D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov

ADVISORY GROUP MEMORANDUM #32

To: Code Revision Advisory Group
From: Criminal Code Reform Commission (CCRC)
Date: March 20, 2020
Re: Supplemental Materials to the First Draft of Report #52

This Advisory Group Memorandum supplements the First Draft of Report #52, *Cumulative Update to the Revised Criminal Code Chapter 6* with a few additional notes and various attachments with relevant research and background information.

Notes:

The issuance of recommendations for specific imprisonment and fine sanctions for penalty classes in this First Draft of Report #52, in conjunction with the previously issued Second Draft of Report #41, Ordinal Ranking of Maximum Imprisonment Penalties (currently under review) provides for the first time complete recommendations as to the specific maximum and minimum penalties for RCC offenses. No future changes to specific RCC offenses' penalties are assumed by the recommendations in this First Draft of Report #52—no exceptions to the penalty classes are recommended at this time. To facilitate your review, one of the attachments puts together the RCC ordinal rankings in the Second Draft of Report #41 with the new penalty class numbers and enhancements in this First Draft of Report #52. (The penalty class numbers in this First Draft of Report #52 do not strictly follow either the "Model 1" or "Model 2" in the spreadsheet in the Second Draft of Report #41. Generally, serious and mid-range felony classes follow "Model 2," while low felony and misdemeanor classes follow "Model 1.")

The current Commentary in the First Draft of Report #52 does not discuss the effect of the penalty classification imprisonment maximums (or absence of mandatory minimums) as applied to particular RCC offenses. Assessing the effect of the RCC penalty recommendations on current District practice is a complex task that requires an assessment of new or overlapping offenses that may apply to criminal conduct, the availability of enhancements (including a repeat offender enhancement), and the effect of concurrent sentencing. With the Advisory Group's feedback on the First Draft of Report #52 and the Second Draft of Report #41, as well as supplemental analysis of court data now underway, the CCRC will be better able to conduct such an assessment in the near future. In the coming months the CCRC does plan to issue at least general guidance on the effects of the RCC on current practice (either through commentary to the next RCC draft or in a separate document).

At this time, in conducting your own assessment of the recommendations and their effect on current law and practice, please refer to the previously distributed information in Advisory Group Memoranda #26-28, including court statistics, voluntary sentencing guideline rankings, current statutory maxima, and public opinion surveys. Appendix D to Advisory Group Memorandum #10 also provides some useful statistics regarding the (in)frequency with which penalty enhancements at issue in this First Draft of Report #52 have been use in recent years.

In addition, the CCRC recommends Advisory Group members give particular attention to the American Law Institute (ALI) recent recommendations in its Sentencing provisions for the Model Penal Code. The ALI effort represents a nearly decade-long effort involving the input and approval of many of the most accomplished judges, scholars, and practitioners throughout the country. The ALI recommendations regarding imprisonment penalties (especially mandatory minimums) are supported by lengthy research citations, some of which the CCRC has reviewed. Given the resources and timeline of the CCRC's mandate, the agency has not sought to represent these research findings and instead refers to the ALI materials and works of other scholars and practitioners cited therein. While excerpts of the ALI Sentencing recommendations are attached to this memorandum, the full report as approved by the ALI at its 2017 meeting is available online.[1]

Lastly, the CCRC particularly solicits Advisory Group members' comments on the interaction of the proposed Chapter 6 changes to the repeat offender penalty enhancement provision and the new penalty classes. Based on the statistics in Appendix D to Advisory Group Memorandum #10, the current repeat offender enhancements have been applied on average to only one or two sentences a year (based on 2010-2015 data), and even then have rarely raised the penalty above the otherwise authorized statutory maximum. Yet, at that time convicted persons have tended to have significant criminal history scores,[2] suggesting that such repeat penalty enhancements could be charged in dramatically more (perhaps most) cases. The CCRC's recommendations must address not only whether and how much to provide a statutory basis for increasing penalties based on criminal history, and how to set overall penalty classifications, but how these

---

[1] https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf. Please note that the excerpts attached are from this online document, labeled the "Proposed Final Draft." As the ALI has not yet printed the final text, the "Proposed Final Draft" is the best available source. As the ALI website (https://www.ali.org/publications/show/sentencing/#drafts) itself says: "This draft was approved by the membership at the 2017 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. This material may be cited as representing the Institute's position until the official text is published."

[2] The average criminal history score for a black defendant in 2015 was 1.7, as opposed to a white defendant's average score of 1.2; in 2014, the average scores for these groups were 1.7 and 0.9, respectively. D.C. Sentencing and Criminal Code Revision Commission, 2015 Annual Report, at 57, *available at* https://scdc.dc.gov/sites/default/files/dc/sites/scdc/publication/attachments/Annual%20Report%202015%20Website%205-2-16.pdf.

provisions interact to provide proportionate and fair sentences. Advisory Group members' recommendations on these matters would be much appreciated.

