits not exceeding 20 percent, a revised discretionary breakdown may be expressed as follows for a three-to-10-year sentence pronounced by a court: Legislature (9.6 months), sentencing court (19.2 months), and parole and corrections officials (91.2 months of combined discretion).²⁹ In percentage terms, the trial court's ability to dictate the length of time served (through discretion not subject to cancellation by later actors) added up, at its fullest extension, to only 16 percent of the total authorized confinement term.

In addition, back-end discretion under the Code was accentuated considerably by provisions governing postre-

²⁸ There were twin rationales for the good-time provisions. First, prisoners who behaved well during their confinement were thought to be signaling their steady progress toward rehabilitation. Second, good-time credits were (and are) seen as an important prison-management tool, providing tangible incentive for inmates to aspire to good behavior.

²⁹ If the judge were instead to impose a one-to-10-year sentence, the breakdown would be: Legislature (9.6 months), sentencing court (0 additional months), and parole and corrections officials (110.4 months).

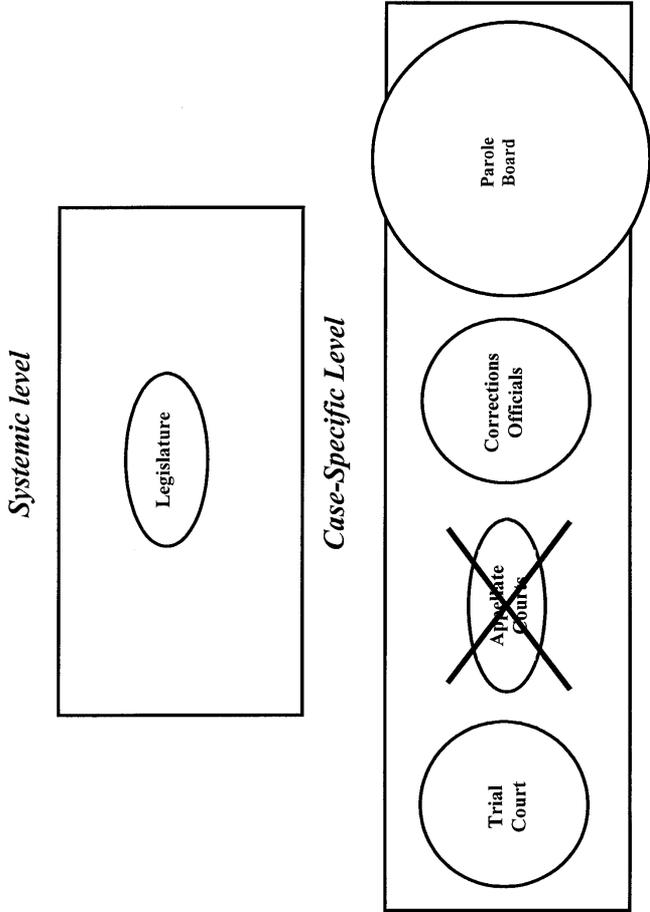
lease supervision. Felonies of the second degree carried a post-incarceration parole term of one to five years, pursuant to § 6.10(2). One innovation in the original Code was to recommend that the period of postrelease supervision always be supplemental to the defendant's original prison sentence, so that the duration of the parole term would be independent of whatever fraction of the maximum prison term an inmate had served before parole release. For offenders who performed especially poorly in the eyes of government decisionmakers, the cumulative impact of the original sentence plus the separate parole term could be substantial. An early revocation of parole could result in reincarceration for as much as five years in the unreviewable discretion of the parole board — even if the offender had already served the maximum 10-year term before release on parole. Therefore, the full potential term of confinement for ordinary second-degree felony offenders, if measured by the combined effects of §§ 6.06 and 6.10, extended to 15 years, not 10 years as indicated by § 6.06 alone, with the final five-year increment wholly under the jurisdiction of the parole board.

Numerous alternative examples could be supplied of the original Code's allocation of authority over punishment outcomes. If all permutations were canvassed, the relative shares of meaningful power held by the legislature, trial courts, prison officials, and parole boards would shift around from case to case. (Under no circumstances would the appellate courts have much to do under the Penal Code structure.) At the felony level, however, the combined discretions of back-end decisionmakers would invariably be seen to eclipse the effective authority of sentencing courts over time served, with the parole board always the single most powerful actor. Figure 2 attempts graphically to summarize these distributions of authority, using visual short-

hand. While trial judges were not wholly powerless in the original Code, the center of gravity for penalty determinations in the most serious cases was positioned much later in the decisional process.

To recapitulate, the relatively modest discretion granted judges to fix the lengths of prison stays reflected the original Code's view that judges possessed little information relevant to offenders' future progress in therapeutic programming. Such treatment was expected to take years to work, at least in many prison cases, and only expert officials with sustained contacts with inmates, over the long haul, were thought to be in a position to determine when the rehabilitative impact of punishment had hit home. Likewise, on-the-scene decisionmakers were viewed as best able to identify incorrigible and dangerous inmates — but again, the individualized data productive of such decisions was expected to accumulate over stretches of time, long after the sentencing judge had moved on to other matters. There was in effect a continuum of punishment outcomes spanning between (1) prisoners thought to be doing well and on the road to reform, and (2) those making no discernible progress, who were considered threats to society. Although the Code's drafters were optimistic that category (1) would predominate, the crucial implementation of the program, including the ultimate judgment to be passed on each inmate, was entrusted to low-visibility actors in the latter stages of the punishment chronology.

**Figure 2. Sentencing Authority under the Model Penal Code:
Time Served in Felony Cases**



The Need to Reconsider Sentencing Purposes

If there is a single explanation for the failure of the original Model Penal Code's punishment provisions to gain and hold influence over American legislatures, it can be found in the Code's offender-based sentencing theory. To the contemporary eye, the most important theoretical shortfalls in the original Code include an insufficiently critical optimism about the effectiveness of rehabilitative and incapacitative sanctions, and the unworkable supposition that retributive considerations should play no important role in policymaking or case-specific dispositions.

Rehabilitation theory has hardly disappeared since 1962 from American sentencing and corrections, nor should it. But it has fallen far from its old position of favor. By the 1970s, an accumulation of research pointed to the conclusion that rehabilitative sanctions seldom effected hoped-for reductions in the future criminal behavior of offenders and, in some instances, supposedly beneficial programs actually appeared to increase recipients' future criminality. The most famous of these works was Robert Martinson's 1974 meta-analysis of hundreds of evaluation studies, entitled "What Works?"³⁰ Martinson's grim findings were popularized in the oversimplified sound-bite that "Nothing Works" — even though his evidence had indicated that positive change was indeed possible for some offenders in a few of the better programs. In later writings, Martinson himself tried to underscore that rehabilitation can work occasionally and in

³⁰ Robert Martinson, *What Works? — Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974). See also DOUGLAS LIPTON, ROBERT MARTINSON, AND JUDITH WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (New York: Praeger Publishers, 1975).

the right circumstances,³¹ but the “Nothing Works” message has survived in public debate and has tended to eclipse a more nuanced perspective. In the meantime, the science of rehabilitation has produced few robust findings to unseat the mid-1970s view that true offender change is only sometimes possible, and is hard to achieve. Research through the 1980s and 1990s has confirmed rather than dispelled Martinson’s claims, although there has been a slow accumulation of knowledge concerning a small number of programs with a demonstrated track record of success, and concerning additional interventions that might be considered “promising” albeit unproven.³²

With the new empirical understanding that, at best, rehabilitation “Occasionally Works,” rehabilitative theory can no longer be accepted uncritically as the primary goal of criminal punishment for most or all offenders, nor should it be the major pillar of the legal structure for sentencing (as it was in the indeterminate systems). In the post-Martinson world, it may be prudent to hold the old model of indeterminate sentencing available for some cases — but only when offenders appear amenable to treatment programs that carry some reasonable prospect for success. As Marvin Frankel has written:

³¹ See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

³² See Gerald G. Gaes, Timothy J. Flanagan, Laurence L. Motiuk, and Lynn Steward, *Adult Correctional Treatment*, in Michael Tonry and Joan Petersilia eds., *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, vol. 26 (Chicago: University of Chicago Press, 1999), pp. 361-426; Doris Layton MacKenzie, *Criminal Justice and Crime Prevention*, in *PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING* (Washington, D.C.: National Institute of Justice, 1997), especially pp. 9-15 through 9-19; Francis T. Cullen, *Rehabilitation and Treatment Programs*, in James Q. Wilson and Joan Petersilia eds., *CRIME* (Oakland: ICS Press, 2002), pp. 253-290.

It is not my claim that rehabilitation is always and everywhere impossible. Nor do I argue that an indeterminate sentence could never be wise and fair. The great evil in current thinking is the pair of false assumptions that (1) rehabilitation is *always* possible and (2) indeterminate sentences are *always* desirable. I urge that the shoe belongs on the other foot. Most importantly, my contention is that the presumption ought always to be in favor of a definite sentence, known and justified on the day of sentencing. . . . There should be a burden of justifying an indeterminate sentence in any particular case — a burden to be satisfied only by concrete reasons and a concrete program for the defendant in that case.³³

Norval Morris, Lawrence Sherman, and others have likewise called for an evidence-based treatment penology, which can make room for an expanding menu of rehabilitative sanctions options provided that good empirical evidence is sought to test the effectiveness of such programs.³⁴ The proviso is crit-

³³ FRANKEL, *CRIMINAL SENTENCES*, p. 98. Frankel further posited that, in order to be meaningful in a specific case, the “rehabilitative ideal” should satisfy three “testable” requirements that:

- (1) the person has some identifiable disorder apart from the mere biographical datum of his offense, (2) the disorder in some verifiable (or theoretically refutable) way is causally related to the offense, and (3) the penologists or judges or somebody in authority knows some way and place for treatment of the disorder.

Id. at 90. At the initial Advisers meeting of September 20, 2002, Pat Wald noted that Frankel’s formula must be softened to permit experimentation with unproven treatment programs, or else a chicken-and-egg problem would foreclose all innovation.

³⁴ See Norval Morris, *Crime, the Media, and Our Public Discourse*, in *PERSPECTIVES ON CRIME AND JUSTICE: 1996-1997 LECTURE SERIES*

ical. No hint of such an assessment ethic can be found in the original Model Penal Code, and the decline of public and professional belief in treatment programs can be attributed in part to the total absence of quality control and accountability attending rehabilitative efforts. Program providers are understandably wary of independent evaluators. It is exquisitely uncomfortable to think that one's well-intended and heartfelt efforts might be useless or counterproductive. In the long run, however, the rigor of experimentation and demonstrable outcomes may well prove the best mechanism for reinvigorating rehabilitation policy, and for providing it with a measure of credibility far beyond its weakened stature today.

The last several decades also have brought advances in knowledge about incapacitation theory as a basis for criminal punishment, and the new learning casts heavy doubt upon the original Code's approach in this arena, as well. The Code's chosen mechanism was *selective* incapacitation, based on the belief that judges and parole officials, primarily through careful observation of offenders (although aided somewhat by the datum of past behavior), could accurately select out those offenders who were especially dangerous to society, and who should therefore be confined for terms much longer than the typical criminal. In this respect, the Code adopted an optimistic view of incapacitation theory resembling the Code's optimistic attitude toward rehabilitation. Little knowledge or research was cited by the Code's drafters in support of their provisions on predictions of

(Washington, D.C.: National Institute of Justice, 1997), pp. 99-121; Lawrence W. Sherman, *Reducing Incarceration Rates: The Promise of Experimental Criminology*, 46 *CRIME AND DELINQUENCY* 299 (2000). See also David P. Farrington and Brandon C. Welsh, special eds., *What Works in Preventing Crime? Systematic Reviews of Experimental and Quasi-Experimental Research*, 578 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 8-173 (2001).

future criminality, such as § 7.03 (criteria for extended terms of imprisonment) or § 305.9 (standards for parole release or continued confinement).³⁵ And once again, the Code failed to insist upon prospective assessment processes to watch over the theory in operation.

Much research on selective incapacitation has been performed since 1962, and the brunt of the findings is that it is difficult to predict future serious criminal behavior with acceptable levels of accuracy. Although considerable enthusiasm followed from the writings of James Q. Wilson, Shlomo and Reuel Shinnar, and Peter Greenwood in the 1970s and 1980s — all offering projections of sizeable crime savings that could be realized through the targeted use of lengthy prison terms — such optimism proved short-lived.³⁶ Later comprehensive assessments, including the reports of

³⁵ See Model Penal Code, Tentative Draft No. 5 (1956), p. 98 (in determining when a prisoner should be released on parole, “the available research . . . is of limited assistance”). The Comment in the Tentative Draft also made it clear that the past history of parole release could supply little ground for confidence in the correctness of such decisions:

Under present parole practice, the release of eligible prisoners is purely discretionary and no formal criteria have been established in the statutes, aside from general principles relating to public safety. . . . The paroling authority may release those who appear clearly to be “good risks” and simply deny the remainder.

Id. at 98.

³⁶ See JAMES Q. WILSON, *THINKING ABOUT CRIME* (New York: Basic Books, 1975), pp. 200-201 (discussing the Shinnars’ work); Peter W. Greenwood and Allan Abrahamse, *Selective Incapacitation: Report Prepared for the National Institute of Justice* (Santa Monica, CA: Rand Corporation, 1982).

two National Academy of Sciences Panels chaired by Alfred Blumstein, concluded that weak existing knowledge of criminal careers, combined with the spottiness of offender-specific information available to criminal-justice decisionmakers, made it unlikely that the criminal courts or correctional establishment could successfully implement a just, or even a cost-effective, program of selective incapacitation.³⁷ Norval Morris, exploring the state of the art of predictive technology (including anamnestic, actuarial, and clinical predictions), framed one aspect of the problem as follows: Even assuming the best information and the best methods available, predictions of future dangerousness are wrong roughly twice as often as they are right. In Morris's view, such a high "false positive" rate should not wholly foreclose penalties geared toward selective incapacitation, but the moral grounding for such dispositions will always be uncertain, and the level of care surrounding such decisions should be great.³⁸

³⁷ See ALFRED BLUMSTEIN, JACQUELINE COHEN, JEFFREY A. ROTH, AND CHRISTY A. VISHER EDS., *CRIMINAL CAREERS AND "CAREER CRIMINALS,"* 2 vols. (Washington: National Academy Press, 1986); ALFRED BLUMSTEIN, JACQUELINE COHEN, AND DANIEL NAGIN EDS., *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (Washington, D.C.: National Academy of Sciences, 1978). Indeed, James Q. Wilson to some extent, and Peter Greenwood to a greater extent, have since retreated from their earlier assertions about the realizable benefits of selective incapacitation as a sentencing theory. See Peter W. Greenwood and Susan Turner, *Selective Incapacitation Revisited: Why the High-Rate Offenders Are Hard to Predict* (Santa Monica, CA: Rand Corporation, 1987); James Q. Wilson, *Crime and Public Policy*, in James Q. Wilson and Joan Petersilia eds., *CRIME* (San Francisco: ICS Press, 1995), p. 501 ("Very large increases in prison population can produce only modest reductions in crime rates").

³⁸ See Norval Morris and Marc Miller, *Predictions of Dangerousness*, in Michael Tonry and Norval Morris eds., *CRIME AND JUSTICE*:

Turning these insights back upon the original Model Penal Code, it is evident that the Code's machinery for selective incapacitation decisions was too amorphous, informal, discretionary, error-prone, and non-self-correcting. Present knowledge suggests that punishments for selective incapacitation ought to be based on rigorous factfinding, filtered through the best available risk-assessment instruments, and perhaps subject to the full due-process protections of a jury trial (as opposed to the second-class procedures of sentencing or parole hearings). As with rehabilitation, experience since the 1960s has taught us to be cautious when reaching high-consequence conclusions about human nature that seem to be intuitively correct, but that often disintegrate upon close inspection.

The original Code also has proven deficient for its failure to anticipate and address sentencing policies of *general* incapacitation. By some lights, general incapacitation has been the main propelling force of U.S. incarceration growth through the 1980s and 1990s.³⁹ Mass confinement has undoubted crime-reductive benefits, although the research

AN ANNUAL REVIEW OF RESEARCH, vol. 6 (Chicago: University of Chicago Press, 1985), pp. 1-50; Norval Morris, *On "Dangerousness" in the Judicial Process*, 39 RECORD OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK 102 (1982). There are glimmerings in research that predictions of dangerousness may become more accurate in the future, see Henry J. Steadman, *From Dangerousness to Risk Assessment of Community Violence: Taking Stock at the Turn of the Century*, 28 THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 265 (2000), but the two-to-one false positive rate cited by Morris still represents the current state of the art.

³⁹ FRANKLIN E. ZIMRING AND GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (New York: Oxford University Press, 1995), p. v.

community has found them to be disappointingly small, especially in the realm of serious violent crime.⁴⁰

Indeterminate-sentencing systems on the Model Penal Code plan were not intended to bring about an explosion in U.S. incarceration rates, but such systems have been the major engines of prison growth since the 1970s. Part of this history is surely due to the failure of indeterminate structures to provide meaningful brakes upon incapacitative impulses. As Professors Zimring and Hawkins have observed, it is difficult to place a ceiling upon the goal general incapacitation in the absence of a limiting principle derived from retributive theory (which the original Code eschewed) and without good empirical data of the thin crime avoidance that is actually won through such policies (which the Code did not promote).⁴¹ A revised Code should introduce both moral and assessment checks upon unexamined enthusiasm for mass incarceration.

Finally, the original Code made virtually no room for retribution as a basis for criminal punishment, or as a source of limitation upon the severity of penalties in particular cases. Since the Code's drafting, retributive theory has ad-

⁴⁰ For a concise literature survey, see Kevin R. Reitz, *The American Experiment: Crime Reduction Through Prison Growth*, 4-3 EUROPEAN J. ON CRIMINAL POLICY AND RESEARCH 74 (1996). For estimates of the contribution of prison growth toward reductions in violent crime in the 1990s, see William Spelman, *The Limited Importance of Prison Expansion*, and Richard Rosenfeld, *Patterns in Adult Homicide, 1980-1995*, both in Alfred Blumstein and Joel Wallman eds., *THE CRIME DROP IN AMERICA* (New York: Cambridge University Press, 2000). Using different methodologies, both researchers estimate that increasing confinement during the 1990s was responsible for about 25 percent of the drops in serious violent offending over the same period.

⁴¹ ZIMRING AND HAWKINS, INCAPACITATION, chapter 4.

vanced in both application and acceptance.⁴² Reflection suggests that moral bases for punishment will be present in any punishment system administered by human beings, and these impulses can hardly be eradicated through legislation. Indeed, some theorists posit that retribution is an affirmative, morally-required foundation for criminal sanctions.⁴³

One of the chief benefits of retributive theory is that it suggests a proportional ordering of the severity of sanctions. Although a crude tool — because one person’s moral sense of an appropriate punishment can differ enormously from another’s — a theory of just deserts can at least insist that offenses and offenders be compared with one another in an organized way when assigning levels of punishment. Moreover, this relational calculus may be performed even when there is no useful information about an offender’s prospects for rehabilitation, the deterrence value of potential punishments, or the likely incapacitative pay-offs of one prison term as opposed to another. If information deficits are the norm rather than the exception, a retributive scale can supply a default algorithm for punishment decisions.

The early plans for a revised Model Penal Code endorse a hybrid theory of criminal punishment that would combine moral and instrumental goals within an organized framework for decisionmaking. The approach in black-let-

⁴² See, e.g., ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE*, THIRD EDITION (London: Butterworths, 2001), pp. 72-74; ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (New York: Oxford University Press, 1993); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (New York: Hill and Wang, 1976).

⁴³ See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in Ferdinand Schoeman ed., *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PHILOSOPHY* (New York: Cambridge University Press, 1987).

ter drafting is borrowed from Norval Morris's theory of "limiting retributivism" (or LR).⁴⁴ In Morris's theory, the imprecise dictates of moral judgment can, at some point in each case, tell us that a certain level of punishment is clearly too high and, at a different point, that it would clearly be too low. Within this range, utilitarian goals such as rehabilitation and incapacitation may be given rein to operate, pushing the severity of sentences up or down, or influencing the selection of one sanction type as opposed to another, provided there is reason to think the utilitarian goal might be achievable in a given case. Where no sense of direction is forthcoming from utilitarian theory, Morris urges that a sanction should be selected on retributive grounds alone. In such cases, he recommends that a principle of "parsimony" should steer sentencers to the low end of the retributive range.⁴⁵

One key insight in Morris's LR theory is that a retributive evaluation of how much punishment is deserved in a given case can seldom be made with precision. There are few judges, philosophers, or other experts who can say that a particular offender who has committed a serious imprisonable crime — let's assume a forcible date rape with a maximum penalty of 10 years — deserves exactly *x years* in prison. Imagine a judge who has decided that a term of about five years in time actually served would be an appropriate retributive response in such a case (after the judge has weighed

⁴⁴ See the proposed black letter of revised § 1.02(2)(a) [reprinted in Appendix A to this Report].

⁴⁵ See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (Chicago: University of Chicago Press, 1974); NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (Chicago: University of Chicago Press, 1982); NORVAL MORRIS AND MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (New York: Oxford University Press, 1990).

everything she knows about the offender, the harm to the victim, and the circumstances of the crime). We cannot ask our hypothetical judge, but it would not be shocking to learn that, deep in her heart, she remains in some doubt about the absolute correctness of her ruling. She might also think a term of four years, or six years, or possibly seven, to be within reason on desert grounds alone. Perhaps she even grappled with such a range of possibilities before the necessity of handing down a decision drove her to an exact number. Her thought process, which never alighted on a single penalty that was unmistakably appropriate, might have been spread along a continuum like the one pictured below:

Clearly Excessive:	10 years
Probably Excessive:	8-9 years
Possibly Excessive:	6-7 years
Possibly Too Lenient:	5 years
Probably Too Lenient:	3-4 years
Clearly Too Lenient:	1-2 years, or probation

Human experience tells us that retributive perceptions are often blurred. This is not to say that they never provide useful guidance. They gather clarity when removed further and further from the fuzzy middle ground. For example, we might expect our hypothetical judge — and most other people equally familiar with the case — to balk without hesitation at a low sentence of one or two years for the date rapist, and to rule out altogether any term of probation.⁴⁶ At the

⁴⁶ Cf. *State v. Chaney*, 477 P.2d 441 (Alaska 1970) (criticizing on retributive and other grounds a trial judge's sentence of 1 year in prison, subject to parole at any time, for offender convicted of forcible rape and kidnapping).

other extreme, and again assuming full knowledge of aggravating and mitigating facts, the judge might be equally resolute that a prison term of nine or 10 years would be unjustly harsh, as would all longer terms and the death penalty (which are not available in any case under the statute of conviction). LR theory allows for the reality of moral imprecision, and yet requires decisionmakers to select sentences inside the boundaries of penalties that are clearly excessive and those that are clearly too lenient.

Within the permissible range of severity, LR provides that the utilitarian purposes of punishment may be weighed. The pursuit of such goals should be done thoughtfully, however, and only where there is a good-faith basis to suppose that a desired objective can be achieved. (The present black-letter draft requires that there be a “realistic prospect for success” before a sentence is allowed to vary on utilitarian grounds.⁴⁷) Thus, for example, a judge with good reason to believe that the date rapist in the earlier example presents an unusual risk of serious reoffending (perhaps because of a prior record of sexual assaults, or because of risk-assessment information included in the presentence report — the law might specify procedural protections attending such a conclusion) might be justified in imposing a prison term of six to seven years or, in an extreme case, even eight to nine years — so long as the informed pursuit of incapacitation is not permitted to break outside the boundaries of plausible retributive limits based on the gravity of the crime and the offender’s conduct. On the other end of the spectrum, now assuming a case in which the specific facts are different and the defendant presents a low risk of serious recidivism, the trial court might be allowed to select punishment at the low end of the retribu-

⁴⁷ See draft of revised § 1.02(2)(a)(ii) [reprinted in Appendix A].

tive range (three to four years in the hypothetical example), especially if information is presented that the defendant appears to be amenable to positive change in a credible sex-offender treatment program. In no circumstances, however, may the court choose a penalty that would be clearly insufficient on desert grounds to respond to the seriousness of the offense and the blameworthiness of the offender.⁴⁸ Retribution works as a boundary at both extremes of lenity and severity — and the case-by-case articulation of such limits can be expected to occupy the thoughts of both the trial and appellate benches.