Attachments:

Several of these attachments correspond to attachments to "Report #50 Cumulative Update…" and even have the same naming conventions, including: "Appendix A" with red-inked copies comparing the current RCC Chapter 6 to prior CCRC recommendations; "Appendix D2" discussing each of the written comments previously received on the statutes in the current Chapter 6; and "Appendix J" compiling other jurisdiction research circulated with prior drafts of these reports (not updated since). The same Appendix C that was circulated with Report #50 Cumulative Update contains all Advisory Group members' written comments to-date and is referred to in the attached "Appendix D2"—however, because of the size of the document and the fact that the Advisory Group currently is reviewing the document, an additional copy is not here attached. An updated, clean copy of the entire draft RCC as of this date, combining both the language in the Report #50 cumulative update and the current Report #52 will be sent separately to aid your review.

The attachments are as follows (in order of appearance):

- Appendix A- RCC Chapter 6 Draft Statutes Comparison to Prior Draft Chapter 6 Statutes (Red-inked)
- Appendix D2 - Disposition of Advisory Group Comments and Other Changes
- Appendix J - Compilation Of Prior Chapter 6 National Legal Trends Entries
- Statutory Text for Report #52 Chapter 6
- RCC Draft Combined Penalty Classification Sheet (3-20-20) (per Second Draft of Report #41 and this First Draft of Report #52)
- American Law Institute, *Model Penal Code: Sentencing, 6.06 Sentence of Incarceration (2017)* (April 10, 2017) [3]
- ABA House of Delegates, Resolution 10B on Mandatory Minimums (2017)
- Erik Luna, *Mandatory Minimums,* Reforming Criminal Justice: Punishment, Incarceration, And Release, Volume 4, Arizona State University (2017)
- U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016).
- U.S. Department of Justice, Bureau of Justice Statistics, *Time Served in State Prison*, NCJ 252205 (November 2018).

Additional background material on any of the sentencing topics involved in the CCRC recommendations in the First Draft of Report #52 are available on request. The attachments to this memorandum are a selection of some of the most relevant literature.

[3] https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf. Please note that the excerpts attached are from this online document, labeled the "Proposed Final Draft." As the ALI has not yet printed the final text, the "Proposed Final Draft" is the best available source. As the ALI website (https://www.ali.org/publications/show/sentencing/#drafts) itself says: "This draft was approved by the membership at the 2017 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. This material may be cited as representing the Institute's position until the official text is published."

APPENDIX A:

RCC CHAPTER 6 DRAFT STATUTES COMPARISON TO PRIOR DRAFT CHAPTER 6 STATUTES (3-20-20)

CCRC Draft Title 22E
Table of Contents

SUBTITLE I. GENERAL PART.

Chapter 6. Offense Classes, Penalties, & Enhancements.

Chapter 7. Definitions.

RCC § 22E-601. Offense Classifications.

(a) *Offense Classifications.* Each offense in this title is classified as a:
(1) Class 1 felony;
(2) Class 2 felony;
(3) Class 3 felony;
(4) Class 4 felony;
(5) Class 5 felony;
(6) Class 6 felony;
(7) Class 7 felony;
(8) Class 8 felony;
(9) [Class 9 felony;]
(10) Class A misdemeanor;
(11) Class B misdemeanor;
(12) Class C misdemeanor;
(13) Class D misdemeanor; or
(14) Class E misdemeanor.

(b) *Definitions.* ~~For purposes of this title:~~
~~(1) "Felony" means an offense with an authorized term of imprisonment that is more than 1 year or, in other jurisdictions, death.~~
~~(2) "Misdemeanor" means an offense with an authorized term of imprisonment that is 1 year or less.~~ The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-602. Authorized Dispositions.

(a) ~~*Authorized Dispositions.* Except as otherwise provided by statute, a court may sentence a defendant upon conviction to sanctions that include one or more of the following:~~ Unless otherwise expressly specified by statute, a court may sentence a person upon conviction to sanctions that include:
(1) ~~Imprisonment as authorized in~~ A term of imprisonment under RCC § 22E-603;
(2) ~~Fines as authorized in~~ A fine under RCC § 22E-604;
(3) Probation ~~as authorized in~~ under D.C. Code § 16-710;
(4) Restitution or reparation ~~as authorized in~~ under D.C. Code § 16-711;
(5) Community service ~~as authorized in~~ under D.C. Code § 16-712;
(6) Post-release supervision ~~as authorized in~~ under D.C. Code § 24-903; and
(7) Work release ~~as authorized in~~ under D.C. Code § 24-241.01.

(b) A court may sentence a person upon conviction to either imprisonment under RCC § 22E-603 or a fine under RCC § 22E-604, but not both, for the following statutes prosecuted by the Attorney General for the District of Columbia:
(1) [RESERVED.]

RCC § 22E-603. Authorized Terms of Imprisonment.

(a) *Authorized Terms of Imprisonment.* ~~Except as otherwise provided by law~~ Unless otherwise expressly specified by statute, the maximum term of imprisonment authorized for an offense is:

(1) For a Class 1 felony, [~~life without possibility of release~~] [~~80 years~~] [~~60 years~~];

(2) For a Class 2 felony, ~~not more than [45 years] [60 years] [50 years]~~48 years;

(3) For a Class 3 felony, ~~not more than [30 years] [40 years] [32 years]~~ 36 years;

(4) For a Class 4 felony, ~~not more than [20 years] [30 years] [24 years]~~ 24 years;

(5) For a Class 5 felony, ~~not more than [15 years] [20 years] [~~18 years~~]~~ ;

(6) For a Class 6 felony, ~~not more than [10 years] [15 years] [~~12 years~~]~~;

(7) For a Class 7 felony, ~~not more than [5 years] [10 years] [~~8 years~~]~~;

(8) For a Class 8 felony, ~~not more than [3 years] [8 years] [4 years]~~ 5 years;

(9) For a Class 9 felony, ~~not more than [~~3 years~~] [2 years]~~;

(10) For a Class A misdemeanor, ~~not more than [1 year] [1 year] [~~1 year~~]~~;

(11) For a Class B misdemeanor, ~~not more than [~~180 days~~] [6 months]~~;

(12) For a Class C misdemeanor, ~~not more than [~~90 days~~] [3 months] [1 month]~~;

(13) For a Class D misdemeanor, ~~not more than [~~30 days~~] [1 month] [10 days]~~; and

(14) For a Class E misdemeanor, no imprisonment.

~~(b) *Attempts.* A court shall decrease the authorized terms of imprisonment for an attempt to commit an offense pursuant to § 22E-301.~~

(b) *Definitions.* The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

~~(c) *Penalty Enhancements.* A court may increase the authorized terms of imprisonment for an offense with a penalty enhancement pursuant to § 22E-605.~~

RCC § 22E-604. Authorized Fines.

(a) *Authorized Fines.* ~~Except as~~ Unless otherwise expressly specified by statute ~~provided by law~~, the maximum fine for an offense is:

(1) For a Class 1 felony, ~~not more than [$500,000] [$XX] [$XX]~~ $1,000,000;

(2) For a Class 2 felony, ~~not more than [$250,000] [$XX] [$XX]~~ $750,000;

(3) For a Class 3 felony, ~~not more than [$75,000] [$XX] [$XX]~~ $500,000;

(4) For a Class 4 felony, ~~not more than [$50,000] [$XX] [$XX]~~ $250,000;

(5) For a Class 5 felony, ~~not more than [$37,500] [$XX] [$XX]~~ $100,000;

(6) For a Class 6 felony, ~~not more than [$25,000] [$XX] [$XX]~~ $75,000;

(7) For a Class 7 felony, ~~not more than [$12,500] [$XX] [$XX]~~ $50,000;

(8) For a Class 8 felony, ~~not more than [$6,000] [$XX] [$XX]~~ $25,000;
(9) [For a Class 9 felony, ~~not more than [$XX] [$XX]~~ $10,000;
(10) For a Class A misdemeanor, not more than ~~[$2,500] [$XX] [$XX]~~ $5,000;
(11) For a Class B misdemeanor, not more than ~~[$1,000] [$XX] [$XX]~~ $2,500;
(12) For a Class C misdemeanor, not more than ~~[$500] [$XX] [$XX]~~ $1,000;
(13) For a Class D misdemeanor, not more than ~~[$250] [$XX] [$XX]~~ $500; and
(14) For a Class E misdemeanor, not more than ~~[$250] [$XX] [$XX]~~ $250.

~~(b)~~(c) *Limits on ~~Maximum~~ fines ~~Penalties~~.* Notwithstanding any other provision of law, ~~A~~a court may not impose a fine that would impair the ability of the ~~defendant~~ person to make restitution or deprive the ~~defendant~~ person of sufficient means for reasonable living expenses and family obligations.

(b) *Alternative ~~Maximum~~ Fine ~~Based on~~ pecuniary loss or gain or organizational defendants*. A court may fine an actor: ~~Subject to the limits on maximum fine penalties in subsection (b) of this section, if the offense of conviction results in pecuniary loss to a person other than the defendant, or if the offense of conviction results in pecuniary gain to any person, a court may fine the defendant:~~

~~(1) Not more than twice the pecuniary loss,~~
~~(2) Not more than twice the pecuniary gain, or~~
~~(3) Not more than the economic sanction in subsection (a) of this section that the defendant is otherwise subject to, whichever is greater. The pecuniary loss or pecuniary gain must be alleged in the indictment and proved beyond a reasonable doubt.~~

(1) Up to twice the pecuniary loss or pecuniary gain when:
(i) The offense, in fact, results in either pecuniary loss to a person other than the actor, or pecuniary gain to any person; and
(ii) The information or indictment alleges the amount of the pecuniary loss or pecuniary gain and that the actor is subject to a fine double the amount of the pecuniary loss or pecuniary gain; or
(2) Up to three times the amount otherwise provided by statute for the offense when the actor, in fact, is an organizational defendant and the information or indictment alleges the actor is an organizational defendant and is subject to a fine treble the maximum amount otherwise authorized.

(c) *Limits on fines.* Notwithstanding any other provision of law, a court may not impose a fine that would impair the ability of the person to make restitution or deprive the person of sufficient means for reasonable living expenses and family obligations.