The LR framework would not require that a lockstep array of purposes be fixed for all time or for all offenses in black-letter provisions. Rather, a new Code should sketch the general outlines of the theory, while delegating fine-tuned decisionmaking to the sentencing commission and the courts. The legislature should further recognize that the priorities of desert and instrumentalism might be ordered differently for more serious and less serious offenses. Thus, for example, it might be appropriate for the commission or the courts to promulgate a rule that, for very serious violent crimes, retribution and incapacitation should be the sentencing purposes of utmost priority. For property offenses, the developing law might see condign retribution as a less stringent requirement, and could place victim restitution and offender rehabilitation higher on sentencing courts' agenda. For white-collar offenses, deterrence may be designated as a privileged utilitarian goal. The revised Code should allow room for flexibility, jurisdictional variation, and the evolution of law in most such questions. Each state would be free within the LR framework to implement a lay-

⁴⁸ See *THE FUTURE OF IMPRISONMENT*, pp. 60-61.

ered approach to the purposes of sentencing that would speak differently to discrete offenses, classes of offenses, or offenders.

In the early meetings of Advisers, Members Consultative Group, and Council, broad support has been voiced for the theory of limiting retributivism as the philosophical cornerstone of sentencing decisions under the revised Model Penal Code. No sizeable coalition has urged the adoption of a more purely retributive conception, such as just-deserts theory.⁴⁹ And no voice has been raised in favor of a pure utilitarianism, unbounded by moral limits upon penalties.⁵⁰ Finally, there is general agreement that LR principles should be extended to decisionmakers throughout the sentencing system, and not merely to sentencing courts.

A New Structural Design for the Code

An initial question to be asked in a Model Code revision is which among the various American sentencing systems in operation have proven over time to be the most successful. Although sentencing structures nationwide differ in many important particulars (no two are identical), there are only a small number of fundamental templates from which

⁴⁹ The question was raised in Preliminary Draft No. 1 (August 28, 2002), p. 20, but no movement in favor of just-deserts theory as the recommended rationale for the Model Code's sentencing structure, or as an alternative rationale to be laid out in official commentary, has yet materialized.

⁵⁰ But see Michael H. Marcus, *Comments on the Model Penal Code: Sentencing, Preliminary Draft No. 1* (unpublished manuscript submitted to ALI, February 21, 2003) (Judge Marcus would elevate the goal of public safety to the first order of sentencing theory).

to choose.⁵¹ This is true, at least, if the drafters of a revised Code limit themselves to institutional programs that have been tried and observed in application over a period of time.

On this score, the revised Code should be supremely reluctant to contrive an unprecedented legal structure for punishment in its recommendation to American criminal-justice systems. A Model Penal Code of the present generation is not the place to urge the wholesale conversion of sentencing systems to premises of “restorative” or “community” justice (which now supply the bases for grassroots experiments worldwide).⁵² Nor should the Code lurch heavily in

⁵¹ There may be some who say that the revision project should be “visionary” and open to new and experimental ideas, even at the level of sentencing structure. To some degree this is an appealing claim. The original Model Penal Code itself was an aspirational work, although firmly grounded in learning from the past. The Institute must find a balance in its efforts so that they are designed to yield affirmative, realistic, incremental advances in the law — changes that will challenge state legislatures while at the same time remaining credible and viable in the contemporary lawmaking process.

⁵² See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (New York: Oxford University Press, 2002); Andrew von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach, and Mara Schiff, *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* (Oxford: Hart Publishing, 2003); Leena Kurki, *Restorative and Community Justice in the United States*, in Michael Tonry ed., *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, vol. 27 (Chicago: University of Chicago Press, 2000), pp. 235-303. Restorative-justice theory posits that the punishment of offenders should not be a central objective of criminal penalties; rather, the sanctioning process should seek so far as possible to restore the injuries done to crime victims and communities, and restore offenders to a productive role in the community. The instant proposal for a Model Code revision contemplates that restorative-justice experiments may be encouraged within the larger sentencing system, but that the entire system cannot at this time be constructed on such premises.

the direction of proposals for “risk-based” sentencing (that have been tried so far only on a limited basis in one or two states), or “sentencing information systems” that have been used for several years with little evaluation in Scotland and New South Wales.⁵³ A new Code may encourage continued experimentation with these and other innovations, which may in time grow to be major engines of policy, but the architecture of today’s Code cannot be formed around such hopes.

Nor should the drafters of a new Code hold any illusions that it is possible to develop a perfect system of sen-

⁵³ For discussion of the risk-based approach, see *Wisconsin Governor’s Task Force on Sentencing and Corrections — Final Report*, reprinted in 7 *OVERCROWDED TIMES* 5-17 (1996) (chaired by Walter J. Dickey, with Michael E. Smith as research director); Michael E. Smith and Walter J. Dickey, *Reforming Sentencing and Corrections for Just Punishment and Public Safety* (Washington, D.C.: Office of Justice Programs, 1999). The risk-based theory (something of a misnomer) supposes that sentences should be individualized to respond not only to the characteristics of offenders, but also to characteristics of place and time associated with the offense itself. The goal is to reduce the future risk of harm posed by a criminal *in his particular community*, with an emphasis upon community-based sanctions and situational problem solving. The theory would allow at least as much discretion in sentencing authorities as found in traditional indeterminate systems, and places similar reliance upon the inductive abilities of decisionmakers to make a close study of case-specific facts in order to discover effective remediations. There is too little experience with this approach to know whether it holds important advantages. Michael Tonry has noted that “No such system is now in full operation. . . . This conception, too, is less fully elaborated than indeterminate or comprehensive structured sentencing and so far is not the subject of as extensive experimentation as community/restorative sentencing.” *The Fragmentation of Sentencing and Corrections in America* (Washington, D.C.: Office of Justice Programs, 1999), p. 5.

The Sentencing information system (or SIS) is recommended in Marc Miller, *Sentencing Reform Reform: The Sentencing Information*

tencing law, without vulnerability to criticism or worries about future misperformance. The operative standard cannot be perfection, but whether *option a* is superior to *options b and c*. In that spirit, a short typology of existing American sentencing structures will set the parameters for policy judgments based on comparative merit.

A first structural option is the traditional model of indeterminacy in sentencing endorsed in the original Code. The indeterminate approach, discussed at length above, was the dominant American approach of the 1930s through the 1960s, and the basis for the Model Penal Code sentencing provisions drafted in the 1950s, but it has come under increasing fire ever since.⁵⁴ There are relatively few defenders of the theories or practices of indeterminacy today, but a plurality of American states continue to work with the

System Alternative to Sentencing Guidelines (or "Sentencing Reform Without Sentencing Guidelines"), in Michael Tonry ed., *THE FUTURE OF IMPRISONMENT IN THE TWENTY-FIRST CENTURY* (New York: Oxford University Press, forthcoming 2004). Such a system would inform but not constrain the discretion of sentencing judges through the provision of data concerning the sentencing decisions of other judges on a rolling, updated basis. The approach remains highly experimental, and has been tried for short periods only in two countries. Significant problems are unresolved including the quality of the information that may be compiled at an affordable price, the degree to which judges can successfully locate information about cases truly similar to their own (as opposed to cases that appear to be similar only because they fall within the same broad categories), the likelihood that individual judges will use the information in idiosyncratic ways, and the ultimate desirability of establishing sentencing policy entirely through a bottom-up system of case-specific discretion without systemwide policymaking or planning.

⁵⁴ The classic indictment of indeterminate-sentencing practices is MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (New York: Hill & Wang, 1973). Although three decades old, the book remains well worth reading and relevant to the plurality of U.S. jurisdictions that retain the basic framework of indeterminacy.

vestiges of their mid-20th century programs, modified by a growing patchwork of mandatory-penalty statutes and limitations upon (or an increased stinginess in) parole-release discretion. There are few spokespersons for the view that indeterminacy ought to be the preferred institutional arrangement for 21st-century sentencing structures — particularly among those who have made a close study of the alternatives.

As a second option, a handful of states have introduced “statutory determinate” reforms starting in the mid-1970s, which accomplish systemwide change in punishment structure entirely through legislation. A common feature in all statutory-determinate jurisdictions is the abolition of the prison-release discretion of the parole board. Most statutory-determinate states also have narrowed the menus of authorized punishments for particular crimes when compared with the very broad ranges available under indeterminate laws. For example, in California, the current provision governing first-degree burglary specifies that the incarceration options for that offense include “imprisonment in the state prison for two, four, or six years.”⁵⁵ In a normal case, the trial judge is expected to impose the middle, or “presumptive,” sentence laid out for the crime. As alternatives, the judge may select the “mitigated” or “aggravated” term, provided the judge can cite adequate reasons on the record.

The major weakness of statutory-determinate plans is that they rely on legislatures to define penalties (or narrowed ranges of penalties) for specific crimes, diminishing the importance of other potential discretionary actors such as judges, a sentencing commission (which does not exist in such systems), and the parole board (whose authority is

⁵⁵ CALIFORNIA PENAL CODE, § 461 (2003).

sharply curtailed). In hindsight, this has proven a poor allocation of authority among available decisionmakers. State legislatures do not have the time or expertise to ponder exact punishments with care. Nor do legislatures have the attention span needed to monitor their sentencing systems in operation and make periodic adjustments in their matrices of presumptive sentences. Most jurisdictions that enacted statutory-determinate laws have found that their legislators have passed crazy-quilt amendments over time. Not surprisingly, legislative determinacy has also proven a weak tool for the deliberate management of prison-population growth. Such concerns have resulted in a virtual halt in state adoptions of the statutory-determinate structure through the 1980s and 1990s, and two states (Colorado and North Carolina) adopted and then abandoned statutory-determinate reforms in favor of other structures.⁵⁶ Although there are still a small number of such jurisdictions around the country, one would be hard pressed to recommend statutory determinacy as the institutional plan for a new Model Penal Code.

Third, a growing number of states since 1980 have moved toward an administrative model of sentencing reform characterized by the creation of a sentencing commission authorized to promulgate sentencing guidelines. Alone among the three categories of U.S. sentencing structures, the commission-guidelines reforms have been perceived widely to be successful in most states where they have been introduced. Marvin Frankel first proposed the creation of a “commission on sentencing” as the centerpiece of reform of indeterminate-sentencing structures in his

⁵⁶ See also MICHAEL TONRY, *SENTENCING MATTERS* (New York: Oxford University Press, 1996), p. 28.

influential writings of the early 1970s.⁵⁷ At the close of the 1990s, 15 states and the federal system were operating with sentencing guidelines of one kind or another, and at least seven states and the District of Columbia had entered active study processes moving toward such a framework.⁵⁸ After five years of study, the commission-guidelines model became the centerpiece of the American Bar Association's recommendations in its revised Criminal Justice Standards for Sentencing, published in 1994.⁵⁹ As Michael Tonry wrote, in a comprehensive study of sentencing reform since the 1970s:

⁵⁷ See FRANKEL, *CRIMINAL SENTENCES*, pp. 118-123; Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). Frankel's later writings on the subject include Marvin E. Frankel and Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEORGETOWN L.J. 225 (1984); Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043 (1992) (criticizing the operation of the federal guidelines and offering proposals for improvement); Marvin E. Frankel and Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655 (1993).

⁵⁸ See Appendix B for a table setting forth the essential features of American sentencing guideline systems as of 1999, and a summary of states with pending legislation, active sentencing commissions, or active study groups.

⁵⁹ AMERICAN BAR ASSOCIATION, *STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, THIRD EDITION* (Chicago: ABA Press, 1994). In 1996, a report prepared for the U.S. Department of Justice's Bureau of Justice Assistance, incorporating a 50-state survey of the law and operation of American sentencing structures, similarly concluded that "the most promising structured sentencing model" to address problems of disparity, incarceration rates, and prison crowding, was "sentencing guidelines developed by sentencing commissions." BUREAU OF JUSTICE ASSISTANCE, *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING* (Washington, D.C.: 1996), p. 127.

After nearly two decades of experimentation, the guideline-setting sentencing commission is the only reform strategy that commands widespread support and continues to be the subject of new legislation. . . . [S]entencing commissions and their guidelines have proven themselves as the most effective prescription thus far offered for the ills of lawlessness, arbitrariness, disparity, and discrimination that were widely believed to characterize indeterminate sentencing.⁶⁰

Not all guideline systems have been equally well received by judges, practitioners, and scholars, and at least one iteration of commission-guideline reform — that in the federal system — has received far more condemnation than praise. The federal system is far different from any of its state counterparts, however.⁶¹ If we conceive of the relevant knowledge base for a Model Penal Code revision as amassing primarily from experiences among state criminal-justice systems, there is little question that the state commission-guideline reforms are the best and most promising programs that have been tried to date. Most are viewed in their home jurisdictions as clear advances over prior indeterminate systems, and at least one state (North Carolina) rejected a failed endeavor of statutory-determinacy only to produce one of the best and most widely admired commission-guidelines structures in the nation today. The soundness of the program is perhaps evident in its growing popularity. Commission-guidelines reforms have been spreading to in-

⁶⁰ TONRY, SENTENCING MATTERS, pp. 28, 71.

⁶¹ Major areas of distinction between the current federal sentencing system and the commission-guidelines system contemplated for the Model Penal Code are reviewed in the final section of this Report.

creasing numbers of states through the 1980s, 1990s, and early 2000s.

The perceived advantages of the commission-guideline systems will be discussed at length in the pages that follow, but a shorthand catalogue would include the following:

- The consistent application of law, policy, and principle to individual sentencing decisions.
- The articulation of starting points for sentencing decisions, as opposed to the total absence of such guidance in the cavernous penalty ranges of indeterminate-sentencing codes.
- New visibility of the decision rules for sentencing, giving rise to new opportunities to study and debate those rules.
- A vastly improved capacity for systemwide policy-making, including an ongoing process of ensuring that penalties for discrete crime classifications make sense when matched against one another.
- The enlargement of judicial discretion to make effective choices about punishments in the cases before them, particularly in prison cases.
- Improved information about how the sentencing system operates, and the creation of an ethic in legislative and other domains that high-quality information should drive policy.
- The ability to make accurate predictions of future sentencing patterns, in the aggregate and line-by-line by offense type, enabling the production of credible fiscal-impact forecasts when changes in guidelines or laws affecting punishment are proposed. (In most guideline states, this capacity has been used to retard

prison growth as compared to that in other states without sentencing commissions or guidelines.)

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

These features, drawn from the best exemplars of state commission-guideline systems, will be discussed at length in the remainder of this document.

The Minnesota Model

Guideline systems vary widely from one another, but nearly all accept the starting premise that there should be a permanent policymaking body at the jurisdiction-wide level,

usually called a sentencing commission, with dual responsibilities of research and prescription. Looking back to Figure 2, one remarkable feature of traditional indeterminate regimes was the paucity of authority over sentencing outcomes located on the systemic plane. It is quite true that the legislature in traditional systems was an important player in creating the punishment structure in the first instance, but, once the indeterminate design was in place, neither the legislature nor any other agency of systemwide competence held meaningful authority to influence penalties in specific cases.⁶² All guideline jurisdictions in the late 20th and early 21st centuries have rejected the view that sentencing discretion, and the concomitant power to enact sentencing policy, should be pooled so completely at the case-specific level.⁶³ Instead, with the introduction of a sentencing commission, the new structures have pursued many different strategies to achieve a vertical distribution of power, with meaningful sentencing authority divided across both the systemic and case-specific levels. In the better guideline structures, the goal is not to eliminate the authority of the courts to indi-

⁶² As noted earlier, the drafters of the original Code sought to enhance the legislative role somewhat as compared with then-existing American practices, but the Code's primary device for doing so was to recommend advisory and unenforceable statements of legislative purposes and standards for decision.

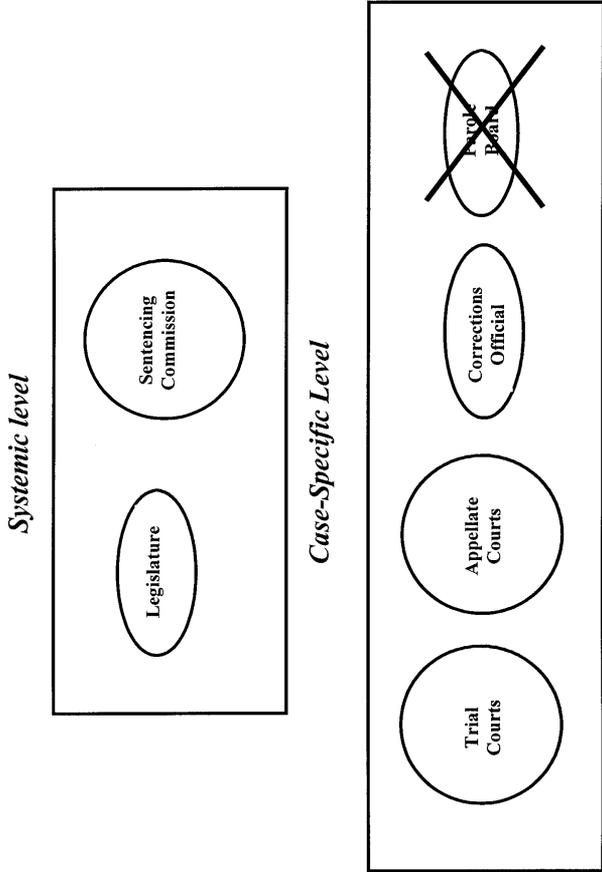
⁶³ Even the most forceful and perceptive critics of the present federal-guidelines scheme rarely challenge the desirability of having a sentencing commission with some policymaking and lawmaking powers. Instead, the informed debate in the federal system centers on how much power a commission should be given in relation to judges and other decisionmakers, and what form the commission's guidelines should take. See, e.g., TONRY, *SENTENCING MATTERS*, chapter 3; KATE STITH AND JOSÉ CABRANES, *FEAR OF JUDGING* (Chicago: University of Chicago Press, 1998), chapter 5; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991), pp. 939-949.

vidualize sentences to the needs of unusual cases, but to provide an overall framework in which that discretion may be exercised.

Figure 3 supplies a visual preview of how such an arrangement can work. The figure is based on the sentencing structure pioneered in Minnesota in 1980 and later emulated in other states, including Washington, Oregon, Kansas, and Massachusetts (where a new commission-guideline system is under development). For present purposes, the main thing to notice about Figure 3, especially in comparison with Figure 2, is the introduction of the sentencing commission as a systemwide player with a degree of authority over punishment outcomes roughly comparable to that held by the trial and appellate judiciaries. Within a framework of legislatively-defined and broadly-graded offenses, the sentencing commission in the Minnesota model is given power to specify presumptive sentences through legally binding guidelines for whole categories of offenses and offenders. The guideline structure, however, also authorizes and invites substantial trial-court discretion to deviate from presumptive penalties in cases that fall outside the paradigm of a typical case. Commissions articulate often-recurring aggravating or mitigating factors to be considered by sentencing courts as reasons for departing from the presumptive penalties set out in the guidelines. Nearly all state systems also allow considerable room for the development of judge-made departure factors, sometimes overseen by appellate courts.⁶⁴

⁶⁴ The allowable grounds of departure should be fashioned and litigated in light of the legislative purposes of sentencing. Under a scheme of limiting retributivism, for example, a departure might be allowed in cases where the presumptive sentence is not adequate, or is too harsh, to reflect the offender's desert. Alternatively, within a range of deserved penalties, a departure may be based upon authorized utilitarian rationales, provided there is reason to think that a sentence geared toward such goals will be effective in a given case.

Figure 3. Sentencing Structure on the “Minnesota Model” Authority over Time Served



In addition to their prescriptive responsibilities, sentencing commissions that follow the Minnesota model perform a variety of research and assessment roles. This subject will be discussed later in more detail, but one important component of the research function is worth highlighting here. State sentencing commissions typically monitor rates of trial-court compliance with the presumptive penalties set forth in guidelines, and also track the reasons given by courts for guideline departures. In state systems (but not in the federal system), commissions have responded to such feedback by adopting amendments fashioned to bring the text of the guidelines more closely in line with judicial practices and preferences. Thus, for example, judge-made grounds for departure, if cited by courts with frequency, may be incorporated over time into the guideline enumerations of aggravating or mitigating factors. In addition, consistently high departure rates for specific offenses have been treated by some commissions as signals that the presumptive ranges for such offenses are out of kilter and in need of amendment.⁶⁵ In rare cases, commissions working under the Minnesota model have acted to combat or overrule what they see as unwarranted manipulations of the guidelines by sentencing courts, but such power has been exercised with far greater restraint in state systems than in the federal system.⁶⁶

⁶⁵ For an account of the Pennsylvania Sentencing Commission's retooling of its guidelines in the mid-1990s, see John Kramer and Cynthia Kempinen, *The Reassessment and Remaking of Pennsylvania's Sentencing Guidelines*, 8 FED. SENT. RPTR. 74 (1995).

⁶⁶ The new Code should include a provision to ensure that such preclusive authority may be used by sentencing commissions only in delineated circumstances. It may even be desirable to authorize the courts to review the commission's regulations for threshold validity as exercises in administrative rulemaking. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991).

The relative authorities of sentencing commissions and the courts vary enormously across current American guideline systems. In the federal system, the power of the U.S. Sentencing Commission eclipses that of sentencing judges, in part because the commission's guidelines are exhaustive and highly detailed, but more importantly because the judicial power to depart from mechanical guideline calculations is defined narrowly in both federal statutes and the guidelines themselves, and departure decisions have been policed closely by the federal appellate courts. No state system has yet emulated the federal example in these respects. In fact, in some states the commission is a relatively weak discretionary player, with authority to formulate only advisory guidelines unsupported by an appeals enforcement mechanism. In a number of systems, particularly where there have been statutory cutbacks in the discretions of parole and corrections agencies, trial judges have attained a hegemony over sentencing outcomes undreamed of in the days of indeterminate sentencing.⁶⁷

The Minnesota model strikes a middle position between the extremes of commission domination and trial-court hegemony. Two structural features of the model are of special importance in achieving this balance: (1) Legislation must give sentencing judges substantial discretion to depart from guidelines, perhaps including authority to impose sentences anywhere within the full statutory ranges of authorized punishments in cases that judges conclude are outside

⁶⁷ See Kevin R. Reitz, *Sentencing: Allocation of Authority*, in Joshua Dressler ed., *ENCYCLOPEDIA OF CRIME AND JUSTICE*, REVISED EDITION (New York: Macmillan Reference, 2002) (comparing apportionments of discretion in the federal system, with a strong sentencing commission and weak trial courts, and in Delaware's guideline system, featuring a weak commission and strong trial courts).

the norms built into the guidelines. In such instances, sentencing judges should be required to explain on the record why they have chosen the departure sentences, with reasons grounded in the statutory purposes of punishment. (2) The legislature should carefully delineate an appellate-review mechanism for departure cases to test the sufficiency of reasons given by trial courts for sentencing outside the guidelines, and to engender a “common law” of sentencing in light of legislatively-defined goals. Legislation should require the appellate courts to be deferential to trial-court rulings, except in cases in which departures are rendered for legally-impermissible reasons, or are disproportionate in light of the rationales supplied. In the well-designed state systems that currently exist, reversals are few in number, but are sufficiently in prospect to impose discipline upon the thought processes of sentencing courts.⁶⁸

Aside from the introduction of a sentencing commission at the front end of the punishment system, the most visible institutional innovation of the Minnesota model is the elimination of parole-release discretion, which in several guideline jurisdictions has been conjoined with sharp reductions in the authority of corrections officials to award good-time or earned-time credits. In effect, the Minnesota model assumes that trial courts on the day of sentencing possess most of the knowledge relevant to what actual punishments should be, and so there is no reason to delay the exercise of determinative discretion for months or years. The abolition of parole-release authority has not been accepted universally in reform jurisdictions. Indeed, seven guideline systems currently operate with the parole board’s back-end release

⁶⁸ See Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NORTHWESTERN L. REV. 1441 (1997).

discretion relatively intact.⁶⁹ Moreover, the annulment of discretion to set prison-release dates should not be taken to affect the quite separate practice of postrelease *supervision*, which has been carried forward in all guideline jurisdictions. Thus, parole agencies typically retain their former responsibilities of monitoring and assisting prison releasees in the community, just as they continue to play a powerful role in revocation determinations.⁷⁰ Focusing only upon original prison sentences, however, the effect of an abrogation, or any sharp limitation, of back-end release authority is to shift power forward to judges and to the commission itself.

Figure 3 depicts these interwoven discretionary relationships, and gives visual emphasis to the triumvirate of commission, trial bench, and appellate bench as the dominant discretionary actors in the Minnesota model.

Illustration

We may now return to the earlier hypothetical case of an offender convicted of a second-degree felony as defined by the Model Penal Code, but this section will analyze the case under a Minnesota-type sentencing structure adapted to work within the original Code's grading framework. The hypothetical will proceed in light of the following assump-

⁶⁹ See Appendix B for a jurisdiction-by-jurisdiction description of current guideline systems, including their retention or abolition of a parole-release mechanism. One important issue for study in the Code revision process will be whether parole-release discretion ought to be retained, at least for some prisoners, and under what legal constraints.