(d) *Definitions*.
(1) The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" have the meanings specified in RCC § 22E-701.

(2) In this section, "organizational defendant" means any actor other than a natural person, including a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

~~(c) *Alternative Maximum Fine for Organizational Defendants*. Subject to the limits on maximum fine penalties in subsection (b) of this section, if an organizational defendant is convicted of a Class A misdemeanor or any felony, a court may fine the organizational defendant not more than double the applicable amount under subsection (a) of this section.~~

~~(c) *Attempts*. A court shall decrease the authorized fines for an attempt to commit an offense pursuant to RCC § 22E-301.~~

~~(f) *Penalty Enhancements*. A court may decrease the authorized fines for an offense pursuant to RCC § 22E-605.~~

~~(g) *Definitions*. In this section:~~

~~(1) "Organizational Defendant" means any person other than an individual human being. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.~~

~~(2) "Pecuniary loss" means actual harm that is monetary or readily measurable in money.~~

~~(3) "Pecuniary gain" means before-tax profit, including additional revenue or cost savings.~~

RCC § 22E-605. Limitations on Penalty Enhancements.

~~(a) *Penalty Enhancements Not Applicable To Offenses with Equivalent Elements*. Notwithstanding any other provision of law, an offense is not subject to a penalty enhancement in this Chapter when that offense contains an element in one of its gradations which is equivalent to the penalty enhancement.~~

(a) *Charging of Penalty Enhancements.* ~~A person is not subject to additional punishment for a penalty enhancement unless notice of the penalty enhancement is provided by an information or indictment.~~ An offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless notice of the penalty enhancement is specified in the information or indictment for the offense.

(b) *Standard of Proof for Penalty Enhancements*. Except for the establishment of prior convictions as provided in D.C. Code § 23-111, an offense ~~a person~~ is not subject to a general ~~additional punishment for a~~ penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

~~(c) *Multiple Penalty Enhancements Permitted in Charging and Proof*. Multiple penalty enhancements may be applied to an offense for purposes of charging~~

~~and proof at trial. However, an offense with multiple penalty enhancements is subject to RCC § 22E-70[X].~~

RCC § 22E-606. Repeat Offender Penalty Enhancements.

(a) *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has: ~~a felony when the offender, in fact, has 2 or more prior convictions for District of Columbia felonies or offenses equivalent to current District of Columbia felonies.~~

(1) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or

(2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:

(A) Committed within 10 years; and

(B) Not committed on the same occasion

(b) *Misdemeanor Repeat Offender Penalty Enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when, if fact, the actor commits a misdemeanor offense under Subtitle I of this title and at the time has: ~~misdemeanor when the defendant, in fact, has 2 or more prior convictions for District of Columbia offenses or offenses equivalent to current District of Columbia offenses.~~

(1) Two or more prior convictions for a misdemeanor offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion;

(2) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or

(3) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:

(A) Committed within the prior ten years; and

(B) Not committed on the same occasion.

~~(c) *Crime of Violence Repeat Offender Penalty Enhancement.* A crime of violence repeat offender penalty enhancement applies to a crime of violence when the offender, in fact, has one or more prior convictions for a District of Columbia crime of violence or an offense equivalent to a current District of Columbia crime of violence.~~

(c) *Proceedings to establish previous convictions.* ~~*Additional Procedural Requirements.*~~ No person shall be subject to additional punishment for a felony or misdemeanor repeat offender penalty enhancement in this section unless the requirements of D.C. Code § 23-111 are satisfied.

(d) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine:

(1) A felony repeat offender penalty enhancement under subsection (a) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:

(A) For a Class 1 or Class 2 felony, 10 years and $50,000;

(B) For a Class 3 or Class 4 felony, 6 years and $40,000;
(C) For a Class 5 or Class 6 felony, 3 years and $30,000;
(D) For a Class 7 or Class 8 felony, 2 years and $20,000; and
(E) For a Class 9 felony, 1 year and $10,000; and

(2) A misdemeanor repeat offender penalty enhancement under subsection (b) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:

~~(3) *Misdemeanor Repeat Offender*. A misdemeanor repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

~~(A) For a Class A or Class B misdemeanor, 90 days and $500; and~~
~~(B) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.~~

~~(2) *Felony Repeat Offender*. A felony repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

~~(3) *Crime of Violence Repeat Offender*. A crime of violence repeat offender penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

(e) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "comparable offense," "felony," "misdemeanor," and "prior conviction" have the meanings specified in RCC § 22E-701.

~~(1) *Crime of Violence*. "Crime of violence" has the meaning specified in RCC § 22E-[XXX].~~

~~(2) *Equivalent*. For purposes of this section, "equivalent" means a criminal offense with elements that would necessarily prove the elements of a District criminal offense.~~

~~(3) *Felony*. "Felony" has the meaning specified in RCC § 22E-601.~~

~~(4) *Misdemeanor*. "Misdemeanor" has the meaning specified in RCC § 22E-601.~~

~~(5) *Prior Convictions*. In this section, "prior convictions" means convictions by any court or courts of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, provided that:~~

~~(i) Convictions for 2 or more offenses committed on the same occasion or during the same course of conduct shall be counted as only one conviction;~~

~~(ii) A conviction for an offense with a sentence that was completed more than 10 years prior to the commission of the instant offense shall not be counted for determining repeat misdemeanor offender and repeat felony offender penalty enhancements;~~

~~(iii) An offense that was committed when the defendant was a minor shall not be counted for determining misdemeanor repeat offender or felony repeat offender penalty enhancements; and~~

~~(iv) A conviction for which a person has been pardoned shall not be counted as a conviction.~~

RCC § 22E-60~~8~~7. Pretrial Release Penalty Enhancements.

(a) ~~*Misdemeanor*~~ *Pretrial Release Penalty Enhancement.* A ~~misdemeanor~~ pretrial release penalty enhancement applies to an offense ~~misdemeanor~~ when, in fact, ~~the offender committed the misdemeanor while on release pursuant to D.C. Code § 23-1321 for another offense~~ at the time the actor commits the offense the actor is on pretrial release under D.C. Code § 23-1321.

~~(b) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement applies to a felony when the offender committed the felony while on release pursuant to D.C. Code § 23-1321 for another offense.~~

~~(c) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement applies to a crime of violence when the defendant committed the crime of violence while on release pursuant to D.C. Code § 23-1321 for another offense.~~

(a) *Exceptions* ~~*Penalty Enhancement Not Applicable Where Conduct Punished as Contempt or Violation of Condition of Release*~~. Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense of Contempt under D.C. Code § 11-741, Third Degree Escape from a Correctional Facility or Officer under RCC § 22E-3401(c), Tampering With a Detection Device under RCC § 22E-3402(a)(1)(B), or Violation of a Condition of Release under D.C. Code § 23-1329, for the same conduct. ~~when a person is convicted of contempt pursuant to D.C. Code § 11-741 or violation of a condition of release pursuant to D.C. Code § 23-1329 for the same conduct.~~

(b) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine, a pretrial release penalty enhancement increases the authorized term of imprisonment and fine for an offense above the otherwise authorized penalty classification:

(1) For a Class 1 or Class 2 offense, 10 years and $50,000;
(2) For a Class 3 or Class 4 felony, 6 years and $40,000;
(3) For a Class 5 or Class 6 felony, 3 years and $30,000;
(4) For a Class 7 or Class 8 felony, 2 years and $20,000;
(5) For a Class 9 felony, 1 year and $10,000;
(6) For a Class A or B misdemeanor, 90 days and $500; and
(7) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.

~~(1) *Misdemeanor Pretrial Release Penalty Enhancement.* A misdemeanor pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

~~(2) *Felony Pretrial Release Penalty Enhancement.* A felony pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

~~(3) *Crime of Violence Pretrial Release Penalty Enhancement.* A crime of violence pretrial release penalty enhancement [increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years].~~

(c) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701.

~~(1) *Crime of Violence.* "Crime of violence" has the meaning specified in RCC § 22E-[XXX].~~

~~(2) *Felony.* "Felony" has the meaning specified in RCC § 22E-601.~~

~~(3) *Misdemeanor.* "Misdemeanor" has the meaning specified in RCC § 22E-601.~~

RCC § 22E-60~~7~~8. Hate Crime Penalty Enhancement.

(a) *Hate Crime Penalty Enhancement.* A hate crime penalty enhancement applies to an offense when the ~~offender~~ actor commits the offense with ~~intent to injure or intimidate another person~~ the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against ~~that person's~~ the perceived race, color, religion, national origin, sex, age, ~~marital status, personal appearance,~~ sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), ~~family responsibility,~~ homelessness, physical disability, ~~matriculation,~~ or political affiliation of a person or group of persons.

(b) *Penalty.* A hate crime penalty enhancement increases the otherwise applicable penalty classification for any offense or gradation of an offense by one class ~~[increases the maximum punishment for an offense by X class(es), X years, X.X times, or carries a mandatory minimum of X years]~~.

(c) *Definitions.* The term "purpose" has the meaning specified in RCC § 22E-206; and the terms "actor," "homelessness," "property," "pecuniary loss," and "person acting in the place of a parent per civil law," have the meanings specified in RCC § 22E-701.

~~(1) *Definition of Gender Identity or Expression.* For purposes of this section, "Gender identity or expression" shall have the same meaning as provided in D.C. Code § 2-1401.02(12A).~~

~~(2) *Definition of Homelessness.* For purposes of this section, "Homelessness" means:~~

~~(A) The status or circumstance of an individual who lacks a fixed, regular, and adequate nighttime residence; or~~

~~(B) The status or circumstance of an individual who has a primary nighttime residence that is:~~

~~(C) A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including welfare motels, hotels, congregate shelters, and transitional housing for the mentally ill;~~

~~(D) An institution that provides a temporary residence for individuals intended to be institutionalized; or~~

~~(E) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.~~

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(a) *Civil Provisions on Data Collection and Publication.*

(1) The Metropolitan Police Department shall afford each crime victim the opportunity to submit with their complaint a written statement that contains information to support a claim that the conduct that occurred is a crime subject to a hate crime penalty enhancement under RCC § 22E-608.