⁷⁰ The proper distribution of authority over revocation decisions is another important subject to be encountered during revision. In recent years, more than one-third of all prison admissions nationwide have resulted from probation- or parole-revocation determinations, and there are some states in which more than one-half of prison admissions flow from revocations.

tions, which are drawn from the experience of jurisdictions that have adopted the Minnesota structure: (1) The statutory range of penalties for a second-degree felony remain the same as in the original Code, under § 6.06. At the lowest end, the offender may be given a suspended sentence without conditions; at the upper end, there may be a maximum prison term of 10 years. However, a prison sentence under the Minnesota plan is no longer expressed as a range between minimum and maximum terms. Instead, the sentence pronounced by the court will be given as a single number of months or years, subject to good-time reductions as explained below. (2) There are presumptive sentencing guidelines in place that will designate a narrow punishment range for the offense in question (much narrower than the statutory range), probably also with reference to the offender's record of prior convictions. (3) Trial judges, if they make an adequate written statement of reasons, may depart from the presumptive-guideline sentence to the full upper or lower limits of the statutory penalty range. The appellate courts are authorized to review departure decisions, but reversals are infrequent. (4) Overall, in cases where the guidelines call for a term of imprisonment, trial judges comply with the presumptive guidelines roughly two-thirds of the time, and elect to depart from them in the remaining one-third of cases. (5) The release authority of the parole board has been eliminated, but prison officials may award good-time credits of up to 25 percent against the pronounced prison term.⁷¹ (6) Even though parole-release dis-

⁷¹ The ceiling upon good-time credits varies by jurisdiction. Many systems cap good time at 15 percent, and have been encouraged to do so by federal funding criteria for prison-construction grants. The Minnesota system began with a good-time provision allowing credits up to 33 percent of the pronounced term, but has cut back on that authorization in recent legislation. See MINN. STAT. § 244.04(1) (2003). The

cretion has been removed, the convicted offender will serve a freestanding term of postrelease supervision, with the possibility of revocation, as set forth in § 6.10 of the original Code.

We can now work through some of the discretionary implications of the hypothesized structure, keeping a focus on scenarios that are likely to arise in large numbers. Throughout, the discussion will draw comparisons between allocations of authority in the Minnesota scheme and those observed earlier under the original Code.

The first point of difference is that trial judges' power over the in-out decision is no longer absolute in the Minnesota model. Presumptive guidelines, everywhere that they exist, address the in-out (or "dispositional") decision as well as the duration of confinement terms. If, for example, the guidelines indicate a presumptive sentence of probation, or some other form of community sanction, and if the sentencing judge thinks there are good reasons to impose a term of incarceration, the judge may do so only through a departure. The in-out decision remains largely with the court, so long as the judge is willing to write an opinion (or state reasons on the record), because the majority of such departures will not be disturbed on appeal. Still, under the indeterminate structure, judges held unreviewable authority over the threshold decision of what sanction to impose. Now, although trial-court authority is hardly eviscerated, it is encumbered and, in some cases, can be countermanded.

For prison-bound offenders, however, sentencing judges in the Minnesota structure hold considerably more sway over time served than their counterparts in indetermi-

assumption in text is meant to be within the ballpark of current practice, but was also selected as a high enough figure to avoid slanting the Illustration in favor of front-end decisionmakers.

nate systems. It is necessary to work through case examples to see why. Let us assume that the presumptive range for our hypothetical second-degree felony offender (who has, perhaps, one prior felony conviction) is stated in the commission's guidelines as 24 to 27 months. On first blush, such a narrow guideline range bespeaks of a very powerful sentencing commission. Out of a possible 120 months, the trial judge appears to have authority over only four months of the duration of confinement, which would place the commission in control of almost 97 percent of the durational choice. The matter is not so simple, however. A presumptive term is imposed in a given case only through converging choices of the commission (to specify the presumptive term) and the trial court (to impose the presumptive penalty in this instance). If trial judges' departures are upheld on review in the majority of cases, then a judicial decision to impose, and thus "ratify," the guidelines' presumptive sentence is more determinative of punishment than the commission's original designation of the applicable range. Stated differently, the trial court has more power to deviate from the commission's guidelines than the commission has power to prevent such a thing from happening. It is important to see that each sentencing outcome that includes a presumptive sentence must be viewed as a collaborative venture on the part of commission and court — with the court as the stronger partner.

Once a presumptive prison term is imposed, however, it becomes subject to the later discretion of correctional authorities to award good-time credits. We are assuming for this analysis that such power exists up to a ceiling of 25 percent of the pronounced sentence. Thus, the collaborative decision of court and commission governs 75 percent of the range of choice within the 120-month statutory maximum, and prison officials hold the residual 25 percent. Compared

with indeterminate structures such as the one endorsed by the original Code, a much greater share of sentencing discretion in the Minnesota model has been shifted to the front end of the decisional process, and, even allowing for the importance of the sentencing commission, trial judges have more real authority over time served than in the traditional scheme.⁷²

Switching gears, let us now analyze the discretionary implications of guideline departures, which are permitted to occur with some frequency in our hypothetical structure (as in actual systems that employ the Minnesota model). If a trial judge views a case as sufficiently unusual, a departure sentence may be ordered anywhere within the full statutory range of penalties for the offense. For a second-degree felony, therefore, the least severe departure sentence would be the suspended imposition of punishment (i.e., probation without conditions), and the most severe available sentence would be a 10-year prison term. The judge's potential departure authority thus comprehends the full range of durational possibilities that may be attached to a confinement sanction, as well as the full range of available community sanctions if the court finds that incarceration is inappropriate.

On first inspection, it may appear that the trial judge controls 100 percent of the dispositional (in-out) decision in a departure case, and that the trial court is in full control of 75 percent of the durational decision for any departure sentence that includes a prison term (subtracting 25 percent for the possibility of good-time reductions). This judgment would be entirely correct in a structure that made no provi-

⁷² In the hypothetical, moreover, we have assumed a cap on good-time credits of 25 percent. Many jurisdictions employ lower ceilings of 15 percent. In such systems, the effective tilt of discretion toward judges and commissions is even greater than in the scenario examined here.

sion for appellate sentence review (or other effective oversight of judicial departures). In the Minnesota model, however, the appellate courts exercise moderate and deferential review of departures that are appealed. Thus, the trial judge's seeming control of a departure decision must be discounted for the risk of reversal. The actual state experience with sentence review is that far fewer appeals are taken under the Minnesota structure than in the federal system (where there has been a deluge of sentence appeals), and the likelihood of a state trial judge's sentence being reversed by a higher court is usually a small fraction of that encountered by district-court sentences under the federal guidelines.⁷³ Even so, departure decisions are best understood as engaging the shared discretions of trial courts and appellate courts.

⁷³ Only one study comparing appellate-review practices under various American guideline systems has been performed to date. (It was conducted by the Reporter). It assembled preliminary data for six jurisdictions for a single year. Despite the study's limitations, however, a number of useful observations were suggested in its findings. Based on 1994-1995 data, the study estimated that sentence appeals were taken in roughly 11 percent of all federal cases. This rate of appeal was about 10 times the estimated rate in Minnesota and Florida for the same year, 36 times the rate in Washington and Oregon, and more than 100 times the rate in Pennsylvania. See Reitz, *Sentencing Guideline Systems and Sentence Appeals*, at 1494. In all six guideline jurisdictions, the average odds of a given trial-court sentence being appealed and reversed were small — but the prospects of reversal were much higher in the federal system than in any of the five states. For the time period studied, federal appellate courts reversed one out of every 49 sentences imposed by federal district courts (calculated against all district-court sentences imposed in one year). In the five state systems included in the study, there were no near competitors of the federal system on this “disturbance rate” measure. In Minnesota, for example, appellate courts generated one reversal for every 134 sentences imposed. In Oregon and Washington, reversals occurred in only one case per 825 sentences imposed. *Id.* at 1497. An important issue in the drafting of a revised

Because appellate judges typically scrutinize departures with reference to guideline provisions, the review process also reintroduces the authority of the sentencing commission, as filtered through the appellate court's understanding of how strictly the guidelines should be enforced. In the federal structure, where the courts of appeals have reversed a greater share of trial-court sentences than in the state systems, and where the appellate jurisprudence has leaned heavily on the literal terms of the federal guidelines, the result has been an inflation of commission authority and a deflation of the power of district courts. In contrast, in the state systems built on the Minnesota model, appellate review with a lighter touch has ensured that the commission's guidelines cannot be elided without reason, but the lion's share of departure power still resides with trial judges.

In sum, if we posit realistic sentencing scenarios under a Minnesota-type sentencing structure adapted to the Model Penal Code grading scheme, judicial discretion is somewhat enlarged in cases where presumptive sentences are imposed, and greatly enlarged in departure cases, when the yardstick of comparison is the original Code's indeterminate structure. In addition, new discretionary powers are created and located in the sentencing commission and the appellate courts, but those powers are exercised in collaboration with trial-court decisionmaking, and are not arranged so as to overwhelm trial-court discretion.

The Desirability of a New Structure

The preceding pages might be seen as sketching possible "before" and "after" pictures of decisionmaking under

Model Penal Code will be the design of an appellate-review mechanism that does not generate a flood of appeals, as in the federal system, but instead produces reasonable and manageable levels of appellate enforcement, as has occurred in the state systems.

the Model Penal Code sentencing structure, pre and post revision. It is a tentative sketch, to be sure, because most of the critical issues of structural design, including variations on the themes explored above, have only begun to be debated in the full drafting process. Nevertheless, judging from early meetings of the Advisers, the major characteristics of the Minnesota model, including a permanent sentencing commission, sentencing guidelines, appellate sentence review, regulation of back-end prison-release discretion, and substantial trial-court decisionmaking authority, will comprise the essential building blocks of a new institutional structural in proposed black-letter — just as they were the major elements of the recent ABA Criminal Justice Standards for Sentencing.

The following sections provide highlights of what existing sentencing-guidelines systems have accomplished in the past 20 years, and explores areas in which a revised Code might press for future improvements.

The rule of law and the visibility of punishment decisions. There is much continuing force to Marvin Frankel's charge, leveled in the early 1970s, that indeterminate-sentencing systems were fundamentally "lawless" in their reliance on the unguided and unchecked discretions of judges and parole boards. Not only did the decisionmakers work in the absence of *ex ante* legal prescriptions, it was generally impossible, even in retrospect, to discern what motivations had moved their hands in particular cases. Frankel's critique of indeterminacy remains remarkably apt for the many American states that continue to work with the old structure. With respect to trial judges, Frankel wrote:

[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society

that professes devotion to the rule of law. . . . Left at large, wandering in deserts of uncharted discretion, the judges suit their own value systems insofar as they think about the problem at all. . . . The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all.⁷⁴

As for parole boards, Frankel's attack rested on the absence of intelligible legal and scientific criteria for the exercise of their great authority over release decisions:

Having in view no genuine program of "treatment," the sentencers and parole officers cannot say how long it will take. . . . [W]e send the prisoner away for as long as that consummation may require, not knowing when or whether it may be achieved; and we go on to the next case borne on a vaporous sense of virtue and justice. . . . There is no suggestion of what a parole board is to be looking at or looking for as it hears the prisoner's application for release. Small wonder that our parole boards characteristically never tell the prisoner — or anyone — the grounds of their decisions. Who knows if they know?⁷⁵

One goal of a revised Model Code should be to encourage the introduction of generally applicable rules and principles to the sanctioning process to the extent such governance is feasible, reserving room for individualized dis-

⁷⁴ FRANKEL, *CRIMINAL SENTENCES*, pp. 5, 7-8.

⁷⁵ *Id.* at 92, 110.

cretion in cases where good reasons can be cited for a more qualitative mode of decisionmaking.

On these criteria, the commission-based model has proven far superior to the older indeterminate-sentencing structure. Under the Minnesota approach, the rule of law is advanced by guidelines of uniform application that channel outcomes in the majority of cases and provide a starting point for the reasoned analysis of departure decisions. A common law may be developed for departure sentences themselves, through a jurisprudence generated by trial and appellate courts in light of the legislative goals of sentencing.

The value of legality stems from concerns that the exercise of fearsome power should be regularized, should not be a matter of idiosyncratic ukase, and that the rationales for punishment decisions should be made knowable and subject to inspection. These are worthy objectives for a Model Code revision.

Systemwide policymaking. Indeterminate-sentencing systems had few effective tools for transmitting broad policy judgments down to the case-specific level. Let us suppose that responsible policymakers in a given jurisdiction have decided that prison terms for certain violent crimes should be lengthened, or incarceration for property offenses should be shaved by 15 percent, or restorative justice sanctions should be used more often by trial courts, or financial penalties for certain white-collar offenders should be increased. In traditional systems, such policies could be communicated to trial judges through advisory legislation, as the original Code often chose to do, or through crude vehicles such as mandatory-minimum penalties, or through indirect means such as increased or decreased statutory maxima (in hopes that these would stretch or compress the average penalties handed out by courts and others). The fact re-

mained, however, that most real decisions about sentencing policy were made one case at a time.

The aggregate results of such atomistic choices could be surprising.⁷⁶ Through the 1980s and 1990s, for example, the majority share of prison growth in the United States was due to the increased incarceration of nonviolent offenders.⁷⁷ As Franklin Zimring and Gordon Hawkins observed in 1995:

While much of the political rhetoric of incapacitation uses the imagery of violent crime, most sophisticated observers of the criminal justice system would acknowledge that the debate about prison expansion in the 1980s and the 1990s is about burglars, automobile thieves, and minor⁷⁸ property offenders, as well as . . . drug offenders.

Research by Alfred Blumstein and Allen Beck unearthed very complex patterns contributing to the explosion in imprisonment in recent decades. Their study suggests that mass-confinement practices can follow trends that few sensible policymakers would have approved in advance. For instance, Blumstein and Beck reported that, from 1980 to

⁷⁶ For a sustained and powerful analysis of the headless quality of American imprisonment policy, see FRANKLIN E. ZIMRING AND GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (Chicago: University of Chicago Press, 1991).

⁷⁷ See Alfred Blumstein and Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, in MICHAEL TONRY AND JOAN PETERSILIA EDS., *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, vol. 26 (Chicago: University of Chicago Press, 1999), pp. 17-61.

⁷⁸ FRANKLIN E. ZIMRING AND GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (New York: Oxford University Press, 1995), p. 165.

1996, imprisonment rates for women increased at nearly twice the pace of increase of male rates — with drug offenses accounting for a much larger share of prison growth among females than among males.⁷⁹ Given the very low percentage of serious offenses committed by women as compared to men, and the great costs of incarceration for all concerned, it is challenging to find justification for the thousands of incremental decisions that have added up to such gross results.⁸⁰ The truth is that such things happen by accident, not by prior design. American sentencing systems are for the most part headless, with aggregate policy made by no one.

Many of the state guideline systems have worked to change this picture, and have made progress toward bringing coherent overall policy frameworks to their sentencing structures. The earliest guideline systems were founded on just-deserts principles and the view that sanctions should be proportionate to the perceived moral gravity of offenses.⁸¹ Over time, individual guideline systems have evolved to pursue more complex admixtures of sentencing purposes.⁸² Largely through developments in case law, the current Minnesota system has accommodated itself to the hybrid goals

⁷⁹ Blumstein and Beck, *Population Growth in U.S. Prisons, 1980-1996*, pp. 22, 26.

⁸⁰ See HENRY RUTH AND KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* (Cambridge: Harvard University Press, 2003), pp. 114-115 (calling for intensified policy scrutiny of incarceration of women in light of doubtful crime-reduction benefits).

⁸¹ See, e.g., Andrew von Hirsch, *Structure and Rationale: Minnesota's Critical Choices*, in ANDREW VON HIRSCH, KAY A. KNAPP, AND MICHAEL TONRY, *THE SENTENCING COMMISSION AND ITS GUIDELINES* (Boston: Northeastern University Press, 1987).

⁸² It is important to recognize — because many commentators do not — that state guideline structures can be built to serve any set of

of limiting retributivism.⁸³ A far different theoretical conception gave shape to the current Virginia guidelines, where confinement terms have been calibrated to serve the objective of selective incapacitation, based on the commission's understanding of the social science of criminal careers and offender dangerousness.⁸⁴ Perhaps most intriguing of all, amendments to the Pennsylvania guidelines in the mid-1990s established layered hierarchies of sentencing goals for different levels of offenses. The current guidelines are sectioned into five "sentencing levels." At the uppermost level of crime severity, retribution and incapacitation are given as dominant objectives. Moving down the gravity scale, concerns of offender treatment and victim restitution are recommended more frequently and more emphatically to sentencing judges.⁸⁵ Also based on such a layering strategy, a

philosophical goals for criminal punishment, and are not limited to the pursuit of a just-deserts program. The Institute itself has been mistaken in this regard. See Model Penal Code and Commentaries, Part I, Vol. 3, Introduction to Articles 6 and 7: The Model Penal Code's Sentencing System, pp. 11-30 (equating sentencing reform on a commission-guidelines model with just-deserts sentencing theory).

⁸³ The evolution of Minnesota's guideline system toward such a theoretical framework is explored in Richard S. Frase, *Sentencing Principles in Theory and Practice*, in MICHAEL TONRY, ED., *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, vol. 22 (Chicago: University of Chicago Press, 1997), pp. 363-433.

⁸⁴ See Richard Kern, *Sentencing Reform in Virginia*, 8 FED. SENT. RPTR. 84 (1995). Aspects of the selective-incapacitation rationale, as built into the Virginia guidelines, are criticized in Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 U.C.L.A. L. REV. 1751, 1759-1763 (1999) (disapproving of provisions in the Virginia guidelines that treat youth and prior juvenile criminal record as aggravating factors at sentencing).

⁸⁵ See Pennsylvania Sentencing Guidelines, Pennsylvania Code, Title 204, Ch. 303, § 303.11(b), also attached to 42 PA.C.S.A. § 9721 (2003).

recent proposal by Robin Lubitz and Thomas Ross (two of the principal architects of the present North Carolina system) has suggested that existing state guidelines could be adapted to encourage the use of restorative-justice innovations for selected offenses and offenders.⁸⁶

Sentencing commissions, if properly constituted, can gain unique credibility within a jurisdiction to speak to questions of punishment policy. A well-designed commission should include representatives from all sectors of the criminal-justice system, with an emphasis on judicial membership, but also drawing on the experience of prosecutors, defense counsel, corrections officials, law-enforcement officers, local-government officials, and members of the public. The diverse membership of a commission serves several useful functions. First, there can be a “roundtable” effect when criminal-justice actors shed some of their daily roles, which often place them in adversarial relationships to one another, to work together on common policy objectives for the system as a whole. Such forums are absent in many jurisdictions. The anecdotal evidence from many state commissions is that members discover opportunities for consensus policy judgments on a surprising number of issues. Second, individual commission members can act as ambassadors for the commission with their home constituencies, ensuring different groups that their concerns are known within the commission. Third, when commissions can boast an inclusive membership, they gain moral authority to speak for the community to a greater degree than individual actors within the system. The collective deliberations of a commission, for example, can help set the retributive anchoring points

⁸⁶ See Robin L. Lubitz and Thomas W. Ross, *Sentencing Guidelines: Reflections on the Future* (Washington, D.C.: National Institute of Justice, 2001), pp. 4-5.

necessary to give content to a punishment philosophy of limiting retributivism.⁸⁷

No American guideline system currently exploits the full potential of purpose-based sentencing, largely because promising innovations exist piecemeal across a number of systems and are nowhere combined into a single comprehensive program. For example, Pennsylvania has pioneered a nuanced approach to layered purposes for different offenses, but the state's system functions with no appellate review to encourage judges to make serious reference to such provisions. In addition, most legislative statements of sentencing purposes, even within guideline systems, have not been refined to interact closely with the decisionmaking of commissions and courts. Most typically, perhaps, legislatures have retained the "multiple choice" or "laundry list" approach of the original Code, albeit with greater emphases upon retribution and public safety than the Code's recommendations. No current legislative statement of punishment goals embraces a theory of layered purposes, which would allow for different combinations of concerns to come to the fore for different crime categories.⁸⁸ This is one area in which a revised Code could spur meaningful advances in the law, building upon the experience of guideline states.

⁸⁷ A little-noticed suggestion of this kind was developed 20 years ago in John Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 *INTERNAT'L J. LAW & PSYCH.* 103 (1982), pp. 109-110. More recently, Richard Frase has argued that LR theory is too flexible to offer useful guidance to individual judges *unless* a sentencing commission or equivalent body has supplied retributive starting points. Richard S. Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment*, in Michael Tonry ed., *THE FUTURE OF IMPRISONMENT IN THE TWENTY-FIRST CENTURY* (New York: Oxford University Press, forthcoming 2004).

⁸⁸ Pennsylvania's layered approach was introduced by the state's sentencing commission.

Resource management. Despite the deserved reputation of the federal sentencing guidelines as major contributors to the growth of the federal prison population, most state guideline systems have been used to opposite effect — to slow the pace of prison expansion. In the late 1980s and throughout the 1990s, the states that embarked on sentencing-guideline reform did so, in large part, because of the perceived ability of guideline structures to manage future prison growth.⁸⁹ Every state that has tried to deploy guidelines to this purpose has succeeded, which includes a majority of all state guideline systems in current operation.⁹⁰

The “resource management” capability of guidelines is likely to remain a major selling point with state legislatures. In the early 2000s, state budget crises nationwide have forced governments to reevaluate correctional and other expenditures, prompting emergency measures and some

⁸⁹ See Leonard Orland and Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. COLO. L. REV. 837, 839-840 (1993).

⁹⁰ Current state-by-state data is presented in text below. For prior analyses and studies documenting the effects of sentencing guidelines as inhibitors of incarceration growth, see Jon Sorenson and Don Stemen, *The Effect of State Sentencing Policies on Incarceration Rates*, 48 CRIME & DELINQ. 456, 469 (2002) (“States with guidelines have significantly lower rates of incarceration and prison admission”); Judith Greene and Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis* (Washington, D.C.: Justice Policy Institute, 2002), pp. 18-19, 31 (based on empirical and anecdotal evidence, recommending that states adopt sentencing guidelines as a way of controlling prison-construction costs without sacrifice to public safety); Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696 (1995) (finding that state sentencing commissions working with political mandates to control prison growth have succeeded in that objective).

heightened interest in long-term planning. This seems to be a common phenomenon across states with stabilizing, dropping, or increasing prison populations.⁹¹ Alabama, the District of Columbia, Georgia, and Wisconsin have all chartered sentencing commissions in the last two years with instructions to study the advisability of new sentencing guide-

⁹¹ See generally Greene and Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis*; Daniel F. Wilhelm and Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT. RPTR. 41 (2002) [a copy of the Wilhelm and Turner article is reprinted with permission as Appendix C]. For more recent developments, see Armando Villafranca and Clay Robison, *Prison System Grapples with Overcrowding*, THE HOUSTON CHRONICLE, February 20, 2003, p. A19; Richard P. Jones, *Prisons: 200 Jobs Would be Cut, Two New Facilities Would Stay Dormant*, MILWAUKEE JOURNAL SENTINEL, February 19, 2003, p. 10A; Gary Heinlein, *Inmate Early-Out Idea Revived: Granholm Revisits Proposal Engler Rejected Among Options to Ease Prison Overcrowding*, THE DETROIT NEWS, February 16, 2003, p. 1D; Matthew Purdy, *Our Towns: So Little Cash for Prisons, So Much Time*, NEW YORK TIMES, February 12, 2003, p. B1 (reporting Governor Pataki's proposal for emergency release of about 1300 nonviolent prisoners, including as many as 800 drug offenders); Henry J. Cordes, *Crime War's Costly Legacy: Counter to U.S. Trends, Nebraska's Prison Population is Rising*, OMAHA WORLD-HERALD, February 9, 2003, p. 4A; Dan Morain and Jenifer Warren, *Battle Looms Over Prison Spending in State Budget*, LOS ANGELES TIMES, January 22, 2003, p. 1; Alexandra Marks, *Strapped for Cash, States Set Some Felons Free*, CHRISTIAN SCIENCE MONITOR, January 21, 2003, p. 3; Bill Rankin, *Judges May Get Sentencing Guidelines*, THE ATLANTA JOURNAL AND CONSTITUTION, January 20, 2003, p. 1D; Loftus Tom, *Hearing Set on Release of Prisoners: 316 Inmates are Freed Early to Save Money*, THE COURIER-JOURNAL (Louisville, Kentucky), January 18, 2003, p. 1B; Alan Johnson, *State [of Ohio] May Close Another Prison: Budget Woes Leave All 33 Institutions "On the Table," Head of Corrections Says*, THE COLUMBUS DISPATCH, January 18, 2003, p. 1A; Chris Clayton, *Budget Creates Bars to [Iowa] Prison Population: Lawmakers Say Changes in Sentencing Laws Could Help Ease the Crunch*, OMAHA WORLD-HERALD, IOWA EDITION, January 11, 2003, p. 1A.

lines as a means (among other goals) of better forecasting and managing the use of correctional resources.⁹²

The information in the preceding two paragraphs will come as a surprise to many readers. The conventional wisdom — built on the notoriety of the federal experience — holds that guideline systems, along with other “determinate” sentencing reforms, including the abolition of parole-release discretion in numerous jurisdictions and the widespread adoption of mandatory-minimum penalties, have been responsible for a large share of the incarceration explosion of the last 20 to 30 years. This conventional wisdom as applied to commission-guideline reforms, although firmly believed in some quarters, is badly off the mark.

Investigation of patterns of prison growth among the 50 states in recent decades shows that the largest upswings in punishment have occurred in those states that have retained the traditional indeterminate structure for sentencing decisions, as endorsed by the 1962 Model Penal Code. Table 1 compares long-term rates of prison growth from 1980 to 2001 among indeterminate structures and three other types of sentencing structures. States are classified as “high-growth” or “low-growth” as measured against the average changes in prison rates nationwide among all 50 states. Table 1 reveals that, of all mainstream systems in operation since 1980, indeterminacy was most often associated with above-average amounts of prison expansion. Cur-

⁹² See Wilhelm and Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, p. 44 (Alabama and Georgia); DISTRICT OF COLUMBIA ADVISORY COMMISSION ON SENTENCING, 2002 ANNUAL REPORT (Washington, D.C.: November 2002), pp. 13-14; Thomas Barland, *2003 Truth-in-Sentencing Seminar: Sentencing Commission Overview* (Madison, WI: Wisconsin Supreme Court Office of Judicial Education, 2003), p. 3.

rent statistics reinforce this judgment. In 2001, eight of the 10 states with the highest prison rates nationwide employed indeterminate structures.⁹³ So did nine of the 10 states with the highest rate of prison-population growth from 1995 to 2001.⁹⁴ These include a number of indeterminate jurisdictions with imprisonment rates spectacularly higher than the national benchmark, such as Louisiana (90 percent above average prison rate among all states), Texas (68 percent above), and Oklahoma (56 percent above).⁹⁵

Table 1. States Above and Below the National Mean for Prison Rate Expansion by Type of Sentencing Structure, 1980-2001*

<i>Type</i>	<i>Number of High-Growth States</i>	<i>Number of Low-Growth States</i>
Indeterminate Systems	18	12
Parole-Abolition States, No Guidelines	3	3
Guideline States Retaining Parole Release	3	2
Sentencing-Guideline-Parole- Release Abolition States	2	7

Sources: Bureau of Justice Statistics, *Prisoners in 2001* (Washington, D.C.: BJS, 2002), p. 4, table 4; Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics — 2000* (Washington, D.C.: BJS, 2001), p. 508, table 6, 28.

*Note: States are classified based on the sentencing structure in place in 2001, provided that structure had been in operation for at least five years. Otherwise, a state is classified according to the sentencing system in use for 17 or more years of the 21-year period. For states that have undergone sentencing reform, the classification as “high-growth” or “low-growth” was calculated for the years after the reform was instituted.

⁹³ U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2001* (Washington, D.C.: BJS, 2002), p. 6, table 6.

⁹⁴ *Id.* at 5 table 5, 6 table 6. Actually, two states (South Dakota and Missouri) were tied in tenth place for rate of prison-population growth for this period — both are indeterminate states.

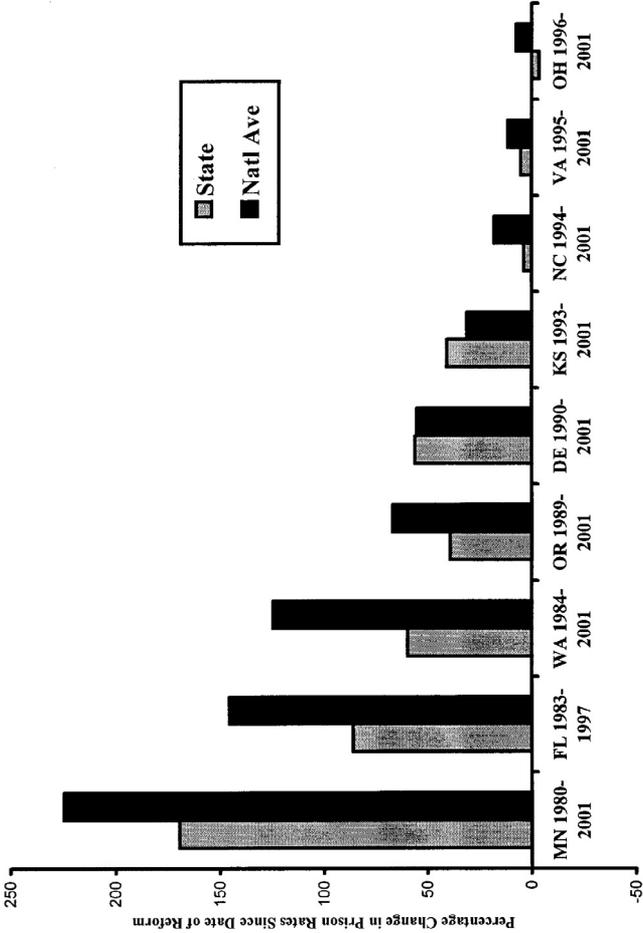
⁹⁵ *Id.* at 4 table 4.

In contrast, the state sentencing structures most frequently associated with below-average rates of prison growth over the same period were those that followed the reform plan pioneered in Minnesota — the adoption of sentencing guidelines accompanied with the abrogation of back-end parole-release discretion. (These might be called “sentencing-guideline-parole-release-abolition” or “SGPRA” jurisdictions.) Nine states have implemented such reforms for more than five-year periods since 1980 and, as displayed in Table 1, seven of the nine have experienced rates of prison expansion below those for the nation as a whole following implementation of reform.

Figure 4 gives further detail to the post-reform incarceration trends in SGPRA states. Minnesota, Florida, Washington, Oregon, North Carolina, Virginia, and Ohio all had *substantially* lower rates of imprisonment change than the nation as a whole in the years following implementation of their guideline reforms. The two SGPRA states with higher-than-average rates of post-reform prison expansion, Delaware and Kansas, were only modestly above the national standard. *See Figure 4 on page 77.*

The fact that most SGPRA systems at the state level have worked to inhibit prison-population growth is attributable to two main causes: First, the SGPRA structure allows for uniquely accurate computerized simulations of future patterns of sentencing decisions, both in the aggregate and line-by-line across specific offenses in the criminal code. This in turn allows for informed policy prioritization and fiscal planning whenever guidelines, amended guidelines, or new punishment laws are proposed or enacted. Second, in the last two decades of American history, policy-makers in most SGPRA jurisdictions have consciously chosen paths over time of comparatively low rates of prison

Figure 4. Prison Rate Change, Guideline States That Have Abolished Parole Release versus National Averages



SOURCES: BJS, *Prisoners in 2001* (Washington, D.C., 2002), p. 4 table 4; BJS, *Sourcebook of Criminal Justice Statistics 2000* (Washington, D.C., 2001), p. 508 table 6.28. Note: Florida abrogated its sentencing guidelines in 1987; Delaware adopted guidelines in 1987, but did not abolish parole-release discretion until 1990.

growth. Some additional words about both causal factors are warranted.

“Resource-management” technology conjoins computer modeling programs with the increased predictability of sentencing patterns under guidelines. Even in guideline systems that cede substantial discretion to trial courts, guideline compliance rates tend to be sufficiently high, and patterns of departures sufficiently predictable, to allow for credible projections of future correctional needs.⁹⁶ In contrast, correctional forecasting within indeterminate systems has proven to be an extremely inexact science. Where the sentencing decisions of judges and parole boards occur within wide ranges of unregulated and unreviewable discretion, changes in sentencing law or process tend to yield uncertain results — sometimes far afield from expecta-

⁹⁶ See Kim Hunt, *Sentencing Commissions as Centers for Policy Analysis and Research: Illustrations from the Budget Process*, 20 LAW & POLICY 465 (1998). The ABA Sentencing Standards included the following illustration:

For example, the commission might wish to weigh the merits of more or less severe penalties for a specific class of drug offenses. Given reliable background information concerning the expected number and severity of such offenses (and the criminal histories of people convicted of such crimes), the commission might develop impact projections for sentence outcomes under various scenarios, as follows: A presumptive incarceration sentence of x months will produce y demand for prison beds; if the presumptive sentence is lowered by two months, the reduced drain on prison space can also be calculated; if the presumptive sentences are altered so that half of the offenders (with less serious criminal histories, perhaps) are assigned to community-based sanctions, the expected use of prison and nonprison resources can be forecast.

ABA SENTENCING STANDARDS, p. 158.

tions.⁹⁷ Thus, the enhanced modeling and prediction powers of guideline structures have come to be seen as one of their most important advantages over traditional, unreformed systems. It is now possible to tell legislators and other policymakers, with reasonable precision, what the price tag of a change in penalties will be, whether large or small, global or offense-specific. It is further possible to build in mechanisms to ensure that there is willingness to fund needed resources (or live within the constraints of existing resources) as a regular part of the lawmaking process.

If desired, a sentencing commission can be instructed to do its work in light of available or funded facilities. The ABA Sentencing Standards gave emphasis to the responsibility of sentencing commissions to monitor and control the use of finite correctional resources:

[The sentencing commission or equivalent agency] should see that the aggregate of sentences

⁹⁷ See generally ZIMRING AND HAWKINS, *THE SCALE OF IMPRISONMENT*, chapter 3 (recounting the disappointing track record of correctional forecasting). William Woodward, former Director of the Colorado Division of Criminal Justice, has told me about the difficulties of formulating impact projections for a legislative change that occurred in Colorado in the late 1980s. The statutory maximum penalties for many felonies were raised substantially, including some that were doubled, while minimum available penalties were left unchanged. No one knew how often judges would use their new freedom to impose very severe sentences, but most people guessed that, in the ordinary run of cases, judges would impose prison terms similar to those they had selected before the change. This assumption was made part of the model for projecting future impact. Instead, however, in the years following the legislation, even average sentences lengthened substantially, as though the elevated ceiling of the penalty range had pulled the entire bell curve of sentences toward the higher maximum values. For a time, and without advance planning, Colorado had one of the fastest-growing prison systems in the country.

imposed in conformity with legislative policies does not exceed the facilities and services provided for the proper execution of those sentences. In particular, the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state.⁹⁸

Resource management entails more than simply governing the aggregate size of correctional populations. It also allows for the establishment of priorities in how sanctions resources are used. For example, most state sentencing commissions have crafted guidelines to increase penalties for serious violent offenses, sometimes very substantially. Us-

⁹⁸ ABA SENTENCING STANDARDS, Standard 18-2.3(e). Commentary to this Standard further provided:

Standard 18-2.3 simultaneously rejects two strong views of the relationship between resources and sentencing decisions: (1) the idea that existing resources should control sentencing policy, and (2) the notion that responsible sentencing policy can be made without consideration of resources. Either view, in its pure form, is nonsensical. Resources and policy are interactive variables. As policy evolves, or when it is discovered that existing policy is not being well served, significant changes in funding allocations may be necessary. At any one moment in time, however, the total facilities available for the administration of sentences are fixed and finite. It is a prime function of the legislature and sentencing agency to see that they are apportioned wisely.

Id. at 27, citing Kay A. Knapp, *Allocation of Discretion*, at 686-689; Kay A. Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181, 183-184 (1984); Andrew von Hirsch, *The Sentencing Commission's Functions* at 12-14, in ANDREW VON HIRSCH, KAY A. KNAPP, AND MICHAEL TONRY, *THE SENTENCING COMMISSION AND ITS GUIDELINES* (Boston: Northeastern University Press, 1987).

ually, however, “toughness” on violence has been paired with guidelines fashioned to reduce penalties for specific categories of nonviolent offenses. Because the most serious crimes occur in far smaller numbers than less serious crimes, many commissions have found that large incremental increases in punishments for violent offenses may be offset with modest incremental decreases in sanctions for property crimes. Minnesota first demonstrated in the 1980s that such tradeoffs could be accomplished with little or no change in total required prison capacity. Since then other states have replicated Minnesota’s experience including, most recently, North Carolina and Virginia in the mid and late 1990s.⁹⁹ Indeed, North Carolina took the Minnesota precedent one step further. The North Carolina “structured sentencing” scheme has lengthened sentences for violent offenders, has reduced the use of imprisonment for many nonviolent felons, and has routed many otherwise prison-bound offenders to intermediate sanctions newly funded by the state legislature to meet the sentencing commission’s projections of need. All of this has been accomplished with minimal growth in the state’s incarceration rates.¹⁰⁰

The North Carolina experience (along with reforms in Delaware and Pennsylvania) demonstrates that the resource-

⁹⁹ For detailed state-specific discussions, see Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. LAW & PUB. POLICY 279 (1993); David Boerner and Roxanne Lieb, *Sentencing Reform in the Other Washington*, in Michael Tonry ed., CRIME AND JUSTICE: A REVIEW OF RESEARCH, vol. 28 (Chicago: University of Chicago Press, 2001), pp. 71-136; 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 (Chicago: University of Chicago Press, 2002), pp. 39-112.

¹⁰⁰ Wright, *Counting the Cost of Sentencing in North Carolina*.

management function can be turned to sentencing policy generally, not merely to incarceration policy. Planned diversions of less serious offenders in North Carolina away from the prisons and into community-based punishments were made feasible by the sentencing commission's ability to project the funding needs for community program slots. In part because the commission had gained a reputation for accurate correctional forecasting, the state legislature was persuaded to devote substantial new appropriations to programs such as intensive probation and day-reporting centers, to accommodate the anticipated flows of previously prison-bound offenders.¹⁰¹ When such planning is absent, as in the recent example of Proposition 36 in California (a voter initiative to divert many classes of drug offenders from prison to drug treatment), large changes in sentencing law can produce great dislocations when newly-sentenced offenders appear in numbers that overwhelm the available program slots. At best, states are in a position of playing catch-up when this occurs.¹⁰² At worst, desired policy changes may collapse or be deemed a failure because of inadequate implementation.

The discussion above has been meant to challenge the stereotype that determinate sentencing reform, and guideline reform in particular, has proven in the past to be an engine of ungoverned prison growth. For the most part, the experience in commission-guidelines jurisdictions has been otherwise. It would be a mistake, however, to see the resource-management capability of these systems as *necessarily* allied with a deincarceration agenda. A sentencing commission's planning

¹⁰¹ Id. at 84-86, 91-92.

¹⁰² See CALIFORNIA DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS, SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000 (SACPA — PROPOSITION 36); FIRST ANNUAL REPORT TO THE LEGISLATURE (Sacramento, 2002), pp. 27-28, 42.

capabilities may be turned just as easily to policies of incarceration growth as to the inhibition of such growth. Among longstanding guideline reforms only two jurisdictions have pursued deliberate incarceration-growth agendas consistently over many years: the Pennsylvania and federal systems. Both systems have succeeded smashingly in realizing their chosen objectives.¹⁰³ As Michael Tonry has observed, however, it is incorrect to classify these jurisdictions as examples of failure of the resource-management tools provided by guidelines. If one has a quarrel with either set of outcomes in the federal or Pennsylvania system, it is a quarrel with the substantive policies concerning sentencing severity that have been fed into the guideline systems, not with the systems' abilities faithfully to translate policy into results.¹⁰⁴

Even so, the past low-growth experience in many guideline states may be a fair indicator of the future performance of similar structures in other jurisdictions. There could be something about the very institutions of commission, guidelines, and resource-management tools that combine over the long haul in the direction of parsimony in punishment. This may be so even recognizing that the policies and politics of criminal justice will oscillate over the years and decades in all jurisdictions. The typical state that has

¹⁰³ Per capita confinement in the federal prisons grew 182 percent from 1987 (the year of guideline implementation) to 2001 — a rate impressively greater than the swift nationwide growth among the states of 100 percent over the same period. In Pennsylvania, since the beginning of the guideline regime in 1982 through 2001, the state prison population expanded by 252 percent, far outpacing the national average among the states over the same period of 164 percent. U.S. Department of Justice, *Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics — 2000* (Washington, D.C.: BJS, 2001), p. 506 table 6.28; Bureau of Justice Statistics, *Prisoners in 2001*, p. 4 table 4.

¹⁰⁴ See Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. Colo. L. Rev. 713 (1993).

employed an SGPR 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 notions of lenity or restraint 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.¹⁰⁵ For a number of years following these amendments, the rate of growth in the Minnesota prisons outstripped national averages. On the other side of the coin, however, most years under the Minnesota guidelines have been years of relative restraint in the expansion of prison resources.¹⁰⁶ During some years, therefore, the SGPR systems provide effective tools to retard punitive expansionism that would otherwise occur — and this ends up being a significant thing even if it does not happen every year. Over the long term, the broken cadence of punitiveness in some years, and parsimony 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 SGPR system.

It is no small accomplishment when a policy tool appears on the horizon that works to a reasonable degree of consistency with its intentions. In a 1995 study of guideline commissions and incarceration growth, researcher Thomas Marvell wrote:

¹⁰⁵ 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 (1993), pp. 359-360.

¹⁰⁶ For a report of a similar history in North Carolina, see Wright, *Counting the Cost of Sentencing in North Carolina*, p. 90.

Sentencing guidelines are strongly associated with comparatively slow prison population growth whenever the legislature charged the sentencing commission to consider prison capacity when establishing presumptive sentencing ranges. . . . These findings are a refreshing departure from the usual negative results when evaluating criminal justice reforms.¹⁰⁷

It is not enough, of course, to erect a sentencing system that manages resources and does nothing else. In a comprehensive program of sentencing reform, however, such a planning capacity is a prerequisite to responsible policymaking in the furtherance of other goals.

Uniformity in sentencing. It is probably fair to say that uniformity in punishment — or the elimination of unwarranted sentencing disparity — has proven to be a more elusive commodity than many proponents of sentencing guidelines foresaw in the 1970s and 1980s. For one thing, the past few decades have not yielded a consensus on what *counts* as uniformity. As one wag observed, “uniformity” could be taken to mean that all felons, no matter what their crimes, should receive cookie-cutter five-year prison sentences. On the opposite extreme of the argument, defenders of indeterminacy sometimes urge that the seemingly wild disparities of discretionary sentencing would largely evaporate if we only knew enough about the texture and details of each case. Uniformity (relative to what criteria) tends to be in the eye of the beholder.

Nearly all guideline systems report that, in the majority of cases, trial judges follow the applicable presumptive sen-

¹⁰⁷ Marvell, *Sentencing Guidelines and Prison Population Growth*, p. 707.

tences. Many observers accept this as evidence of a better pattern of sentencing uniformity than prevailed under indeterminate systems.¹⁰⁸ The claim carries force if one accepts the anchor points of current offense and prior record as satisfactory bases for making initial punishment determinations. Even assuming the parties can manipulate the system through charge or sentence bargains, as undoubtedly occurs in every guideline system, the parties' decisions and negotiations unfold against the background of relatively predictable results if their cases were fully litigated. It would be surprising if this knowledge did not influence bargained resolutions, causing them on the whole to reflect guideline penalties adjusted for such factors as the sentence discount normally afforded to defendants who agree to forego trials, and the strength or weakness of the prosecution's evidence.¹⁰⁹ Even given the complexities of multi-stage case processing and a settlement-driven system, evidence of enhanced uniformity expressed in terms of guidelines compliance tells us something.

Furthermore, so long as the schema of the guidelines is available to public inspection, the built-in criteria of "uniformity" can be studied and debated.¹¹⁰ For example, the federal sentencing system bases penalties on the so-called

¹⁰⁸ See TONRY, SENTENCING MATTERS, chapter 2.

¹⁰⁹ Cf. Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

¹¹⁰ Exactly such a debate has been raging for years within the federal system. Critics of the federal guidelines argue that high rates of guideline compliance (enforced with rigor by the federal appellate courts) show nothing more than false uniformity in sentencing. See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AMER. CRIM. L. REV. 833 (1992); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681

“relevant conduct” of offenders, which may include alleged criminal violations reaching far beyond the charges of conviction. In contrast, most state guideline systems key punishment only to offenses of conviction — and some actively prohibit the consideration of facts having to do with uncharged crimes.¹¹¹ Regardless of one’s policy preferences among these systems, it is only in guidelines jurisdictions that the issue of conviction-offense versus real-offense sentencing comes to light for open debate and rulemaking purposes. This is far more than can be said of the black-box processes of the indeterminate structure, where speculation is often the most powerful tool for discovering what considerations play into actual sentencing dispositions.

It is important to recognize that the goal of uniformity in sentencing is complex and contestable, both when evaluating existing systems and in designing a new one. The thought is too often overlooked. Some evaluations of guideline systems, for example, treat departure decisions as *per se* non-uniform, so that discretionary choices taking penalties outside the presumptive range are treated as undesirable — or as a return to the bad old days of unregulated discretion. Such conclusions are too hasty. Under the Minnesota model, departure decisions are cut free of the quantitative terms of the guidelines, to be sure, but they are nonetheless steered by principles of gen-

(1992). But again, it depends on one’s definition of the term. If one believes that the federal guidelines mandate lock-step punishments that exclude consideration of important offender characteristics, then the federal guidelines will appear to demand rigidly disparate sentences. On the other hand, if one believes that most personal characteristics of defendants should be removed from the sentencing calculus, then current federal sentences tend to look more appropriate and more uniform.

¹¹¹ For a discussion of different approaches to these issues nationwide, see Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993).

eral application articulated in legislation, guidelines, and judicial precedent. Minnesota appellate case law, for example, allows downward departures from the presumptive guidelines if the defendant is shown to be unusually amenable to probation.¹¹² This ground for departure is “uniformly” available in the sense that trial courts must in all cases consider whether or not defendants possess the mitigating characteristic.¹¹³ Further, if the court concludes that an adjustment away from the presumptive-guideline sentence is needed, the *starting point* for analysis remains the guideline range, and the magnitude of the departure must be defended in light of that point of departure. In Minnesota, as departure sentences stray farther and farther from the presumptive penalty, the likelihood of reversal on appeal increases.¹¹⁴

In early drafting for the revised Code, the general definition of “uniformity” is formulated with reference to the underlying goals of the sentencing system, thus defusing any expectations of cookie-cutter penalties. In proposed black-letter, the concepts of uniformity, certainty, and proportionality, are all defined with reference to the theory of limiting

¹¹² See, e.g., *State v. Wright*, 310 N.W.2d 461 (Minn. 1981); *State v. Trog*, 323 N.W.2d 28 (1982).

¹¹³ This is not the case in indeterminate-sentencing systems, where trial judges can differ widely on what factors should be considered in aggravation or mitigation. See FRANKEL, *CRIMINAL SENTENCES*, pp. 23, 112-113.

¹¹⁴ For example, the Minnesota courts have created a rule that an aggravated penalty of more than twice the upper limit of the guideline range must be justified by unusually compelling circumstances, but departures of lesser degree are afforded the deference of an abuse of discretion standard. See *State v. Evans*, 311 N.W.2d 481 (Minn. 1981); *State v. Stumm*, 312 N.W.2d 248 (Minn. 1981). Mitigated departures have very rarely been reversed on appeal in Minnesota. See Reitz, *Sentencing Guideline Systems and Sentence Appeals*, p. 1486.

retributivism.¹¹⁵ Because LR theory allows for a combination of desert-based and instrumental considerations to influence punishment outcomes, the “neutral application” of these considerations allows for the individualization of sentences and envisions something far different from a pure tariff system. Defendants are entitled to a consistent reasoning process, not prefabricated results.

Racial and ethnic overrepresentations in punished populations. For a very long time, the most pressing issues of uniformity and disparity in American criminal law have been those of racial and ethnic disproportionalities in sentences imposed. These subjects were not addressed explicitly in the original Model Penal Code. The new Code’s sentencing structure should be fashioned in a way that maximizes the potential for policymakers to identify and eliminate imbalances in punishment that unfairly impact minority communities.

Dating back to the late 19th century, African-American imprisonment rates have grown steadily and more quickly than rates among whites, and this has contributed to extremely high levels of African-American incarceration during the prison explosion of the last three decades. Figure 5, tracing the relative white-male and black-male imprisonment rates from 1880 to 2000 gives visual emphasis to this sad history. In 1880, the black-male imprisonment rate was 2.3 times that for white males. This differential increased more or less steadily to a disparity ratio of 7.7 in the year 2000.¹¹⁶ The relative dis-

¹¹⁵ See proposed § 1.02(2)(b)(ii) [Appendix A].

¹¹⁶ If current jail statistics are added to the analysis (these cannot be traced back very far in time), the picture remains much the same. Black incarceration rates in both prisons and jails, measured against population, stood at nearly seven times the comparable white rates in 2001. U.S. Department of Justice, Bureau of Justice Statistics, *Prison and*

parity ratio, while a serious matter in itself, has had a magnified effect on African-American communities as prison populations themselves have expanded seven times over in raw size since the early 1970s. The dramatic bar graph in Figure 5 captures the *combined* effects of worsening proportional disparities between blacks and whites in prison, together with the sheer growth of the prison enterprise itself, especially in the last 30 years. According to the U.S. Department of Justice, young black males born in America in the early 1990s faced an estimated lifetime risk of serving time in prison of 28.5 percent, compared to an estimated 4.4 percent risk among white males of similar age.¹¹⁷ In the intervening decade, those probabilities have only worsened.