(2) The Mayor shall collect and compile data on the incidence of crime subject to a hate crime penalty enhancement under this section, provided that such data shall be used for research or statistical purposes and shall not contain information that may reveal the identity of an individual crime victim.

(3) The Mayor shall publish an annual summary of the data collected under paragraph (b)(2) of this section and transmit the summary and recommendations based on the summary to the Council.

(b) *Civil Action.*

(1) Irrespective of any criminal prosecution or the result of a criminal prosecution, a civil cause of action in a court of competent jurisdiction for appropriate relief shall be available for any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.

(2) In a civil action under paragraph (b)(1) of this section, the relief available shall include:

(A) An injunction;

(B) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

(C) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or

(D) Reasonable attorneys' fees and costs.

(3) An actor's parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor shall

be liable for any damages that an actor under 18 years of age is required to pay in a civil action brought under paragraph (b)(1) of this section, if any action or omission of the parent or person acting in the place of a parent per civil law contributed to the conduct of the actor.

(c) *Definitions.* The terms "actor" and "person acting in the place of a parent per civil law" have the meanings specified in RCC § 22E-701.

Chapter 7. Definitions.

RCC § 22E-701. Generally Applicable Definitions.

~~"Comparable offense" means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.~~

"Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year; or,

(B) In other jurisdictions, an offense punishable by death.

"Homelessness" means the status or circumstance of an individual who:

(A) ~~The status or circumstance of an individual who~~ ~~I~~ Lacks a fixed, regular, and adequate nighttime residence; or

(B) ~~The status or circumstance of an individual who~~ Has a primary nighttime residence that is:

(1) A supervised publicly or privately operated shelter designed to provide temporary living accommodations, including ~~welfare~~ motels, hotels, congregate shelters, and transitional housing for the mentally ill;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(3) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

"Misdemeanor" means an offense punishable by a term of imprisonment that is one year or less.

"Pecuniary gain" means before-tax profit that is monetary or readily measured in money, including additional revenue or cost savings.

"Pecuniary loss" means actual harm that is monetary or readily measurable in money.

"Prior conviction" means a final order, by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;

(B) A conviction that is subject to successful completion of a diversion program or probation under D.C. Code § 48-904.01(e);

(C) A conviction that has been vacated, sealed, or expunged; or

(D) A conviction for which a person has been granted clemency or a pardon.

APPENDIX D2:

DISPOSITION OF ADVISORY GROUP COMMENTS & OTHER CHANGES TO DRAFT DOCUMENTS

Chapter 6. Offense Classes, Penalties, & Enhancements.

RCC § 22E-601. Offense Classifications.

(1) *The CCRC recommends codification of nine felony classes, instead of eight, to allow more differentiation among the most serious felony offenses.*
- This change improves the proportionality of the revised statutes.

(2) *The CCRC recommends moving the definitions of "felony" and "misdemeanor" to the general definitions in RCC § 22E-701.*
- This change clarifies and improves the organization and consistency of the revised statutes.

RCC § 22E-602. Authorized Dispositions.

(1) *The CCRC recommends adding subsection (b) to state, "A court may sentence a person upon conviction to either imprisonment under RCC § 22E-603 or a fine under RCC § 22E-604, but not both, for the following statutes prosecuted by the Attorney General for the District of Columbia:", and then list any specified offenses prosecuted by the Attorney General that potentially fall under D.C. Code § 23-101(a).*[1] *This provision ensures that RCC § 22E-602 is not interpreted in a manner that would shift prosecutorial jurisdiction from the Attorney General to the United States Attorney for the specified offenses.*
- This change improves the clarity of the revised statutes.

RCC § 22E-603. Authorized Terms of Imprisonment.

(1) *OAG, App. C. at 31, recommends deleting the multiple instances of the phrase "not more than" from the section as redundant. OAG says that the introductory portion of the section refers to a "maximum" term of imprisonment which sufficiently indicates a lower penalty is available.*
- The RCC incorporates this recommendation by deleting the phrase "not more than." This change improves the clarity of the revised statutes.

(2) *OAG, App. C. at 31, recommends updating the commentary to correct a typographical error regarding the applicable Supreme Court standard for jury demandability. OAG says that the constitutional limit is "more than six months" and that should replace the commentary reference to "six months or more."*

[1] D.C. Code § 23-101(a) ("Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia [Attorney General for the District of Columbia] or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section.").

- The RCC incorporates this recommendation by replacing the relevant commentary reference to the phrase "six months or more" with "more than six months." This change improves the clarity of the revised statutes.