If one combines today's correctional populations in the prisons, jails, on probation, and on parole, nearly one-third of young adult African-American males (in the age group 20 to 29) are under the jurisdiction of American criminal-justice systems on any given day.¹¹⁸ Single-city estimates in the early

Jail Inmates at Midyear 2001 (Washington, D.C.: BJS, 2002), p. 12 table 15 (the incarceration rate for black males was 6.9 times the white-male rate; among black females, the incarceration rate was 5.7 times the white-female rate).

¹¹⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Lifetime Likelihood of Going to State or Federal Prison* (Washington, D.C., 2001), p. 1. The estimates in this report were derived assuming that U.S. imprisonment rates in 1991 were to remain unchanged in the future. Between 1991 and 2000, however, per capita imprisonment nationwide increased by an additional 53 percent, suggesting that the estimates in the *Lifetime Likelihood* report may be too low by a significant margin. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2000* (Washington, D.C., 2001), p. 507 table 6.27.

¹¹⁸ MARC MAUER, *RACE TO INCARCERATE* (New York: The New Press, 1999), pp. 124-125; Marc Mauer and Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (Washington, D.C.: The Sentencing Project, 1995), p. 3.

1990s produced still higher control rates in one-day counts: 42 percent of young black males aged 18 to 35 were under justice-system control in Washington, D.C., and 56 percent in Baltimore.¹¹⁹ It bears emphasis that these are snapshot observations, which understate long-term impacts. The lifetime likelihood of events such as felony arrests, convictions, and sentences for black-male residents of the poorest neighborhoods in the nation, while it cannot be calculated with confidence, can only be staggering. *See Figure 5 on page 92.*

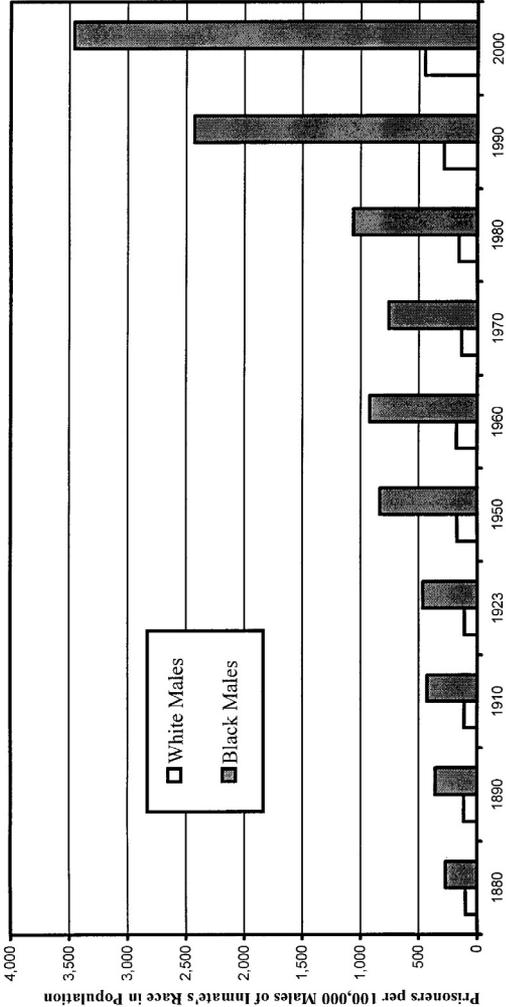
Criminal-justice statistics for minority groups other than African Americans are extremely spotty, are subject to controversial and changing definitions, and do not extend far back in time.¹²⁰ Still, the data available on Hispanics and Native Americans reveal disturbing patterns in punishment, although at lower levels of numerical disproportionality than for African Americans. Blumstein and Beck reported that, “Hispanics were by far the fastest-growing minority group among [prison] inmates, increasing from approximately 9.7 percent of all inmates in 1980 to 17.6 percent of all inmates in 1996.”¹²¹ By 2001, the Hispanic incarceration rate among males in prison and jail was nearly two and one-half times the

¹¹⁹ See Jerome G. Miller, *42 Percent of Black D.C. Males, 18 to 35, Under Criminal Justice System Control*, *OVERCROWDED TIMES*, vol. 3(3), pp. 1, 11 (1992); Jerome G. Miller, *Hobbling a Generation: Young African American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland* (Alexandria, VA: National Center on Institutions and Alternatives, 1992).

¹²⁰ See GARY LAFREE, *LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA* (Boulder, CO: Westview Press, 1998), p. 48 (noting “limitations and difficulties” in criminal-justice data for such groups as Hispanics, Native Americans, and Asians).

¹²¹ Blumstein and Beck, *Population Growth in U.S. Prisons*, pp. 22-23.

Figure 5. Male Imprisonment Rates by Race, 1880 to 2000



SOURCES: U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2000* (Washington, DC: Bureau of Justice Statistics, 2001), p. 11 table Historical Corrections Statistics in the United States, 1850-1984 (Washington, D.C.: U.S. Government Printing Office, 1986), pp. 34 table 3-6, 65 table 3-3 Incarceration in the United States since 1880: A Summary of Reported Rates and the Distribution of Offenses, *Crime & Delinquency*, 25:9-41 (1979), p. 4 *Census of Population* (various years).

white rate.¹²² The lifetime-imprisonment risk for Hispanic males born in the early 1990s, according to the Justice Department study cited earlier, was 16 percent, 44 percent lower than the risk for black males but more than three times the risk for white males.¹²³ According to 1997 data (the most recent available), Native-American imprisonment rates were then two and one-half times the white rate, and the Native-American incarceration rate in local jails more than six times the white rate.¹²⁴ These numbers suggest lifetime-incarceration risks for Native Americans at least as great as those for Hispanics.

Large overrepresentations of minority groups in sentenced populations sound significant alarm bells for a society, and can lead to public perceptions of rampant unfairness. A growing literature posits that the efficacy of a criminal-justice system depends in part upon its reputation of moral legitimacy among those groups affected by it.¹²⁵ In some communities, among many African Americans, and among many critics of U.S. punishment practices of all races and ethnicities,

¹²² Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, p. 12 table 15 (the incarceration rate for Hispanic males was 2.4 times the white-male rate; among black females, the incarceration rate was 1.8 times the white-female rate).

¹²³ Bureau of Justice Statistics, *Lifetime Likelihood of Going to State or Federal Prison*, p. 1.

¹²⁴ U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime* (Washington, D.C.: BJS, 1999), p. 26 table 33.

¹²⁵ The negative consequences of widespread distrust of the criminal-justice system have drawn considerable comment over time. They include reduced inclinations to abide by the law, cooperate with officials during a criminal investigation, and even to report serious criminal victimizations in the first instance. See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE*

the gross disparities in sentencing that exist nationwide are accepted as *prima facie* evidence of pervasive and deeply-rooted biases in policing, prosecution, adjudication, and sentencing. It is not uncommon, for example, to hear of recent initiatives against crime, or the “war” on drugs, characterized as examples of covert racial warfare or, somewhat less pejoratively, as a cynical exploitation of racial hostilities for political gain.¹²⁶ That these beliefs are widespread, especially in some communities, is a grave problem for a system of law *in addition to* the underlying realities of the distribution of crime and punishment.

OF CRIME IN A FREE SOCIETY (Washington, D.C.: U.S. Government Printing Office, 1967), pp. 49-55; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (New Haven: Yale University Press, 1990), pp. 19-68 (arguing that compliance with law depends largely on the perceived fairness of the legal system); Lawrence Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RSRCH. CRIME & DELINQ. 445 (1993); JAMES W. CLARKE, *THE LINEAMENTS OF WRATH: RACE, VIOLENT CRIME, AND AMERICAN CULTURE* (New Brunswick: Transaction Publishers, 1998); BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (New York: Routledge, 1996), pp. 77, 95-97. For these reasons, one of the express systemic goals included in new drafting in § 1.02(2)(b) is “to enhance the legitimacy of [the sentencing and corrections system’s] operations as perceived by all affected communities.” See Appendix A.

¹²⁶ See, e.g., JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (Cambridge: Cambridge University Press, 1996), p. 1; KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (New York: Oxford University Press, 1997), pp. 28-29, 32-33; WILLIAM J. CHAMBLISS, *POWER, POLITICS, AND CRIME* (Boulder: Westview Press, 2001), p. 141. These are not altogether new assertions. See AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (New York: Hill & Wang, 1971), p. 107 (“The justice system functions to maintain a racist relationship between the white majority and the black, brown, red, and yellow minorities in America”).

The historical facts of racial animus in the administration of criminal justice during the past 140 years are at times quite stark.¹²⁷ It is pleasant to think that one's contemporary era is wholly free from outrages of the past, but not realistic. No one can doubt that improper discrimination based on race and ethnicity (and other personal attributes of offenders) still exists today within American criminal-justice systems, and that it is not an isolated or aberrational phenomenon. Reasonable disagreement can exist, however, concerning the sources, locations, and full extent of improper biases. These are critically important questions to investigate. Remedial efforts, if they are to be effective, can only begin with a careful study of the layers, nuances, and even the unattractive realities of the problem at hand. In our culture, however, such inquiry is exceedingly difficult to undertake in matters of race and, to some extent, ethnicity. Almost any starting point intrudes upon sensitive domains of emotion and politics. As William Julius Wilson has written, the study of conditions in the most deprived neighborhoods of America's inner cities has been stunted for years by fear among researchers that they will be charged with racism when reporting their findings.¹²⁸ Michael Tonry, who

¹²⁷ See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (New York: Pantheon Books, 1997), chapters 2 and 3; EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* (New York: Oxford University Press, 1984), chapters 5, 6, and 7.

¹²⁸ Wilson attributes this fear among researchers to the "virulent attacks" on the Moynihan report following its publication in the 1960s. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (Chicago: University of Chicago Press, 1987), pp. 15, 20. See also DANIEL PATRICK MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (Washington, D.C.: Office of Policy Planning and Research, U.S. Department of Labor, 1965). Wilson explained that "the controversy surrounding the

published a thoughtful study on race, crime, and punishment in the mid-1990s, explained in his preface that he was moved to write the book in large part because so many other qualified scholars had refused to approach the controversial subject.¹²⁹ If these accounts are representative, the paralysis of American legal systems in dealing with the question of race and punishment may be attributable in part to a fear of opening the debate. The Institute has an opportunity, not without peril, to do a public service in helping to break this impasse.

Reasoned analysis requires a sound factual foundation, however uncomfortable the facts may be. It is essential to recognize that numerical overrepresentations of some groups (such as men, African Americans, and young people in their 20s and 30s) in sentenced populations are not by themselves proof of the degree of illicit discrimination within sentencing

Moynihan report had the effect of curtailing serious research on minority problems in the inner city for over a decade, as liberal scholars shied away from researching behavior construed as unflattering or stigmatizing to particular racial minorities.” WILSON, *THE TRULY DISADVANTAGED*, p. 4.

¹²⁹ MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (New York: Oxford University Press, 1995), p. viii. Tonry’s account is illuminating:

Criminologists likewise [like social welfare scholars] long avoided the issue of “race and crime” for the same reasons [fear generated by “fierce attacks” on the Moynihan report] and also to avoid being labeled a racist. Several times from the 1970s onward, I tried to commission essays on race and crime for *Crime and Justice*, a book series I edit for the University of Chicago Press that specializes in state-of-the-art reviews of knowledge on important research and policy subjects. Most qualified scholars turned me down cold. Two took on the subject and later withdrew because it was just too controversial. Serious writing on race and crime resumed only in the mid-1980s and continues at a trickle.

systems.¹³⁰ Accusations based solely on the raw statistics risk unfairness to many people who work within U.S. justice systems in good faith. Reflexive charges of racism can also bring about intellectual and political stalemate, and can alienate people who might otherwise be sympathetic to proposals for change.¹³¹

There is now a consensus among researchers that a large share of the numerical overrepresentations of African Americans in punished populations is not the result of discriminatory treatment by police, prosecutors, or sentencing courts. Even the shocking incarceration figures for African Americans in recent years lose some of their impact when compared with African-American homicide-commission rates in the 1990s (at times exceeding eight times the white rates), or African-American armed-robbery rates (sometimes exceeding 10 times the white rates).¹³² The risk of serious victimization has also been intolerably high among many minority communities in the contemporary United States. African Americans nationwide in the late 1990s faced homicide-victimization risks that were six-to-seven times those experienced by white Americans. For Hispanics, according to available data, the homicide risk in some communities has been four-to-five times the white rate.¹³³ Ninety-four percent

¹³⁰ For example, the current incarceration rate among males of all races and ethnicities is nearly 12 times the rate among females. The incarceration rate for males aged 25 to 29 is 20 times the rate for males 55 and older. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001*, p. 12 table 15.

¹³¹ See generally KENNEDY, RACE, CRIME, AND THE LAW, chapter 1.

¹³² See FRANKLIN E. ZIMRING AND GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (New York: Oxford University Press, 1998), p. 76.

¹³³ Franklin Zimring, Keynote Speech, 2000 Law and Policy Symposium, *Reactions to Youth Violence: The Legacy of Columbine*, Uni-

of black homicide victims in 1998 were killed by black offenders, and 76 percent of all blacks who were the victims of any violent crime in the 1990s were victimized by black offenders.¹³⁴ In the most disorganized communities, these daily risks are much greater than the averaged-out figures portray.

In a famous series of studies, Alfred Blumstein estimated that 75 to 80 percent of black-white disparities in U.S. prison populations could be accounted for by racial differences in crime commission based on arrests (working with data from 1991 and 1979).¹³⁵ Blumstein's work has consistently suggested that "unexplained" racial disproportionalities are largest for crimes at the low end of the seriousness scale — especially drug offenses.¹³⁶ This suggests that racial biases influence punishment most dramatically where there is widest

iversity of Denver College of Law, Denver, Colorado, March 24, 2000; Darnell F. Hawkins, John H. Laub, and Janet H. Lauritsen, *Race, Ethnicity, and Serious Juvenile Offending*, in Rolf Loeber and David P. Farrington, eds., *SERIOUS & VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* (Thousand Oaks, Calif.: Sage Publications, 1998), p. 38.

¹³⁴ U.S. Department of Justice, Bureau of Justice Statistics, *Homicide Trends in the U.S.: 1998 Update* (Washington, D.C.: BJS, 2000), pp. 1-3; U.S. Department of Justice, Bureau of Justice Statistics, *Violent Victimization and Race, 1993-98* (Washington, D.C.: BJS, 2001), p. 10 table 14.

¹³⁵ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993); Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1983).

¹³⁶ See also KENNEDY, *RACE, CRIME, AND THE LAW*, chapter 10; MAUER, *RACE TO INCARCERATE*, chapter 8; TONRY, *MALIGN NEGLECT*, chapter 3; DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (New York: The New Press, 1999), pp. 141-146; Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (Washington, D.C.: HRW, 2000).

discretion over arrest, charging, and sentencing decisions. Many uncertainties entered into the analysis,¹³⁷ but Blumstein's conclusions have held up well in light of later research, including works based on methodologies far different from his landmark studies.¹³⁸ Even assuming that roughly three-quarters of racial disparities in imprisonment can be explained by differential crime rates, however, we are still left with the very substantial figure of 25 percent that is not explained. These clinical-sounding percentage points are amplified in social importance by the unprecedented scale of the U.S. incarceration industry. In the year 2001, roughly one million African Americans were housed in prisons and jails across the country. The possibility of illegitimate considerations contributing "only" a 20 or 25 percent share of such enormous dislocations of human lives and communities would describe an abomination of historic proportions.

¹³⁷ Blumstein acknowledged that his methodology was limited on a number of counts: He could not test the possibility that blacks on average might commit more serious variants of certain crimes than whites, nor could he correct for the possibility that black defendants on average might come to court with more serious records of prior offending. In either case, racial differences in imprisonment might be explicable to an even higher degree than that shown in Blumstein's findings. On the other hand, Blumstein could not determine whether penalties for black-on-black crime were sometimes disproportionately low, an effect that might mask the imposition of unusually severe sentences for black-on-white crimes. Such twin effects, both manifestations of indefensible biases, could offset one another while producing the misleading appearance that aggregate sanctions imposed on black offenders are closely linked with actual crime rates. See also Robert D. Crutchfield, George S. Bridges, and Susan R. Pitchford, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY, 166 (1994).

¹³⁸ See, e.g., the surveys of research in LAFREE, LOSING LEGITIMACY, chapter 3; TONRY, MALIGN NEGLECT, chapter 2.

Racial disproportionalities in punishment are a national tragedy, but so are racial disproportionalities in crime commission and victimization, especially at the high end of the violence spectrum. It has for some time been politically correct to avert one's eyes from the facts of black-white crime differentials, but avoidance tactics do a good service to no one. If it is true that the bulk of punitive disparity originates in differential crime rates, then anyone who cares about racial justice in America should be focusing major effort on understanding and combating the causes of higher levels of crime in our poor, urban, minority communities. Urban sociologists such as William Julius Wilson and Robert Sampson have long maintained that disorganized communities and concentrated poverty and segregation have produced extraordinarily high levels of crime, especially violent crime, in our poorest minority neighborhoods.¹³⁹ A much greater percentage of black than white children are raised in conditions of intense poverty and family disruption.¹⁴⁰ Ethnographies such as Elijah Anderson's *Code of the Street* suggest that, for many black children in the

¹³⁹ Robert J. Sampson and William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in John Hagan and Ruth D. Peterson, eds., *CRIME AND INEQUALITY* (Stanford: Stanford University Press, 1995), pp. 37-54; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (Chicago: University of Chicago Press, 1987), pp. 22-26; Robert J. Sampson, *Neighborhood and Crime: The Structural Determinants of Personal Victimization*, 22 *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* 7-40 (1985).

¹⁴⁰ Research has documented that the "underclass" status of a community is associated with high crime rates among the people who live there, regardless of race and ethnicity. Lauren J. Krivo and Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 *SOCIAL FORCES* 619-650 (1996); Faith Peeples and Rolf Loeber, *Do Individual Factors and Neighborhood Context Explain Ethnic Differences in Juvenile Delinquency?*, 10 *JOURNAL OF QUANTITATIVE CRIMINOLOGY* 141-158 (1994).

inner cities of the late 20th century, involvement in gangs, the drug market, and violent interaction was both rational and very hard to avoid.¹⁴¹

No American criminal-justice system can stand aloof from the stark realities of longstanding racial differences in sentencing outcomes, and growing ethnic differences, whatever their sources. Such disparities produce corrosive effects on perceptions of fairness and system legitimacy within minority communities, with disastrous effects reaching far outward into law and culture. Yet there is no uncomplicated solution in view. From a policy perspective, it is surely unwise to declare that numerical overrepresentations in punishment by racial and ethnic group can never be allowed to exist, if such an edict were to foreclose the ability of the legal system to respond to true differences in crime commission, and to address risks of victimization that are felt most acutely in minority communities. Still, the unique historical and social context of race relations in this country suggests that a burden of explanation, based on hard data, ought to rest upon government to explore and justify differential sentencing patterns that now exist, and that government should also strive to ameliorate such patterns to the degree that this can be done without sacrificing important underlying objectives of the crime-response system.

No American jurisdiction has yet approached such modest ideals in practice. The track record of state guideline systems in the domain of race and sentencing has been one of marginal but apparently positive effects, which stand dimly lit

¹⁴¹ ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (New York: W.W. Norton & Company, 1999). See also ELIJAH ANDERSON, *STREET WISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (Chicago: University of Chicago Press, 1990).

against a general backdrop of inattention and inaction. The few commissions that have purported to assess the issue have reported modest reductions in racially-disparate sentencing following the implementation of sentencing guidelines, although there have also been findings in a number of jurisdictions that departure decisions, where case-specific discretion is most powerful, tend to be more favorable to white than black defendants.¹⁴² No guideline jurisdiction claims to have made major headway on the problem of minority group overrepresentation in punishment. To make the picture more sobering, forceful charges have been leveled against the federal sentencing system that its guidelines, particularly for drug offenses, and in conjunction with mandatory-minimum penalties for drug crimes enacted by Congress, have exacerbated preexisting racial disparities in the federal prisons without persuasive justification.¹⁴³

A Model Penal Code revision should seek to spur investment at the state level in the tracking and analysis of racial and ethnic patterns in sentencing, including the factors that contribute to those patterns. Elementary data are lacking about relationships among punishments imposed, race or ethnicity of offender, race or ethnicity of victim, crime seriousness, the presence of aggravating or mitigating factors, and offenders' prior criminal histories. Improved information of this kind would inform legislative decisionmaking, and public debate, about whether and when numerical overrepresentations outcomes are explicable in light of the realities of crime and the goals of crime prevention. It may even be desirable, on a scheduled and periodic basis, for commissions to audit

¹⁴² Relevant reports from a number of state commissions are surveyed in TONRY, SENTENCING MATTERS, chapter 2.

¹⁴³ See, e.g., Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); TONRY, MALIGN NEGLECT, chapter 3.

long-term trends in racial and ethnic effects of the sentencing system as a whole, perhaps as part of an omnibus systemic review.¹⁴⁴

Further, commissions should be charged to investigate levers of change that may be built into guideline systems to attack disparities where they are discovered. For example, some guideline structures now operate with strong prohibitions against the consideration by judges at sentencing of many personal characteristics of offenders. One theory behind the restriction is that such characteristics as employment history, educational attainment, family situation, and standing in the community will act as proxies for variables of race or ethnicity, usually to the detriment of minority offenders. No one knows whether this rationale holds water, however, because we have no comparative information from jurisdictions that follow, and jurisdictions that reject, this approach. Perhaps the ABA Sentencing Standards were right to suggest an alternative view, that personal characteristics of offenders may be weighed by sentencing courts in mitigation of the severity of sentence, but only “if the characteristics are indicative of circumstances of hardship, deprivation, or handicap.”¹⁴⁵ Again, we simply do not know. Designers of sentencing systems ought to be in a position to say which alternative is most conducive to equity in sentencing, or whether there is any difference at all.¹⁴⁶

¹⁴⁴ See ABA SENTENCING STANDARDS, Standard 18-2.7.

¹⁴⁵ *Id.*, Standard 18-3.4(c).

¹⁴⁶ To cite another example, much evidence suggests that some of the discretionary decisions made by the federal sentencing commission concerning appropriate penalties for crack versus powder cocaine, and the close equivalence maintained between guidelines and mandatory statutory penalties for drug crimes, have yielded sharp increases in racial disparities in the punishment for such crimes. At the state level,

One innovative proposal appears in early black-letter drafting for a new Code, and has already gained strong support from the Advisers. Just as sentencing commissions now routinely prepare fiscal-impact projections, it would be feasible to require them to produce forecasts of the racial, ethnic, and gender effects of proposed punishment legislation or guideline amendments, before they are voted on or allowed to take effect. Michael Tonry, in his 1995 book on race and punishment in America, suggested that some form of political accountability for foreseeable racial impacts of the criminal law ought to be a regular feature of the legislative process.¹⁴⁷ The revised Code could suggest a regularized machinery for the generation of this information.

If a provision on “racial impact” (or “demographic impact”) projections were included in a revised Code, considerable thought should be given to the appropriate use of such data. For example, no neutral law imposing stiff penalties for the crime of homicide in the early 21st century could avoid large racial disproportionalities in punishment — and yet, few would argue that stiff penalties for homicide should therefore be forbidden. A racial-impact forecast cannot

the former director of the Minnesota Sentencing Guidelines Commission has written that much of the observable racial disparities under the Minnesota guidelines can be traced back to patterns of enforcement and sentencing for drug offenses. See Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761 (1993); Debra L. Dailey, *Minnesota’s Continuing Efforts to Address Racial Disparities in Sentencing*, 8 FED. SENT. RPTR. 89 (1995). If certain offense categories are responsible for more than their share of racial impacts in punishment, it ought to be the responsibility of a sentencing commission to point this out. Where the impacts cannot be justified with reference to legislative sentencing policies, legislatures and commissions should be encouraged to collaborate on statutory and guideline amendments to attack the causes of disparity.

¹⁴⁷ TONRY, *MALIGN NEGLECT*, chapter 7.

serve as an absolute proscription of policies that will have predictably differential impacts, but instead should act as a catalyst for the justification of foreseeable effects.¹⁴⁸

If significant progress is to be made in the tragic area of race, ethnicity, crime, and punishment, American governments will require better information than they now possess, including an audit of current sentencing patterns and an improved capability to project future patterns. These are functional capabilities that sentencing commissions can provide. Further, criminal-justice systems will require tools to implement more equitable policies where needs are found to exist — and sentencing guidelines are proven tools for deliberate policy change of this kind. Last, and perhaps most important, U.S. governments will require the political will to address a set of problems that has all too easily been swept under the rug, not merely for decades, but for more than a century. It is here that the Institute can perhaps provide greatest service, in insisting upon forward progress into

¹⁴⁸ One conceptual proposal for the use of data showing racial and ethnic disproportionalities in incarceration is as follows:

[E]xisting and projected racial and ethnic disparities in punishment should not be tolerated by policymakers or members of the public in the absence of good evidence that (1) such disparities reflect real differences in the rates of crimes committed by different racial and ethnic groups, including past criminal histories, (2) the crimes in question involve serious past victimizations and the risk of serious future victimizations, and (3) the use of incarceration will address effectively the risks of serious reoffending in the future.

RUTH AND REITZ, *THE CHALLENGE OF CRIME*, p. 103. A sentencing commission charged with preparation of a racial or ethnic impact projection could be instructed, as part of its report, to supply information relevant to inquiries (1), (2), and (3) above.

territory where policymakers and legislators have shown little spontaneous inclination to tread.

Improved information. A first priority of a Code revision as a whole ought to be encouragement of greater investments in research and development within governmental institutions of sentencing and corrections. In 1967, with reference to American criminal justice as a whole, the President's Crime Commission pronounced that "The greatest need is the need to know."¹⁴⁹ Nearly 30 years later, distinguished researchers Alfred Blumstein and Joan Petersilia could still write:

The nation is investing many billions of dollars . . . in programs intended to address the problem of crime. It is hard to think of another policy area where the concern is so high, the expenditures are so high, and the knowledge base is so thin. In view of that situation, it is particularly troublesome that so little effort is being directed at improving the situation.¹⁵⁰

¹⁴⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, p. 273.

¹⁵⁰ Alfred Blumstein and Joan Petersilia, *Investing in Criminal Justice Research*, in JAMES Q. WILSON AND JOAN PETERSILIA EDS., *CRIME* (San Francisco: ICS Press, 1995), p. 483. Among the areas most in need of study, according to Blumstein and Petersilia's research agenda, are many that are closely connected to criminal punishment. These include (1) the study of criminal careers including the development of improved methods for "distinguishing the high frequency offenders who should be of primary interest to the criminal justice system from those who have had only marginal involvement," and a better understanding of the duration of criminal careers; (2) the "complex and difficult question . . . of assessing the extent to which formal justice agencies, individually and collectively, contribute to crime reduction in the community through

Original § 1.02(2)(g) announced that one fundamental purpose of the sentencing and treatment provisions of the Model Penal Code was “to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders.” Despite the prominence given to this thought by its inclusion in the cornerstone provision of § 1.02, however, the remainder of the Code’s black letter devoted relatively little attention to basic research.

Much of the work in a new Code to develop adequate research and information systems will be undertaken within Parts III and IV, dealing with institutions of corrections. Sentencing commissions, however, can be an integral component of such a program.¹⁵¹ The ABA Sentencing Standards provide that:

incapacitation and deterrence;” (3) the generation of “more solid data . . . to assess the crime and cost implications of alternative criminal sanctions,” including intermediate punishments designed to rehabilitate or to serve other functions such as surveillance, punishment, or incapacitation; (4) a close study of the reasons for probation and parole revocations, large numbers of which occur for “technical violations,” and an assessment of what purposes are served by the use of incarceration as a response to such violations; (5) research about the “characteristics of inmates [currently incarcerated] in different states (by age, criminal record, and substance abuse history)” in order to assess the oft-made claim that too many persons are currently residing in prisons; (6) “better follow-up studies (ideally, using experimental design) of offenders who have been sentenced to prison as opposed to various forms of community supervision . . . to refine our recidivism prediction models, and begin to estimate more accurately the crime and cost implications of different sentencing choices;” and (7) research on the effects of criminal prosecution and incarceration of drug offenders on drug markets, drug abuse, and related criminal activity, together with comparative assessment of alternative means of addressing the harms associated with illegal substance use. *Id.* at 472-480.

¹⁵¹ In Part IV of the original Code, § 401.9 proposed the creation of a “Division of Research and Training” within the Department of Corrections, to be charged with:

The [sentencing commission or equivalent agency] should be the information center for all elements of the criminal justice system. The agency should collect, analyze and disseminate information on the nature and effects of sentences imposed and carried out. The agency should develop means to monitor, evaluate, and predict patterns of sentencing, including levels of severity of sentences imposed and relative use of each type of sanction.¹⁵²

To a substantial degree, existing commissions have already been discharging these functions. As Richard Frase wrote in 1999, “Guideline systems now possess by far the best system-wide data on sentencing practices and correctional popula-

the collection, development and maintenance of statistical and other information concerning the dispositions by criminal courts of the State, length of sentences imposed and length of sentences actually served, release on parole, success or failure on parole, discharge from parole supervision, success or failure on probation, recidivism, and concerning such other aspects of sentencing practice and correctional treatment as may be useful in practical penological research or in the development of treatment programs . . .

Model Penal Code § 401.9(1)(a). The Code also created an advisory body called the “Commission of Correction and Community Services” in § 401.10. Among the Commission’s duties were to advise the Governor and Director of Correction concerning “the need for and the development of useful researches in penology, correctional treatment, criminal law, or in the disciplines relevant thereto.” Model Penal Code § 401.10(3)(c). Together, these provisions constituted the total program of the original Code to foster necessary research about sentencing, the evaluation of sanctions programs, and the future life courses of offenders.

¹⁵² ABA SENTENCING STANDARDS, Standard 18-4.1(b).

tions.”¹⁵³ On a routine basis, many existing commissions monitor case-processing patterns jurisdiction-wide, in specific counties, and even for individual judges, including data on filed cases, convictions, patterns of sentencing outcomes, and many particular attributes of each case. The commissions also track rates of compliance with guideline provisions, where noncompliance is occurring, and the reasons given by courts for guideline departures. Armed with increasingly thick data sets, most commissions study the past, present, and expected impacts of sentencing statutes and guidelines upon available correctional resources, including prison bedspaces and, in some places, community program slots. Many commissions have found that, over time, as their resource projections have been shown to be accurate and objectively-determined, their legislatures have placed ever-greater stock in their forecasts, affording the commissions a deepening reputation for credibility, and allowing their research to play a more powerful role in legislative deliberations. As Ron Wright has observed of the North Carolina Sentencing and Policy Advisory Commission, one of its great accomplishments has been to condition legislators to expect and demand high-quality empirical data before embarking upon changes in sentencing legislation.¹⁵⁴

Guideline structures and “mandatory” penalties. The institution of a commission-based guideline system can remove much of the rationale for the passage of mandatory penalties, or mandatory-minimum penalties, by legislatures. To the extent that legislatures see mandatory punishments as a means to communicate and enforce strong systemwide

¹⁵³ Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Court: A Twenty-Year Retrospective*, 12 FED. SENT. RPTR. 69, 75 (1999).

¹⁵⁴ Wright, *Counting the Cost of Sentencing in North Carolina*, pp. 41-42, 103.

policy judgments to trial courts about sentences in particular classes of cases, sentencing guidelines provide an alternative, albeit more flexible, vehicle for doing the same thing. Because rates of guideline compliance are high in most states that have adopted the Minnesota structure, the specification of a severe presumptive sentence for a serious offense can carry much of the policy force of a mandatory punishment. At the same time, however, the departure mechanism allows room for trial-court discretion in unusual circumstances, subject to the scrutiny of the appellate courts.¹⁵⁵

The mere presence of a sentencing commission with a good track record of prison-impact projections can also affect legislative decisionmaking when mandatory-penalty laws are proposed. In a number of guideline states, legislatures have drawn back from the enactment of mandatory provisions, or have narrowed such provisions before enactment, when presented with impact projections attending the proposed laws. Sentencing commissions have opposed such legislation, sometimes successfully, on the additional ground that rigid mandatory penalties hamper the commissions' abilities to match aggregate sentencing patterns to available correctional resources, or to set priorities for the use of those resources.

At least two states (Minnesota and successive proposals from the Massachusetts Sentencing Commission) have explored the possibility of appending a judicial "departure"

¹⁵⁵ It would be possible for a legislature or commission to increase the legally-binding effect of certain guideline sentences, say, for certain serious violent crimes, by creating a specialized departure standard that is more restrictive than the general standard otherwise operable throughout the guidelines. Likewise, a specialized standard of appellate review, less deferential than the baseline standard, could be created for limited categories of cases.

power to existing mandatory-sentencing provisions. Such a statutory departure power need not be as expansive as the guideline departure power, and it is possible to design a standard of review on appeal that is less deferential than that for guideline departures. Even so, this appears to be a promising vehicle for the insertion of judicial discretion into the mandatory-penalty context.

The original Code took a firm position that mandatory sentences to incarceration should not be included in criminal codes, with the narrow potential exception of capital murder. For decades, the American Bar Association has asserted a similar position, as have many judges, academics, and even (for the vast majority of offenses) the U.S. Sentencing Commission.¹⁵⁶ Such longstanding and categorical opposition should be continued, but the Institute must also recognize that these broad proscriptions have had little noticeable effect upon state and federal legislators. The evidence of futility includes the nationwide surge in the enactment of three-strikes and even two-strikes laws in the 1990s, as well as the proliferation of drug and gun mandatory provisions, first in federal law, and subsequently in most states.¹⁵⁷ A revised Code must therefore confront the issue of mandatory sentencing anew, and should search for ap-

¹⁵⁶ See LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (New York: W.W. Norton & Co., 1994); TONRY, *SENTENCING MATTERS*, chapter 5; U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, D.C., 1991).

¹⁵⁷ A survey in the mid-1990s found that all U.S. jurisdictions had at least some mandatory-minimum prison penalties in their criminal codes, although the numbers and terms of such laws differed widely from state to state. BUREAU OF JUSTICE ASSISTANCE, *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING*, pp. 20-23 and table 3-1.

proaches in addition to the former Code's subconstitutional ban on mandatory penalties. A guideline structure, and tools borrowed from the guideline decisionmaking process, may be the best available means to ameliorate the consequences of rigid mandatory sentences, while taking account of the political reality that such laws will remain on the books, and will continue to be proposed, in the foreseeable future.

Guideline structures and drug sentencing. At the end of the 20th century and the beginning of the 21st, there have been numerous signals nationwide of a softening of attitudes toward the punishment of drug offenders, and a growing sense that correctional resources are better directed toward other, more serious acts.¹⁵⁸ A new Model Penal Code sentencing structure can help give shape to this movement, and provide crucial recommendations for the implementation of desired policy change.

¹⁵⁸ These include, among individual states, voter initiatives to divert prison-bound drug offenders to treatment programs, court-made rules to the same effect, the legalization of marijuana for medical use, and the repeal of some mandatory penalties for drug offending. For recent surveys of developments across the country, see two special issues of the Federal Sentencing Reporter: *Recent State Reforms I: Developments in the Sentencing of Drug Offenders*, FED. SENT. RPT., vol. 14, no. 6 (2002); *Drug Sentencing: The State of the Debate in 2002*, FED. SENT. RPT., vol. 14, nos. 3-4 (2002). Even John DiIulio, one of the most vocal advocates of rising incarceration rates in the 1990s, has urged recently that large numbers of drug offenders should be released from prison, and has joined an empirical report of incarceration in three states concluding that the confinement of offenders convicted only of drug crimes does not prevent sufficient numbers of non-drug crimes to be cost-effective. See John J. DiIulio, Jr., *Zero Prison Growth: Thoughts on the Morality of Effective Crime Control Policy*, 44 AMER. J. JURISPRUDENCE 67 (1999); Anne Morrison Piehl, Bert Useem, and John J. DiIulio, Jr., *Right-Sizing Justice: A Cost-Benefit Analysis of Imprisonment in Three States* (New York: Manhattan Institute, 1999).

Especially since the 1980s, drug penalties dispensed by American criminal-justice systems frequently have strained or broken away from basic notions of proportionality (when compared to sentences for other more serious crimes), have rested on questionable utilitarian foundations, and have contributed significantly to racial and ethnic disparities in punishment. A sizeable share of U.S. incarceration growth in the last two decades may be attributed to drug enforcement alone, and the impact upon African-American defendants has been particularly great. As William Stuntz has written, even if we assume that drug-enforcement policies were devised in good faith and for plausible instrumental reasons, they have had devastating impact upon the perceptions of African Americans that the criminal law is slanted against them, that drug-using behavior tolerated among whites is not equally tolerated among blacks, that the criminal-justice system as a whole is lacking in moral legitimacy, and that there is little or no reason to respect or comply with the law in general. Stuntz argues that, for these reasons alone, American drug-sentencing policy ought to be reexamined.¹⁵⁹

The original Model Penal Code did not speak to drug offenses or penalties. A revised Code should do so even without the predicate of new substantive provisions defining separate gradations of drug crimes in the special part of the Code. Instead, the revised Code might create a template for decisionmaking in the drug-enforcement arena. Looking back to the matrix of sentencing purposes discussed earlier, it would be a significant advance upon current law for the Code to insist upon proportionality analysis (by legislature, commission, and courts) when authorizing or fixing drug penalties. The revised Code should also require that

¹⁵⁹ William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

punishments for drug crimes, beyond those that satisfy the minimum requirements of desert, be justified in light of utilitarian objectives that are thought to be achievable in light of credible evidence. Finally, the dramatic impact of drug-enforcement policy upon minority offenders calls for further scrutiny, at the policy level, to determine whether long incarceration terms for such offenses carry sufficient crime-reduction advantages to outweigh their heavy costs.

All of these policies could best be implemented through the commission-based guideline structure that is envisioned for a new Model Penal Code.¹⁶⁰ Through their resource-management capabilities, sentencing commissions can also take steps to ensure that correctional needs are anticipated in advance so that, for example, additional drug-treatment slots might be funded in time to meet planned

¹⁶⁰ Over the years, state commissions have sponsored initiatives to retool the severity of drug penalties, although support in the political branches has often been wanting. See Kansas Sentencing Commission, *Report to the 2003 Kansas Legislature* (Topeka, 2003) (report devoted to proposed alternative sentencing guidelines for drug offenders that would save hundreds of prison beds and millions of dollars; the report also projects anticipated substance-abuse-treatment-program needs); Debra Dailey, *Minnesota's Continuing Efforts to Address Racial Disparities in Sentencing*, 8 FED. SENT. RPTR. 89 (1995) (Dailey, then Director of the Minnesota Sentencing Guidelines Commission, outlined data on racial impacts of Minnesota's drug-enforcement and sentencing policies, and recommended changes in light of this information). In 1995, the United States Sentencing Commission proffered amendments to the federal guidelines that would have equalized punishments for crack and powder cocaine through a reduction in crack penalties, but the proposal was rejected resoundingly by Congress. See United States Sentencing Commission, *Amendments to the Sentencing Guidelines for United States Courts*, 60 FED. REG. 25,074, 25,075-25,077 (May 10, 1995); Ann Devory, *Clinton Retains Tough Law on Crack Cocaine: Panel's Call to End Disparity in Drug Sentencing is Rejected*, Washington Post, October 31, 1995.

demand among sentenced offenders. Recent experience in California suggests that the political will to effect vast changes in punishment for drug offenders may exist independently of an adequate planning capacity. It should be the mission of a revised Code to provide the institutional tools necessary to avoid such difficulties.

*Major Points of Distinction Between
Proposed Model Penal Code Sentencing System
and the Federal Sentencing System*

Although the federal sentencing system is but one of 16 jurisdictions that currently operate with sentencing guidelines fashioned by a sentencing commission (with additional guideline reforms now in progress in several new jurisdictions), it is by far the best known and most criticized of all commission-guidelines structures. Michael Tonry has gone so far as to say that “[t]he guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform initiative in U.S. history.”¹⁶¹ In contrast, state commission-guideline systems have enjoyed general acceptance and support among the lawyers and judges who regularly use them.¹⁶²

For readers familiar with current federal sentencing law, who have read this entire document with care, many

¹⁶¹ TONRY, SENTENCING MATTERS, p. 72. The most widespread critiques of the current federal regime are collected, analyzed, and expanded upon, in KATE STITH AND JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (Chicago: University of Chicago Press, 1998). Among many other problems, Stith and Cabranes document the spectacular unpopularity of the federal guidelines, along with other aspects of the federal sentencing system, among most U.S. District Court judges.

¹⁶² Id. at 61.

differences between the federal sentencing structure and the proposed Penal Code structure should be readily evident. Despite the risk of repetition, there may be added value in a short collocation of the major points of distinction that exist between current federal law and the proposed sentencing structure for the Model Code.¹⁶³

Judicial discretion. The proposed Model Penal Code structure, and all state commission-guidelines structures, preserve far greater judicial sentencing discretion than the current federal system. As Stith and Cabranes have recorded, the federal guidelines were created with the express determination to place sharp restrictions on the decision-making powers of U.S. District Court judges (the title of their book, *Fear of Judging*, highlights this theme).¹⁶⁴ The federal system includes a very strong sentencing commission, allowing for little residual authority in the courts. One unintended but serious consequence of this apportionment of power is that prosecutors in the federal system have gained unprecedented authority to influence final sentencing outcomes. In contrast, all state guideline systems locate much greater sentencing discretion with the judiciary, primarily through the enactment of relatively permissive legal standards for deviations from the guidelines — and some states have adopted voluntary guidelines that carry no legal force whatever. Generous authorization to impose non-guideline sentences in appropriate cases increases the power of sentencing courts and diminishes the relative authority of the commission. In addition, the better state commissions have monitored judicial practice under guidelines, and appellate case law, and have taken efforts over time to

¹⁶³ Such a stand-alone discussion was requested by the Advisers, Members Consultative Group, and Council.

¹⁶⁴ STITH AND CABRANES, *FEAR OF JUDGING*, see especially chapter 4.

bring the formal guidelines into conformity with observed judicial preferences. The federal commission, in contrast, has tended to amend its guidelines to *overrule* instances of judicial creativity.

In all these respects, the Model Penal Code will seek to replicate state rather than federal practice. If the key design features are assembled with care, the best guideline systems achieve ongoing dialogue and collaboration between judiciary and commission, with judges holding the greater share of ultimate discretion. Indeed, the proposed approach for the Model Code would increase judicial discretion over that existing in traditional indeterminate structures. Just as importantly, a system designed to make judges the central decisionmakers deflates the outsized discretion of prosecutors to dictate sentences through charging and bargaining decisions. The parties cannot tie the hands of a sentencing judge who has room to move from the presumptive-guideline sentence whenever the judge believes adequate reasons are presented. The steady complaints of inflated prosecutorial power heard in the federal system are nowhere echoed in the commission-guideline states.

Complexity and rigidity. The sentencing guidelines envisioned for a new Model Penal Code, and those in all state commission-guidelines structures, are far less complex, detailed, and mechanistic than the current federal guidelines. The ungainly federal machinery requires sentencers to work through multiple steps, including (1) finding the appropriate guideline (the offense of conviction does not make this obvious); (2) selecting a scored “base offense level”; (3) adding and subtracting specific numbers of “offense severity points” for various circumstances of the crime (including exact computations under the “relevant conduct provision,” where applicable); (4) adding or subtracting more points for “adjustments” permitted in separate chapters of the guidelines;

(5) determining the defendant’s criminal-history category (this in itself is a multi-step computation); (6) finding the applicable guideline range on a 258-cell guideline grid; and finally (7) working through standards set forth in the sub-chapters on “specific offender characteristics” and “departures.”¹⁶⁵ Even putting aside the additional gyrations required in cases of more than one count of conviction,¹⁶⁶ the total process is a dizzying progression of calculations that make it hard to remember that the interests of human beings turn on the outcome.

In contrast, the states have designed guideline systems that are relatively simple in operation while also allowing judges more leeway when departing from guideline presumptions. The sentencing grid in a state like Minnesota contains 70 boxes or cells. The difference between this and the 258-celled federal grid provides some window into the relative complexities of the two systems.¹⁶⁷ In most states, the offender’s conviction and prior record by themselves bring the court to a presumptive sentence; there is none of the labyrinthine arithmetic of the federal law. The presumptive sanction is seen as a starting point for analysis, and it is understood that the guidelines cannot anticipate all of the circumstantial, qualitative, and offender-based differences among cases. From the presumptive starting point, judicial discretion — not hemmed in by precisely-weighted guideline factors — determines any adjustments to be made up or down from the guideline penalty within legal limits. Grounds for departure are not quantified, so the courts play

¹⁶⁵ UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 1B1.1 (2002).

¹⁶⁶ *Id.*, chapter 3, part D.

¹⁶⁷ See Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1982).

the leading role both in deciding whether a departure is warranted, and how much of a deviation is required.

Policy-driven sentencing. The sentencing guidelines envisioned for the Model Penal Code, as with those in many state commission-guidelines structures, will be “prescriptive” guidelines designed to further explicit goals of criminal punishment, in contrast with the “descriptive” federal guidelines, which were based largely on past sentencing practices. The federal sentencing commissioners were unable to agree on underlying philosophies of sentencing, and so fell back on an averaging out of prior decisions as the foundation for guideline development. Guidelines with no basis in theory can be just as arbitrary as indeterminate sentences. When the U.S. Sentencing Commission broke free of past practice, as for example in its heavy penalty schedule for drug offenders, it lacked a policy framework for assessing the proportionality of the toughened drug penalties against sanctions for other crimes. The commission in many instances chose to calibrate guideline punishments to mandatory-penalty laws enacted by Congress, without requiring that the mandatory penalties — or the resulting guidelines — be justifiable under stated policy goals. Indeed, the commission has elsewhere recommended that federal mandatory penalties be widely repealed, communicating strong condemnation of the very mandatory benchmarks it used to set guideline values.¹⁶⁸

The proposals in a new Model Penal Code should be otherwise. A number of states have shown that retributive and utilitarian goals of sentencing can be articulated and advanced through guidelines and court decisions. We now

¹⁶⁸ United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, D.C., 1991).

have examples of sentencing systems built on just-deserts principles, in service of utilitarian goals such as selective incapacitation, that further the hybrid ends of limiting retributivism, or that articulate different combinations of sentencing purposes for different categories of cases. Most (but not all) state sentencing commissions have also ignored mandatory-penalty legislation when promulgating guidelines for similar offenses, and some state commissions have championed reforms that would allow trial courts in some circumstances to “depart” from mandatory penalties, just as they can depart from guidelines. Sentencing commissions in many states have even successfully opposed the enactment of new mandatory-sentencing laws in part on the ground that such provisions would distort the careful policy framework built into guidelines as a whole. In all of these respects, the dominant state experience stands in opposition to the federal track record. It is central to the vision of a revised Model Penal Code that articulated and defensible purposes of punishment should drive individual case decisions — and systemwide policymaking by the commission and the legislature itself.

Resource management. The sentencing commission in the Model Penal Code structure will be instructed to create sentencing guidelines that are sensitive to available or funded correctional resources in the state, in sharp contrast to the practice of the U.S. Sentencing Commission, which has failed to take resource constraints into account. The federal guidelines, along with mandatory penalties enacted by Congress, have ushered in an era of pronounced prison growth in the federal system. This came about in part because of deliberate policy preferences in the executive and legislative branches, but was made significantly easier by the fact that correctional costs, even when growing rapidly, amount to no more than a trivial percentage of the total federal

budget. State policymakers, whatever their abstract views of crime and punishment, face fiscal conditions that are far different. As recounted earlier, most of the state commission-guidelines systems have worked over time to control and restrain prison growth — and every state system that has made the effort has succeeded. The resource-management function extends also to ensuring that new facilities are planned and funded when shifts in sentencing policy require, such as when otherwise prison-bound offenders are diverted to drug treatment or community-based sanctions. Thus, advances in resource-management technology have proven a vital component of efforts to foster the greater use of intermediate punishments — the subject of the next heading.

Intermediate punishments. The federal guidelines allow little room for sanctions other than incarceration, and do nothing to *encourage* the wider use of alternative penalties. The availability of probation as a sanction is quite limited, and the federal guidelines make no provision at all for intermediate punishments (those more restrictive than traditional probation yet less intrusive than total confinement). No one accuses the federal system of leadership — or even of a meaningful presence — in the developing arena of intermediate sanctions. In contrast, several state guideline systems, including those in Delaware, North Carolina, Oregon, Pennsylvania, and Washington have incorporated a wide range of nonincarcerative penalties into the express terms of their guidelines. These state-level accomplishments provide useful groundwork for new Model Penal Code provisions. In recent years, some of these jurisdictions have diverted meaningful numbers of offenders who would otherwise have been prison-bound into more or less restrictive community punishments.

Shortfalls of funding for program slots has often frustrated policy initiatives to expand the menu of available punishments but, here again, some of the commission-guidelines jurisdictions have developed the tools to combine innovative sanctions policy with needed fiscal planning. The North Carolina and Pennsylvania sentencing commissions, for example, have had notable success in persuading their state legislatures to fund new community-based programs in order to make intended policy changes a reality. Without such coordination, results can occur like those in California following the passage of Proposition 36 (a drug-treatment voter initiative). Whatever one thinks of the policy wisdom of Proposition 36, the state has been scrambling since it became effective to add required program capacity.