(3) *PDS, App. C at 34-37, recommends penalty classes be determined not only "in light of the sentencing practices but also in light of evidence-based research on public safety and of the potential fiscal impact of incarceration." PDS also specifically recommends the elimination of life without release and all sentences above 20 years of incarceration. PDS says that these sentences of life without release, particularly where there is no "second look" provision or parole eligibility, are not supported by evidence about the dangerousness of the offender and are inhumane. PDS notes research and empirical evidence on the decrease in criminal behavior as persons age. PDS also notes that as the District has sought statehood and additional control over the District's criminal justice system, "the Commission, and ultimately the Council, should be mindful about building a sentencing system it would never be able to afford." PDS also states strong objection to the [previously-proposed] 45-year term of imprisonment for the penultimate [previously Class 2] imprisonment penalty. PDS says that a 45-year penultimate penalty is more severe than the 20-year maximum recommended by the ALI and the 30-year maximum in the Proposed Federal Criminal Code issued by the Brown Commission. PDS discusses at some length how the average sentence for serious felonies compares to the [previously-proposed] classifications.*

- The RCC partially incorporates this recommendation by eliminating formal penalties of life without release, restricting *de facto*[2] penalties of life and life without release to first degree murder and aggravated first degree murder, and setting the maximum imprisonment for penalty classes in a manner that significantly reduces authorized imprisonment to better reflect evidence-based research on public safety and the fiscal impact of incarceration.[3] The RCC classes use determinate rather than indeterminate sentences, cognizant that the maximum for Class 1 and Class 2 authorized sentences are effective equivalents to life imprisonment.[4] Except for murder and the most severe sex and human trafficking crimes, the RCC does not authorize punishments above 30

[2] The District effectively abolished parole in 2000 when the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act") went into effect. Although the D.C. Revitalization Act did not remove "life imprisonment" as an authorized penalty for crimes such as unenhanced first degree murder, since 2000 such authorized penalties of "life imprisonment" are *de facto* authorizations of life imprisonment without parole.

[3] *See, e.g.*, National Institute of Justice, *Five Things About Deterrence* NCJ 247350 (May 2016).

[4] *See* United States Sentencing Commission, Sourcebook 2017 Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders."). The average age of federal defenders is 36, (*Id.* at S-178) which would suggest a life expectancy of around seventy-five years for a thirty-six-year-old placed in Bureau of Prisons' custody. The life expectancy of District residents at birth (2011-2015) varies sharply by race and geography, ranging from 68-89. D.C. Department of Health, *Health Equity Report for the District of Columbia 2018* (available online at https://dchealth.dc.gov/publication/health-equity-report-district-columbia-2018).

years. The RCC does not authorize punishments above 20 years for crimes other than murder, severe sex and human trafficking crimes, and aggravated forms of kidnapping and manslaughter. The RCC penalty classes balance consideration of current court practice, public opinion as to relative offense severity, and research on the marginal (or possibly negative[5]) public safety benefits and high fiscal costs of lengthy periods of incarceration. These changes improve the proportionality of the revised statutes.

(4) *PDS, App. C at 37-38, recommends making the [previously-proposed] Class B penalty 6 months instead of 180 months and specifying in individual statutes any Class B statutes that are jury-demandable. PDS says this default rule, given the current provisions in D.C. Code § 16-705(b), would make the default Class B offense jury demandable. PDS says that such a default is proper because "[t]rial by jury is critical to fair trials for defendants."*

- The RCC partially incorporates this recommendation by setting the maximum imprisonment for Class B offenses to 180 days, but making all class B offenses jury demandable. The practical difference between 180 days and 6 months is negligible, but describing maximum imprisonment terms in days rather than months is more precise, clear, and consistent. The substantive issue at stake is jury demandability, and the CCRC recommends revising D.C. Code § 16-705(b) to make all Class B offenses jury demandable. For further information on CCRC recommendations for jury demandability in the revised statutes, see *First Draft of Report #51 Jury Demandable Offenses* (February 25, 2020) and Advisory Group Memorandum #31, *Supplemental Materials to the First Draft of Report #51* (February 25, 2020). This change improves the clarity, consistency, and proportionality of the revised statutes.

(5) *The CCRC recommends specific maximum imprisonment penalties for every RCC penalty classification but does not recommend statutory or mandatory imprisonment penalties for any RCC penalty classification and offense. As specified in the First Draft of Report #52, Cumulative Update to RCC Chapter 6, the CCRC recommends specific maximum terms of imprisonment for each penalty class in RCC § 22E-603. The RCC penalty class recommendations balance consideration of current court practice, public opinion as to relative offense severity, and research on the marginal (or possibly negative[6]) public safety benefits and high fiscal costs of lengthy periods of incarceration. The RCC penalty classes do not recommend statutory or mandatory minimum penalties for any penalty classes. The District's voluntary sentencing guideline regime provides judges direction on minimum sentences, while providing flexibility to*

[5] For an overview of research indicating a possible criminogenic effect of incarceration, see: National Research Council Of The National Academies, *The Growth Of Incarceration In The United States* (2014) at 193.