Racial and ethnic disparities in punishment. Racial and ethnic overrepresentations in sentenced populations have worsened in the federal system since the advent of sentencing guidelines (along with mandatory-penalty laws enacted in the same time frame). Much of the change has been fueled by drug enforcement and sentencing policy, including the infamous 100:1 ratio in the calculation of offense severity (based on weight) for some crack as opposed to powder-cocaine offenses. State guideline systems, however, have achieved modest success in reducing observable disparities in punishment based on race, as well as gender. A revised Model Penal Code should build on these incremental successes while insisting that much more be done. Sentencing commissions currently possess the research tools to analyze existing patterns of sentencing by race and ethnicity, so that an “audit” of punishment practices could be facilitated. The commissions could also be asked to forecast the demographic impact of new guidelines or laws affecting sentencing at the time they are first proposed, using the same meth-

ods now employed to generate fiscal-impact projections. Such measures could give needed visibility to the consideration of past and future policies that carry differential impacts upon minority groups.

Relevant conduct. All state guidelines key penalties to crimes of which the defendant has been convicted. In contrast, the federal law requires sentencing judges to impose punishment for “relevant conduct” that includes alleged offenses for which there have been no convictions.¹⁶⁹ Thus, for example, a drug courier convicted of carrying a small quantity of drugs can be sentenced based on a finding at the sentencing hearing that she (or her conspirators) committed additional crimes involving much larger quantities, even if no charges have ever been brought for the additional amounts. So long as the statutory maxima for the counts of conviction permit, the defendant’s sentence will be identical to that she would have received if she had been convicted of the uncharged conduct involving additional drug quantities. More striking still, such a sentence would be required even if the defendant had been tried and acquitted of the more serious allegations. State guidelines systems have unanimously rejected this approach, as did the American Bar Association in its Criminal Justice Standards for Sentencing, on grounds that “infliction of punishment for a given crime ought to be preceded by conviction for that crime.”¹⁷⁰ The revised Model Code may be expected to follow state, not federal, practice on this important question.

Sentencing severity. Because commission-guideline sentencing structures have proven capable of producing aggre-

¹⁶⁹ UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 1B1.3.

¹⁷⁰ ABA SENTENCING STANDARDS, p. 66.

gate sentencing patterns that are responsive to the policy goals that are fed into the systems by legislators and other policymakers, some have feared that the guideline-drafting process will become unduly politicized, and will inevitably be captured by “get-tough” impulses. One of the most pronounced and controversial effects of the federal sentencing guidelines has been to increase the average severity of penalties in the federal system, more so for some offenses than others, but markedly overall. Especially in the area of drug sentencing, the federal system has invested in heavier enforcement and punishment than any state (including those with and without guidelines). The extreme unpopularity of the federal guidelines in some quarters is rooted in strong disagreement with these policy preferences rather than disapproval of the sentencing structure itself. If, for example, we were to imagine a federal sentencing scheme identical in every way to the current system, except that all of the mandatory- and presumptive-penalty values prescribed by law were well *below* pre-guideline sentencing practice in the federal courts, many of the most vocal critics would be applauding rather than deriding the system.

Outside the federal system, most commission-guideline systems have inclined toward punitive leniency when they are compared with other American sentencing structures in the late 20th century. Of the 16 guideline systems in present operation, only two (the federal system and the Pennsylvania system) have been deployed in service of high prison growth. Meanwhile, states that have retained traditional indeterminate systems have been, more often than not, the national leaders in incarceration growth in the past 20 years. There can be no guarantees that future state commission-guideline systems, if they are created, will be turned to the furtherance of low-growth or high-growth ends in

punishment severity. It is necessary, however, to differentiate between questions of sentencing structure and substantive sentencing policy. It is also important to realize that the policy choices of federal officials in designing and administering the current law have not to date been representative of choices made by their counterparts at the state level.

Conclusion

The planned sentencing revision of the Model Penal Code has the potential to stimulate major improvements in the statutory frameworks used by jurisdictions now operating with sentencing commissions and guidelines, and to promote serious consideration of well-designed commission-guideline reforms in the American states that, increasingly, are looking for new structural approaches for the dispensation of criminal punishments. Alone among the sentencing systems with substantial operational experience in this nation, the commission-guideline structure can bring legal regularity, rationality, proportionality, reflexivity, and a systemwide planning capacity to the law and practice of criminal punishment. The indeterminate system that dominated law reformers' thinking in the first half of the 20th century, including the drafters of the original Model Penal Code, has proven a failure on all of these counts — and no available competing structure in the United States or in other nations offers the proven advantages of the commission-guideline program.

Realization of the benefits of commission-guidelines reform is especially urgent against the background of a United States Supreme Court jurisprudence that establishes virtually no constitutional oversight upon state or federal punishment practices. Despite temporary perturbations caused by the 2000 ruling in *Apprendi v. New Jersey* (a formalistic decision whose force is easy to evade through leg-

islative drafting),¹⁷¹ nearly every important constitutional precedent in the arena of subcapital punishment has pursued a hands-off doctrine. Major decisions under the Due Process Clause, the Cruel and Unusual Punishment Clause, and the Double Jeopardy Clause, for example, have reinforced the view that state and federal legislatures have

¹⁷¹ 530 U.S. 466 (2000). The Court in *Apprendi* held that:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . “It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”

Id. at 490, quoting *Jones v. United States*, 526 U.S. 227, 252-253 (1999). The ban on non-jury factfinding is easy for legislators to evade simply by providing for an elevated statutory maximum penalty that does not depend on factfinding at sentencing, and then authorizing factfinding *within* that elevated maximum. Initial consternation in the wake of *Apprendi* included fears that such formalistic circumvention would not be possible — but such fears have proven unfounded. The potential for a broad construction of *Apprendi* was greatly limited in *Harris v. United States*, 536 U.S. 545 (2002), which held 5-4 that *Apprendi* does not invalidate factfinding at sentencing — not performed by a jury — that triggers a mandatory-minimum penalty within the statutory maximum for the offense. This holding almost certainly removes any prospect for a successful *Apprendi* challenge to the federal sentencing guidelines.

In capital cases, *Apprendi* has been given somewhat more bite. *Apprendi* has been held to require that aggravated factors necessary for imposition of the death penalty must be determined by juries and not by judges at sentencing proceedings, however, on the theory that such factual determinations result in an elevation of the available maximum penalty. *Ring v. Arizona*, 536 U.S. 584 (2002). This ruling, premised in part on the Court’s view that “death is different” from all other criminal sanctions, poses little threat to subcapital sentencing laws.

enormous latitude when constructing their arrangements for the imposition of criminal punishments.¹⁷² Most recently, the Supreme Court upheld applications of California's three-strikes laws against Eighth Amendment proportionality challenges in two cases where defendants had received prison sentences of 25 and 50 years for the current offenses of thefts of three golf clubs and \$150 worth of videotapes, respectively.¹⁷³ Additional legislative responses to criminal activity, such as the indefinite civil commitment of sex offenders and registration and public-notification laws applied to sex offenders, have been defined by the Supreme Court not to involve "punishment" at all, and therefore to escape even the minimal constitutional scrutiny available for criminal sanctions.¹⁷⁴ It is of course not the role of a Model Penal Code to reinvent constitutional doctrine. However, in a field where constitutional regulation is notably absent, the prudential import of legislative decisionmaking becomes all the more crucial — and all the more worthwhile as an expenditure of the Institute's energies.

¹⁷² See, e.g., *Williams v. New York*, 337 U.S. 241 (1949); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *United States v. Watts*, 519 U.S. 148 (1997); *Witte v. United States*, 515 U.S. 389 (1995); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Chapman v. United States*, 500 U.S. 453 (1991).

¹⁷³ *Ewing v. California*, No. 01-6978 (U.S. Supreme Court, March 5, 2003); *Lockyer v. Andrade*, No. 01-1127 (March 5, 2003) (The *Lockyer* Court did not resolve the Eighth Amendment claim, but held it was not cognizable on federal habeas corpus review).

¹⁷⁴ *Seling v. Young*, 531 U.S. 250 (2001) (holding Washington State's sexually violent predator law, which authorizes indefinite civil commitment of offenders found likely to engage in predatory acts of sexual violence, is civil rather than punitive in nature, and therefore does not implicate the Double Jeopardy Clause or ex post facto prohibition); *Smith v. Doe*, No. 01-729 (U.S., March 5, 2003) (holding Alaska's sex-offender registration act, inspired by New Jersey's "Megan's Law," is a civil regulatory scheme, is nonpunitive, and is exempt from ex post facto prohibition).

Appendix A

Sample Black-Letter Proposal, Revised § 1.02(2)

Introductory Note

The following proposal would replace subsection (2) of § 1.02 of the 1962 Model Penal Code. For extended commentary on the content of the draft provision, see Preliminary Draft No. 1 (August 28, 2002), pp. 8-30.

Revised Section 1.02(2). Purposes; Principles of Construction.

(2) The general purposes of the provisions governing sentencing and corrections, to be discharged by the many official actors within the sentencing and corrections system, are:

(a) in decisions affecting the sentencing and correction of individual offenders:

(i) to render punishment within a range of severity sufficient but not excessive to reflect the gravity of offenses and the blameworthiness of offenders;

(ii) when possible with realistic prospect of success, to serve goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities, provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i); and

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

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

(i) to preserve substantial judicial discretion to individualize sentences within a framework of law;

(ii) to produce sentences that are reasonably uniform, certain, and proportionate in their neutral application of the purposes in subsection (a);

(iii) to eliminate discrimination and inequities in punishment across population groups;

(iv) to ensure that steps are taken to forecast and prevent unjustified overrepresentations of racial and ethnic minorities in sentenced populations when laws and guidelines affecting sentencing are proposed, revised, or enacted;

(v) to encourage the use of intermediate punishments;

(vi) to ensure that adequate resources and facilities are available for carrying out sentences imposed on offenders;

(vii) to ensure that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental-health care, and opportunities to rehabilitate themselves and improve their life chances following their release;

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

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

ORIGINAL PROVISION

Original Section 1.02. Purposes; Principles of Construction.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to give fair warning of the nature of the conduct declared to constitute an offense;

(e) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to prevent the commission of offenses;**
 - (b) to promote the correction and rehabilitation of offenders;**
 - (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;**
 - (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;**
 - (e) to differentiate among offenders with a view to a just individualization in their treatment;**
 - (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;**
 - (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;**
 - (h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].**
- (3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.**

Appendix B

American Sentencing Guideline Systems in 1999

Jurisdiction	Effective Date	Features
<i>Minnesota</i>	May 1980	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions
<i>Pennsylvania</i>	July 1982	Voluntary guidelines for felonies and misdemeanors; minimal appellate review; parole retained; guidelines incorporate intermediate sanctions
<i>Maryland</i>	July 1983	Voluntary guidelines for felonies; no appellate review; parole retained; no guidelines for intermediate sanctions; legislature created permanent sentencing commission in 1998
<i>Washington</i>	July 1984	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions; juvenile guidelines in use
<i>Delaware</i>	October 1987	Voluntary guidelines for felonies and misdemeanors; no appellate review; parole abolished in 1990; guidelines incorporate intermediate sanctions
<i>Federal Courts</i>	November 1987	Presumptive guidelines for felonies and misdemeanors; intensive appellate review; parole abolished; no guidelines for intermediate sanctions
<i>Oregon</i>	November 1989	Presumptive guidelines for felonies; moderate appellate review; parole abolished; guidelines incorporate intermediate sanctions
<i>Tennessee</i>	November 1989	Presumptive guidelines for felonies; moderate appellate review; parole

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Continued from previous page

Jurisdiction	Effective Date	Features
		retained; no guidelines for intermediate sanctions; sentencing commission abolished effective 1995
<i>Kansas</i>	July 1993	Presumptive guidelines for felonies; moderate appellate review; parole abolished; no guidelines for intermediate sanctions
<i>North Carolina</i>	October 1994	Presumptive guidelines for felonies and misdemeanors; minimal appellate review; parole abolished; guidelines incorporate intermediate sanctions; dispositional grid for juvenile offenders to become effective July 1999
<i>Arkansas</i>	January 1994	Voluntary guidelines for felonies; no appellate review; parole retained; guidelines incorporate intermediate sanctions; preliminary discussion of guidelines for juvenile cases
<i>Virginia</i>	January 1995	Voluntary guidelines for felonies; no appellate review; parole abolished; no guidelines for intermediate sanctions; study of juvenile sentencing underway
<i>Ohio</i>	July 1996	Presumptive narrative guidelines (no grid) for felonies; limited appellate review; parole abolished and replaced with judicial release mechanism; no guidelines for intermediate sanctions; structured sentencing for juveniles under consideration by legislature
<i>Missouri</i>	March 1997	Voluntary guidelines for felonies; no appellate review; parole retained; guidelines incorporate intermediate sanctions

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Appendix B: Sentencing Guideline Systems

Continued from previous page

Jurisdiction	Effective Date	Features
<i>Utah</i>	October 1998	Voluntary guidelines for felonies and selected misdemeanors (sex offenses); no appellate review; parole retained; no guidelines for intermediate sanctions; voluntary juvenile guidelines in use
<i>Michigan</i>	January 1999	Presumptive guidelines for felonies; appellate review authorized; parole restricted; guidelines incorporate intermediate sanctions
<i>Alaska</i>	Early 1980s	Judicially-created “benchmark” guidelines for felonies; moderate appellate review; parole abolished for most felonies (retained for about one-third of all felonies); benchmarks do not address intermediate sanctions; no active sentencing commission
<i>Massachusetts</i>	Proposal Pending	Presumptive guidelines for felonies and misdemeanors; appellate review contemplated; parole to be retained; guidelines would incorporate intermediate sanctions
<i>Oklahoma</i>	Proposal Pending	Presumptive guidelines for felonies; appellate review contemplated; parole to be limited; guidelines would not incorporate intermediate sanctions
<i>South Carolina</i>	Proposal Pending	Voluntary guidelines for felonies and misdemeanors with potential sentence of one year or more; no appellate review contemplated; parole to be abolished for all felonies; guidelines would incorporate intermediate sanctions
<i>Wisconsin</i>	Proposal Pending	Voluntary guidelines for felonies; no appellate review contemplated; parole

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Model Penal Code: Sentencing

Continued from previous page

Jurisdiction	Effective Date	Features
		to be eliminated; guidelines would not incorporate intermediate sanctions; new permanent sentencing commission to be created
<i>Washington, D.C.</i>	Under Study	Temporary sentencing commission, currently scheduled to report to City Council in April 2000
<i>Iowa</i>	Under Study	Legislative commission to study sentencing reform, currently scheduled to report in January 2000
<i>Alabama</i>	Under Study	Study committee has requested that Alabama Judicial Study Commission create a permanent sentencing commission in 2000
<i>Georgia</i>	Under Study	Governor's commission charged with producing a sentencing-guideline proposal by December 1999

Appendix C

Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?

Should cost matter when it comes to deciding who goes to prison and for how long?

The process and results of sentencing reform in most states suggest that, until recently, the standard answer to this question has been no. During the 1980s and 1990s, economically costly measures such as stiff mandatory minimum sentences, three-strikes legislation, and truth-in-sentencing laws were planted or took root. Critics of the reforms argued that spendthrift lawmakers driven by political gain and fear of appearing "soft" ignored the fiscal ramifications of new policy. Tough-on-crime advocates asserted that no price was too high for initiatives that would protect public safety. There is little debate about who won the argument: during the last two decades of the twentieth century, America's incarcerated population grew more than 281 percent, finally approaching two million; expenditures for state and local corrections increased 601 percent.¹

A growing body of evidence suggests that the tide of opinion is now changing: in the twenty-first century, fiscal impact does appear to matter. From Louisiana to Iowa, from Ohio to Washington, in every corner of the United States, lawmakers have been looking to slow corrections spending as they grapple with the nation's most serious economic downturn in a decade (for many, the first of their careers). As we reach the midpoint of 2002, 39 states have lowered their annual revenue projections. Of these, 24 have already reported that they will not meet even their revised targets.² Spending has exceeded budgets in 33 states. Spending cuts are on the table in forty. Nationwide, estimates of the total state budget shortfall for fiscal year 2002 range from \$27 billion to \$38 billion.³

Lawmakers are responding to these conditions in several ways. Some have taken predictable immediate action to stanch the flow of expenditures by closing prisons, cutting corrections staffs, and eliminating what they deem to be *nonessential* programs. Others have revisited particular sentencing policies and instituted limited reforms (e.g., reducing sentencing ranges and repealing mandatory minimums) hoping to cut corrections spending by slowing or even reversing prison population growth. As a result of steady reductions in crime that have eroded public fear and expanded voters' appetites for alternative corrections strategies, these officials are discovering political latitude to make broader policy changes.

While likely to be effective as cost-cutting measures, many immediate responses have been one-time or ad hoc reactions. A more imposing challenge confronting legislators, governors, and other public officials responsible for criminal justice policy is to create systems that automatically incorporate consideration of cost and impact into the policy-making process. The experiences of a handful of states suggest that such systems can be built without imperiling public safety. This Issue in Brief examines those systems and their use of mechanisms such as sentencing guidelines and simulation models, legislative checks and early-warning devices, and sentencing tools for judges that assess risk. But first, to understand the magnitude and the scope of the economic challenge facing corrections systems, it examines the often drastic steps that states are taking in response to this crisis.

I. Immediate Responses: Prison Closings, Pink Slips, and Program Cuts

Corrections budgets have been especially hard hit by the current crisis. In FY 2002, 25 states were forced to reduce their corrections budgets. Higher education was the only government sector affected more often, in 29 states. As budget cuts have been imposed or threatened, corrections departments have responded in three predominant ways: closing prisons, reducing staff, and curtailing programs.⁴

Closing Prisons. Ohio is a good example of a state that is responding to a budget crisis by shuttering a prison. Its FY 2002 budget shortfall hovers around \$500 million. As part of his budget reduction plan, Governor Bob Taft ordered the corrections department to slash spending by \$18.9 million, or 1.4 percent. Reginald A. Wilkinson, head of Ohio's prisons, responded by closing the Orient Correctional Institution, a medium-security facility that was one of 22 new prisons established by the state in the 1980s and 1990s. As of December 2001, Orient housed 1,747 inmates and boasted a staff of 533. Just two-and-a-half years earlier, its population was 2,043 (Ohio's overall prison population has declined 9 percent in recent years, falling from 49,023 in 1998 to 44,762 in 2001). The cuts do not end with Orient. The state has also postponed opening a minimum-security boot camp that would have provided substance-abuse treatment to 125 nonviolent male offenders and abandoned plans to open 220 halfway-house beds.



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Model Penal Code: Sentencing

Ohio is not alone in closing major institutions. Illinois is closing the 141-year-old Joliet Correctional Center for a projected savings of \$41 million and will eventually transfer the prison's 1,200 inmates to a new processing center under construction nearby. Massachusetts is closing three prisons and moving 900 inmates into other facilities. All told, 13 states are shutting down correctional facilities or reducing beds. (See Figure 1). Twelve states are delaying or aborting the opening of similar facilities.

Staff Reductions. Not surprisingly, many of the closings and budget cuts have resulted in staff reductions. Illinois is laying off 120 correctional employees. The loss of \$2.6 million from Iowa's corrections budget has forced the layoff of 150 of its corrections staff. In total, 11 states are cutting or eliminating corrections-related jobs, while 18 states have instituted hiring freezes or purposely have allowed staff vacancies to go unfilled. Michigan may provide the starkest example of a state looking to layoffs for immediate budgetary relief. Last December, facing a FY 2002 general fund shortfall of \$500 million and a school fund gap of \$250 million, the state sent layoff notices to 240 prison employees as part of an effort to cut \$55 million from corrections. Approximately 190 of these employees were officers, most from the state's maximum-security facility at Jackson, which was closed as part of the budget trimming process. System-wide, Michigan has eliminated 840 corrections positions, mainly by not filling job vacancies. It has defended these moves as necessary for living within its means, but the savings may be only temporary. Even as they were closing Jackson, officials acknowledged that corrections officers would be offered jobs elsewhere in the system as vacancies occurred and that Jackson could eventually reopen because of the state's growing inmate population. In his budget for the new fiscal year beginning October 1, Governor John Engler has proposed allocating \$8 million to reopen 645 beds at Jackson and 500 beds at another facility.

Cutting "Nonessential" Programs. The third way many state corrections departments are reacting to budget pressures is by cutting so-called nonessential programs. These cuts primarily have affected educational, substance-abuse treatment, and vocational programs.

Facing a budget shortfall of at least \$804 million, Illinois has demanded cuts of \$35.4 million from its corrections department. One victim of these cuts was the \$5.4 million budget for higher education in state prisons. The elimination of this program, which served about 25,000 of the state's nearly 43,000 prisoners, resulted in layoffs of hundreds of instructors at 12 Illinois colleges and drew swift condemnation from educators. "We're going to end up putting people back out on the streets without skills who will just return to their old habits that put them in prison in the first

place," said John Erwin, president of Illinois Central College.⁷ More than 450 prisoners have used the program to earn bachelor's degrees from Roosevelt University in Chicago. As one educator there observed, "It's less expensive to educate an inmate than to incarcerate an inmate two or three or four times."⁸

Educational programs are not the only ones on the chopping block. Arizona is looking to realize \$22.2 million in corrections cuts by scaling back substance abuse treatment programs. Florida, likewise, has cut \$7.3 million from inmate drug treatment and \$8.1 million from prisoner education. In all, nine states are eliminating programs. As these examples attest, the economic challenges are vast and state corrections systems have no choice but to comply with legislative or executive mandates to slash budgets. But while the moves cited above may save money in the short term, it is difficult to predict their effect on long-term costs and the ability of corrections systems to maintain public safety. According to critics, they are reflexive responses to an acute situation and do not necessarily enhance a state's ability to spend corrections dollars effectively or wisely.

II. Reforming Sentencing Policy—Reducing Sentences and Repealing Mandatories

Concern about the spiraling cost of incarcerating offenders has created pressure on corrections administrators to do more than cut costs quickly. In a number of states, lawmakers have used the moment to re-examine sentencing schemes and to engage in targeted mitigation of certain punishments. In some cases, this has resulted in the repeal of mandatory minimum sentences now perceived as too harsh and too financially onerous. In others, it has led to the reclassification of certain offenses so that they no longer automatically result in prison sentences.

Cost concerns alone, however, are insufficient to explain these changes. It seems unlikely that they would be possible if the current economic anxiety did not coincide with a historic drop in crime rates that is changing popular concerns about crime and shifting public attitudes about incarceration.

Shifting Public Attitudes. Crime is down and has been for the better part of a decade.⁹ This decline is reflected in both violent crimes and property crimes. From 1973 to the early 1990s, violent crime rates fluctuated in the United States. But between 1993 and 2000, the rate of all violent crimes and property offenses measured by the Bureau of Justice Statistics fell drastically: violent crimes fell by 44.1 percent; homicides, not included in the previous figure, dropped 61 percent; property crimes declined 44.2 percent. These reductions may be responsible for changing public attitudes toward crime and incarceration.

Americans are not as concerned about crime as they

Appendix C: Sentencing and Incarceration and the Budget Crisis

Figure 1

State Corrections Budget Cuts and Cost-Savings Efforts
States that have cut corrections budgets in FY 2002 or have implemented cost-cutting steps

State	FY 2002 Corrections Budget Decrease (in millions of dollars)	Closing Facilities/Reducing Beds	Delayed/Aborted Openings	Staff Reductions	Staff Vacancies/Freezes	Program Elimination
AR	22.5*		*		*	
AZ	22.2				*	*
CA	37.4	*			*	
CO	23		*		*	
FL	2.8	*	*	*		*
GA	30		*		*	
HI	1.4		*			
ID	3.6				*	
IL	35.4		*	*	*	
IA	2.6		*	*	*	*
KY	9.0		*	*	*	
LA	2.2		*	*	*	
MA	2.7		*	*	*	*
MI	54.9	*	*	*	*	*
MO	no change		*		*	
NE	2.7	*	*	*	*	
NC	44.6		*		*	
NY	no change	*				
OH	18.9	*	*	*	*	*
OR	36.86				*	*
OK	8.5				*	*
RI	1.8	*				
SC	53.7			*	*	*
UT	9	*	*	*	*	
VT	2.2	*	*	*	*	
VA	25.5	*		*	*	
WI	1.7**		*			

Sources: National Conference of State Legislatures; National Institute of Corrections; The Sentencing Project.

* Includes Department of Corrections and Community Corrections.

** Unconfirmed.

were several years ago. A 1994 survey by the Pew Research Center for the People and Press showed that 29 percent of respondents thought that crime was the most important problem facing their local community.⁴ By 2001, only 12 percent gave the same answer. Similarly, a 1994 Harris poll found that 37 percent of respondents considered crime and violence to be one of the two most important issues for government to address.⁵ In 2000, that figure had dropped to 11 percent.

Public attitudes about incarceration appear to be changing as well. A recent opinion poll by Peter D. Hart Research Associates shows that the public is questioning whether harsh prison sentences are the best way to punish nonviolent offenders.⁶ In 1994, 48 percent of Americans surveyed said that they favored addressing the underlying causes of crime, while 42 percent preferred deterrence through stricter sentencing. The Hart poll, conducted late last year, found a substantial change in public opinion, with 65 percent of respondents preferring to address root causes of crime and only 32 percent opting for harsher sentencing. The survey specifically found a change in attitudes toward mandatory sentencing. In 1995, a 55-percent majority of those surveyed said that mandatory sentences were a

good idea, while 38 percent said that judges should be able to determine a defendant's appropriate sentence. The 2001 Hart report found those numbers reversed: only 38 percent responded that mandatory sentences were a good idea, while a plurality of 45 percent said they preferred judicial discretion.

The Hart survey also documents acceptance of alternatives to incarceration for nonviolent drug offenders. In regard to simple drug possessors, 76 percent of the survey's 1,056 national telephone respondents said that they favored "supervised mandatory drug treatment and community service rather than incarceration." Seventy-one percent were in favor of applying the same treatment-based approach to small-scale drug sellers.

The Hart data has been corroborated by a public referendum in California. In November 2000, 61 percent of the state's voters approved Proposition 36, which requires treatment instead of incarceration for certain nonviolent drug offenders. The California legislature has predicted that implementing the proposition will save at least \$100 to \$150 million a year in prison costs and will avoid prison construction costs of \$400 to \$450 million. Heartened by this success, the

Campaign for New Drug Policies, a political advocacy group, is targeting Michigan and Ohio for similar ballot initiatives this year.⁵⁴

Legislators Respond. These new attitudes have resonated strongly in several state legislatures. Louisiana, for example, has faced skyrocketing prison populations and corrections spending since the early 1990s. From 1995 to 2001, the state's incarcerated population jumped from 25,260 to some 36,000, and corrections spending rose by 45 percent from 1994 to 1999. In response, last year the state legislature passed SB 239, which removed mandatory sentences for certain nonviolent offenses and cut many drug sentences in half. The former ten-to-sixty-year penalty for possession of 28 grams of cocaine, for example, was reduced to a sentence of five-to-thirty years. The legislature also limited the application of the state's three-strikes law. The changes are estimated to generate some \$60 million in prison operations savings, some of which will finance drug courts and other alternatives to incarceration.

As Louisiana's corrections head Richard L. Stalder remarked, "[t]he legislature was asking a legitimate question. Are there more cost-effective ways to deal with these problems?"⁵⁵

Individual legislators echoed this assessment. Representative Danny Martiny, chair of the Louisiana House Criminal Justice Committee, told the media, "[t]he people expect us to be tough on crime and they expect us to lock everybody up and throw away the key. And that's great as long as you've got a jail and you've got the finances. But we've come to a point where we just can't afford to keep doing it."⁵⁶ Senator Charles Jones, the architect of the legislation, bluntly told reporters that Louisiana had "lost control of the prison population," adding, "We cannot continue to spend \$600 million on prisons."⁵⁷ But the bill's success was due to more than economic arguments. Governor Mike Foster told the legislature that he supported the measure as a way to save money—but he also acknowledged the high social cost of the state's policies, saying, "We have locked up a lot of people who are redeemable—a whole bunch of them."⁵⁸

In 2001 and 2002, 13 states took legislative action to ameliorate the effects of stringent sentencing laws (see Figure 2). Of these, Connecticut, Indiana, and North Dakota repealed mandatory minimum sentences relating to some nonviolent offenses. (Legislation has also been introduced in three other jurisdictions—Colorado, Delaware, and Michigan—tempering mandatory minimum sentences.) Mississippi pared back truth-in-sentencing requirements. Louisiana, Virginia, and Texas expanded the number of inmates eligible for early release. Iowa granted judges greater discretion in sentencing certain felony offenders. Alabama and New Mexico eased habitual offender laws.

And Idaho, Oregon, and Washington enhanced treatment options for nonviolent drug offenders. In many of these states, rising prison populations and incarceration costs were factors for winning passage of legislation.

These efforts seem to verify what one Oregon corrections official observed: "[B]udget problems are making people ask fundamental questions about whether we can afford to keep doing what we've been doing."⁵⁹

III. Building Fiscal Discipline in the Long Term

State leaders looking for ways to get a better handle on corrections expenses can learn important lessons from jurisdictions that reformed their sentencing systems in the 1990s. In particular, North Carolina, Virginia, and Kansas not only made far-reaching substantive changes to laws governing sentencing and incarceration, but they also developed tools to manage their corrections growth and to systematically connect sentencing policy with available resources. In each state the result has been a more disciplined and rational policy-making process that helps lawmakers balance demands for public safety, fairness, and fiscal accountability. Central to this accomplishment in all three states is a sentencing commission, a government entity serving as the repository of expertise about sentencing and corrections research and analysis.

Sentencing Guidelines. Since 1979, some twenty states and the federal government have created sentencing commissions and implemented sentencing guidelines. Historically, guidelines have served a range of functions, from correcting unwarranted disparity in sentencing, to ensuring greater consistency and truthfulness and promoting better resource management.⁶⁰ Minnesota, the first state to implement guidelines, did so in order to accomplish all these aims. Recently, guidelines—or *structured sentencing*, as they are sometimes called to avoid negative associations with the federal system, which many consider unnecessarily cumbersome and unduly fettering of judicial discretion—have drawn increased interest because of the role they can play in improving resource management. Because guideline sentences offer greater uniformity and predictability, they are a powerful tool for projecting, planning for, and, therefore, controlling prison populations. Georgia and Alabama recently formed sentencing commissions that have been instructed to consider structured sentencing so that lawmakers can better manage and predict the use of resources.⁶¹

Among states that have pursued structured sentencing, North Carolina represents what many consider to be the exemplar of smart political and rational reform. When the state passed structured sentencing legislation in 1994, it sought to combine the politically attractive features of truth-in-sentencing "with other policies

Appendix C: Sentencing and Incarceration and the Budget Crisis

Figure 2
Sentencing Policy Changes
States that have made, or are proposing, changes to their sentencing schemes, 2001-2002

State	Mandatory Minimums Repealed	Habitual Offender Laws Based	Truth-in-Sentencing Rolled Back	Early Release/Parole Eligibility Expanded	Judicial Discretion in Felony Sentencing Enhanced	Drug Treatment Expanded	Drug Treatment Ballot Initiative	Sentencing Commission Formulating Systemic Recommendations
AL		*						*
CA							*	
CO	*							
CT	*							
DC								*
DE	*							
GA								*
IA					*			
ID						*		
IN	*				*			
LA	*		*	*		*		
MI	*				*		*	
MS			*	*				
ND	*							
NM		*						
OH							*	
OR						*		
TX				*				
VA				*				
WA						*		

* Passed • Proposed

designed to achieve a rational allocation of correctional resources.¹⁸ The result was a new sentencing system that simultaneously increased the likelihood and length of prison sanctions for violent and habitual offenders and established a continuum of community punishments for nonviolent offenders.

Prior to this reform, almost everyone involved in North Carolina's system described it as failing. Under the previous, indeterminate sentencing system—the most common structure in the United States then and now—the prison population was controlled through a set of early release mechanisms, primarily parole and good time, and discretion predominantly lay with the parole board and corrections officials. Critics argued that this arrangement undermined the integrity of punishment and eroded public confidence in courts and corrections.¹⁹ By the early 1990s, convicted felons were serving only 18 percent of their sentences, misdemeanants only 12 percent. Part of the problem was that more than 20,000 offenders were entering the prison system each year and there were not enough beds to accommodate them.

The Sentencing and Policy Advisory Commission, created by the state legislature in 1990, was granted an expansive charter to examine the system's structure and to recommend improvements. After three years of study, North Carolina went on to establish a system that required offenders to serve 100 percent of sentenced time, abolished parole, reserved prison beds for the most dangerous and incorrigible, and invested in non-

prison sanctions for others. Because so many nonviolent offenders who had previously been going to prison were now being diverted, the state not only managed to enact tough-on-crime reforms, but it also saw its admissions decrease dramatically. In 1994, the first year under the new policy, admissions fell 7 percent. Between 1993 and 1997, admissions decreased 52 percent, from 28,000 to roughly 13,000 admissions. From 1994 to 2000, North Carolina's crime rate fell 12.5 percent. In 1980, North Carolina had the highest incarceration rate in the country. It now ranks thirty-first in the nation and has the second lowest incarceration rate in the South.

Simulation Models. One of the most important elements of this story is that upon establishing the commission, North Carolina's legislature required it to develop a computerized corrections population simulation model to project the resources needed to implement recommendations and policy changes. In response, the commission began by building an extensive database containing information on offenders, their criminal histories, their sentences, the time they were expected to serve, and other important characteristics. The database enabled the commission to understand the sentencing practices then in use. Information from the database could then be fed into the simulation model to project future prison populations. In formulating its recommendations, the commission was able to navigate often contentious waters by relying on the simulation model to assess the systemic costs of various possible sentencing proposals. In fact, with the help of

the simulation model, the commission was able to produce two plans for the legislature to choose from, one with more severe sentences, and another with slightly less severe sentences that would forestall the need to build new prisons for a few more years. The legislature selected the latter.

The simulation model has been very accurate. For example, the commission's projections showed that North Carolina's prison population for June 2001 would be 32,154. The actual average population for June 2001 was 31,971. This is a difference of 183 beds—or less than one percent.* According to Susan C. Katzenelson, executive director of the North Carolina commission, "the effectiveness of the model is attributable to several factors. First, the model itself is a very sophisticated microsimulation model. Second, the model benefits by receiving good offender admissions data from the court system and good incarceration and revocation data from the corrections department. Finally, the nature of structured sentencing makes outcomes more logical and thus inherently more 'modelable' and predictable." North Carolina is not the only state that employs a simulation model. Pennsylvania, Florida, Texas, Kansas, and Virginia are among the other states relying on such a predictive tool.

More Effective Planning. The value of an accurate simulation model and a credible sentencing commission has become particularly apparent again this year in North Carolina. Each year, by law, the commission must project the state's prison population for the next ten years. Since structured sentencing went into effect, the commission's projections have shown that North Carolina will need 7,000 new prison beds by 2010. The legislature enacted structured sentencing with its eyes open to this fact, recognizing that increases in the length of stay for violent offenders would eventually cause the prison population to grow. This past year, with the state facing a nearly \$1.5 billion budget shortfall and feeling a new urgency to cut costs everywhere, the legislature returned to the commission and asked it to formulate alternatives to the current sentencing guidelines that could alleviate the need to construct thousands of new beds in the next eight years. In a report submitted to the legislature in early May 2002, the commission identified six alternative plans, including one that would shorten sentences for nonviolent habitual felons who commit property and lesser drug offenses and another that would reduce the weight accorded to prior criminal history at sentencing.**

IV. Legislative Tools

Like North Carolina, Kansas also formed a sentencing commission in the early 1990s to develop reforms for a similarly troubled system. And as in North Carolina, the commission recommended, and the legislature enacted,

a set of reforms including parole abolition, truth-in-sentencing, guidelines, and diversion of low-level offenders to community correction and probation. Kansas' commission continues to play a critical role in the state, collecting and analyzing data and formulating policy recommendations.

Early Warning Systems. Since Kansas' reforms were implemented, more than eight years ago, the state's prison population has grown at a rate of 38 percent, far slower than the national average of 54 percent. Over that time, while it has expanded the number of prison beds at several facilities, Kansas has not had to build one prison. One reason for this may be a unique provision in the commission's enabling legislation. In the statute, the commission is directed to "identify and analyze the impact of specific options to reduce prison population" when projections show that "the state's prison population will exceed capacity within two years."⁴ This early warning system serves two important functions: it not only automatically alerts the legislature to an impending crisis, but it also makes the difficult political task of advancing reform slightly easier. Although the legislature must approve commission recommendations, the commission must do the heavy lifting—and it does so, as *required by law*. Thus, elected officials are not put in the sometimes politically perilous position of having to request "options to reduce prison population" or formulate those options themselves.

This early warning provision has led to reforms on a number of occasions. For example, shortly before the 2000 legislative session, the commission warned that Kansas prisons were dangerously close to capacity. After some analysis, the commission determined that prison population growth was being driven in large part by a set of generally low-level, nonviolent offenders. Specifically, more than 70 percent of the entries to state prison the previous year were probationers and parolees who had tested positive for drugs or who had violated some other condition of release; they had not been convicted of new crimes. The commission developed a bill to reduce the admission of these offenders, many of whom had done their time, had been originally determined by a judge to be more appropriate for community sanctions, and had drug problems. The bill modified periods of probation and post-release supervision for some, mandated that certain condition violators be sent to community corrections rather than prison (when there was no public safety risk in doing so), and invested in the expansion of these non-prison sanctions, such as day reporting centers. In all these details, the bill relied on data produced by the commission rather than guesswork or anecdote. In 2001, the first year the effects of the new law could be measured, Kansas' prison population declined by 245 inmates, enough to delay the construction of a new correctional facility.

This year, the commission informed the legislature

Appendix C: Sentencing and Incarceration and the Budget Crisis

that while Kansas will have sufficient prison capacity for the next two years, the state will experience a sustained growth in population from 2004 through 2011 and will be in need of a “long-term strategy for managing the state’s prison population.”³⁴ The commission and legislature are currently studying additional strategies aimed at reducing the number of probationers and parolees admitted to prison for condition violations. They are also looking at reforming the state’s drug sentencing laws to focus on treatment options instead of incarceration for nonviolent repeat drug users.

Fiscal Notes. Another method to interject consideration of fiscal ramifications into legislative debates over sentencing and corrections policy is the requirement that fiscal notes or impact statements – reports describing the economic effects of proposed legislation – be attached to every bill that would change sentencing law. In essence, with these devices the legislature places checks and restraints on its own members. Many states require fiscal notes to be completed before a legislature votes on a bill. The power and effect of the notes vary dramatically from state to state, however. Virginia, for one, has made the fiscal note requirement a particularly muscular mechanism to limit the ability of legislators to make ad hoc alterations to sentencing structures.

By statute, Virginia requires its sentencing commission to prepare a “fiscal impact statement reflecting the operating costs attributable to and necessary appropriations for any bill that would result in a net increase in periods of imprisonment in state adult correctional facilities.”³⁵ This includes all bills that add new crimes punishable by imprisonment, expand the period of incarceration for existing offenses, impose minimum or mandatory terms of incarceration, or modify the law governing the release of offenders in any way that increases the time they are to be incarcerated.

The sentencing commission then forwards copies of the statement to the sponsor of the bill, the chair of the committee that will consider the proposed legislation, and to the public safety subcommittee of either the House Appropriations Committee or the Senate Finance Committee. The estimated fiscal impact of the bill is also printed on the face of the legislation. A bill that is supported by a majority of the committee considering its substance (a process that usually does not include fiscal note review) is referred to the proper finance subcommittee. The subcommittee then determines if there is funding to support the bill. If not, the bill dies without reaching the floor for final consideration. Most important to this process is that a bill’s sponsor must identify the source of revenue to fund the bill before it can be reported out of the subcommittee. In short, if the sponsor cannot find the money to pay for the increased correctional burden, the bill cannot get to the floor for a vote.

As with reforms in North Carolina and Kansas, this

requirement has not been made at the expense of protecting public safety in Virginia. It is part of a comprehensive approach to sentencing policy development that focuses on incapacitating violent and repeat offenders and reserving expensive prison space for them. In the nearly eight years that the fiscal note has been in place, Virginia’s crime rate has dropped 26 percent. This compares with a drop of 24 percent across the country. At the same time, Virginia’s incarceration rate has grown just 6 percent, well below the national growth rate of 22 percent, indicating greater discipline in use of expensive prison beds as a sanction.

According to Dr. Richard P. Kern, director of Virginia’s sentencing commission “the legislative fiscal note process has been so well received that our legislature recently voted to expand its scope. The note process now also considers the cost impact of proposed legislation on local jails and community corrections programs.”

Although other states’ fiscal note requirements are not as robust as Virginia’s, they still manage to influence the dynamics of sentencing policy. As Representative Philip A. Baddour, Jr., Chair of the North Carolina House Judiciary Committee and Majority Leader notes: “The requirement for a fiscal note on all bills creating new crimes or increased punishment became an accepted fact of life for the North Carolina General Assembly. If the fiscal note shows a financial impact then the bill, if passed by the Judiciary Committee, must be re-referred to the Appropriations Committee. It is an integral part of our determination to balance sentencing policy with available corrections resources.”

V. Risk Assessment at Sentencing

Virginia created its sentencing commission in the mid-1990s to make good on the singular campaign promise of then-Governor George Allen to abolish parole. In legislation that required offenders to serve at least 85 percent of their imposed sentence and lengthened sentences for violent and repeat offenders by up to 600 percent, the Virginia General Assembly also directed the commission to devise ways to divert nonviolent offenders from prison. Specifically, legislators told the commission to develop a risk assessment tool that judges could use at sentencing to identify incarceration-bound low-risk drug and property offenders who were suitable for non-prison sanctions. The legislature set as a target that 25 percent of this group be diverted from prison.⁴⁶

Taking up this charge, the commission analyzed characteristics (e.g., criminal history, substance abuse, education, employment history, and family background) and recidivism patterns in a sample of 1,500 fraud, larceny, and drug felons released from incarceration between 1991 and 1992. It found several factors to be important in assessing an offender’s risk of

reconviction, including age, prior record, prior juvenile incarceration, whether the offender had been arrested in the previous 12 months, and whether he or she acted alone. Those factors found to be statistically significant in predicting recidivism were included on a worksheet for judges to fill out at sentencing—a higher total score on the worksheet indicated an increased likelihood that an offender would be reconvicted of a new felony within three years. Commission research showed that an offender scoring nine points or less would have a one-in-eight chance of being reconvicted in three years. Nine was therefore set as the threshold for recommending an alternative sanction (offenders with a violent felony conviction were excluded altogether). In keeping with Virginia's voluntary guidelines, the decision to sentence an offender to prison or to alternative sanctions was left to the discretion of the judge, regardless of the score on the worksheet.

From 1997 to 2001, Virginia ran a pilot program to test the risk assessment tool in six of its 31 judicial circuits. Of the more than 13,000 fraud, larceny, and drug offenders processed in these courts, the tool deemed 24 percent appropriate for alternative sanctions. Put another way, the offenders in this group were otherwise facing incarceration under the voluntary guidelines, had no history of violent felonies, and had received scores of nine or less on the worksheet. Of these, judges sentenced half to alternative sanctions. The rest were sentenced to a traditional term of incarceration.

Virginia's nonviolent offender risk assessment system is novel—no other structured-sentencing state uses an empirically based risk-assessment instrument to divert offenders to alternative sanctions. In 2000, the National Center for State Courts evaluated the pilot program, and concluded that by diverting 363 low-risk offenders from prison and 192 from jail at the pilot sites, the state saved \$8.7 million. When total diversion costs of \$7.2 million were considered, the instrument still produced a net benefit of \$1.5 million. The evaluators estimated that if the instrument had been in use across the whole state, the net benefit would have been between \$3.7 and \$4.5 million in reduced costs. Following a validation study that led to refinements in the risk-assessment model, the sentencing commission recommended that a slightly modified version of the instrument used in the pilot program be introduced throughout Virginia.

VI. Conclusion

The budget traumas of the current economic crisis are playing out against a backdrop of changed public attitudes about crime and incarceration. While perhaps immediately cost effective, prison closings, layoffs, and program eliminations fail to address the broader issue of how to better manage a state's fiscal resources.

As this Issue in Brief shows, several states have seized on the importance and value of creating governmental organizations and arming them with appropriate instruments to take up this systemic challenge. Indeed, as legal scholar Ronald F. Wright has observed, perhaps the most important lesson other jurisdictions can draw "is the need for a [credible] sentencing commission or other full-time body to estimate the impact of changes, monitor and report on the effects of sentencing practices, and coordinate correctional resources."²² The experiences of Kansas, North Carolina, and Virginia illustrate the importance of creating a state entity that can inform the creation of sentencing and corrections policy by providing data-based information that can both predict a system's needs and guide development of laws and policies that respond to those needs. And, as the innovations in these three states show, such reform-minded responses need not compromise public safety.

Notes

- ¹ See Sidra Lea Gifford, Bureau of Justice Statistics, U. S. Department of Justice, *Criminal Justice Expenditure and Employment Extracts* (January 8, 2002); Sidra Lea Gifford, Bureau of Justice Statistics, U. S. Department of Justice, *Justice Expenditures and Employment in the United States, 1999 1-4* (February 2002).
- ² National Conference of State Legislatures, *State Fiscal Update April 2002 1* (April 16, 2002).
- ³ *Ibid.*; National Association of State Budget Officers, *Fiscal Survey of States: December 2001 ix* (December 2001).
- ⁴ For good overviews of developments in these areas, see Ryan S. King & Marc Maurer, *The Sentencing Project, State Sentencing and Corrections Policy in an Era of Fiscal Restraint 11* (February 2002); Judith Greene & Vincent Schiraldi, *Justice Policy Institute, Cutting Correctly? New State Policies for Times of Austerity* (February 1, 2002).
- ⁵ Susan Dodge, *Budget Ax Hits Prison Education*, CHICAGO SUN-TIMES, Dec. 12, 2001.
- ⁶ *Ibid.*
- ⁷ Bureau of Justice Statistics, U. S. Department of Justice, *Criminal Victimization 2000: Changes 1999-2000 with Trends 1993-2000* (June 2001).
- ⁸ Pew Research Center for the People and the Press, *Interdiction and Incarceration Still Top Remedies*, March 21, 2001.
- ⁹ Harris Poll, April 2000.
- ¹⁰ Peter D. Hart Research Associates, Inc., *The New Politics of Criminal Justice: Summary of Findings* (January 2002).
- ¹¹ See Robert Collier, *Treating Drug Offenders: Huge Coffers Fund Effort to Replicate Prop. 36 in Other States*, SAN FRANCISCO CHRONICLE, July 1, 2001.
- ¹² Christopher Swope, *Taking Aim At Corrections Costs*, *Governing*, April 2002, at 54.
- ¹³ Kevin McGill, *Saving Money on Prisons. Will It Be Politically Costly?*, ASSOCIATED PRESS, April 12, 2001.
- ¹⁴ Marsha Shuler, *Senators Vote to Relax Prison Terms*, BATON ROUGE ADVOCATE, May 3, 2001.
- ¹⁵ Kevin McGill, *Foster Pushes for Bill Removing Some Minimum Sentences*, ASSOCIATED PRESS, May 23, 2001.
- ¹⁶ Fox Butterfield, *Tight Budgets Force States to Reconsider Crime and Penalties*, NEW YORK TIMES, January 21, 2002, at A1, A11.

Appendix C: Sentencing and Incarceration and the Budget Crisis

- ¹⁷ See *Sentencing Commission Profiles*, National Center for State Courts 2 (1997).
- ¹⁸ See Alabama Code Title 12, Chapter. 25 § 12-12-1 et seq.; Georgia Executive Order B-22-0336-2001, August 30, 1999. The District of Columbia also has a relatively young sentencing commission that is examining whether and how sentencing in the District should be revised. See D. C. Law 12-165; D. C. Code §24-203.1 et. seq. Because of the District's unique relationship with the federal government, however, resource management issues have not been as urgent there as in other jurisdictions.
- ¹⁹ Carol A. Horton, *U. S. Sentencing Policy: Past Trends, Current Issues, and Future Prospects* 42, 47 AMERICAN JUDICATURE SOCIETY (1997).
- ²⁰ See Robin L. Lubitz, *Recent History of Sentencing Reform in North Carolina*, 6 FEDERAL SENTENCING REPORTER 129, 129-130 (1993).
- ²¹ North Carolina Sentencing and Policy Advisory Commission, *Revised Population Projections Fiscal Year 2001/ 2002 to Fiscal Year 2010/ 2011* 2-3 (December 2001).
- ²² See North Carolina Sentencing and Policy Advisory Commission, *Report on Study of Structured Sentencing Pursuant to Session Law 2001-424, Section 25.8* (May 2002).
- ²³ Kansas Sentencing Commission, *Report to the 2002 Kansas Legislature 2* (February 1, 2002).
- ²⁴ *Ibid.*
- ²⁵ Code of Virginia Title 30, Chapter 1, Section 30-19.1:4.
- ²⁶ Virginia Criminal Sentencing Commission, *Annual Report 2001* 49 (December 1, 2001).
- ²⁷ Ronald F. Wright, National Institute of Justice, U. S. Department of Justice, *Managing Prison Growth in North Carolina Through Structured Sentencing 4* (February 1998).