[6] For an overview of research indicating a possible criminogenic effect of incarceration, see: National Research Council Of The National Academies, *The Growth Of Incarceration In The United States* (2014) at 193.

tailor penalties in unusual cases. The RCC recommendation not to incorporate mandatory minimum penalties follows the recommendations of the Judicial Conference of the United States,[7] the American Law Institute,[8] and the American Bar Association.[9] For more information on the evidence against mandatory minimum sentencing, see Advisory Group Memorandum #32 – Supplemental Materials to the First Draft of Report #52.

- This change improves the consistency and proportionality of the revised statutes.

(6) *The CCRC recommends the removal of prior subsections (b) and (c) that refer to differences in penalties for attempts under RCC § 22E-301 and general penalty enhancements under RCC § 22E-605. These provisions are unnecessary given the section's introductory statement that the penalties apply "unless otherwise expressly specified by statute," and the provisions are potentially confusing as to why any other exceptions to the penalties are not included.*

- This change clarifies the revised statutes.

RCC § 22E-604. Authorized Fines.

(1) *OAG, App. C at 31-32, recommends reorganizing and rephrasing the revised statute's provisions regarding alternative fines based on pecuniary loss or gain to clarify that fines based on pecuniary loss or gain need only be separately alleged in the information or indictment when the fine amount exceeds what is normally*

[7] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) ("The Commission is well aware of the Judicial Conference's longstanding position opposing mandatory minimum penalties and its support of legislative efforts such as expansion of the "safety valve" at 18 U.S.C. 3553(f). Mandatory minimum sentences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of confidence in the criminal justice system. For over sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing provisions and has supported measures for their repeal or to ameliorate their effects. The Judicial Conference also supports the Commission in its work in pursuit of an amendment to 18 U.S.C. § 924(c) to preclude the stacking of counts and make clear that additional penalties apply only when, prior to the commission of such offense, one or more convictions of such person have become final.") (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[8] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 166 ("Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.").

[9] ABA House of Delegates, Resolution 10B on Mandatory Minimums (2017), at 4. ("RESOLVED, That the American Bar Association opposes the imposition of a mandatory minimum sentence; and FURTHER RESOLVED, That the American Bar Association urges Congress, state and territorial legislatures to repeal existing criminal laws requiring minimum sentences, and to refrain from enacting laws punishable by mandatory minimum sentences.").

authorized for the offense under subsection (a). OAG provides specific revised language.

- The RCC partially incorporates this recommendation by reorganizing and rephrasing the alternative fine provisions to state that an allegation as to pecuniary loss or gain in an indictment and information is necessary only when the actor is subject to a fine double the amount of the pecuniary loss or pecuniary gain. The revised commentary notes that a fine up to the maximum amount otherwise authorized under subsection (a) does not require any special provision in the indictment or information and may be imposed by the court for any legitimate penal reason, including the pecuniary loss or gain. This change improves the clarity and organization of the revised statutes.

(2) *OAG, App. C at 33, recommends making the higher fines applicable to organizational defendants apply to all misdemeanors, not just offenses that are Class A misdemeanors or felonies.*

- The RCC incorporates this change by removing the limitation to Class A misdemeanors or felonies for the alternative maximum fine to be applicable to organizational defendants. This change to the RCC constitutes a new change to current D.C. Code § 22–3571.01, which is limited to "an offense punishable by imprisonment for 6 months." In addition, as noted below, the RCC adds a requirement that for the alternative (higher) fines for organizational defendants to apply, the indictment or information must allege the actor's status as an organizational defendant subject to a fine treble the maximum amount otherwise authorized. This latter provision provides a means of charging that (due to the higher fines) would make the charge jury-demandable for even very low-level (Class C or Class D) offenses. This change improves the proportionality of the revised statutes.

(3) *OAG, App. C at 33, recommends rephrasing the alternative maximum fine for organizational defendants to provide that the multiplication of fines is also applicable to any fine specified in the statute for a particular offense (if any exists), not just the standard fine in subsection (a) for the penalty class.*

- The RCC incorporates this recommendation by amending the revised statute to codify an alternative maximum fine for organizational defendants that is a multiple of the fine specified in the statute for a particular offense (if any exists), not just the standard fine in subsection (a) for the penalty class. With this change, the revised statute is now substantively identical to the relevant provision in D.C. Code § 22-3571.02. This change improves the clarity and proportionality of the revised statutes.

(4) *The CCRC recommends amending the provision regarding alternative maximum fines for organizational defendants to provide treble (instead of double) fines when the information or indictment specifies that the actor is an organizational defendant subject to an alternative maximum fine. The trebling of fines is a change in law that may provide a more proportionate punishment for businesses. In addition, the requirement that for the alternative (higher) fines for*

organizational defendants to apply, the indictment or information must allege the actor's status as an organizational defendant subject to an alternative maximum fine is a change in law from the current D.C. Code § 22-3571.01(c) provision which has no special requirements for an indictment or information. The increased fines for organizational defendants under the current D.C. Code statute has the effect of making charges for 180-day imprisonment offenses jury demandable for organizational defendants but not for natural persons, and this discrepancy would be exacerbated if the alternative fines for organizational defendants apply to all misdemeanors and treble damages are allowed. The revised statute provides the government the choice between pursuing treble fines which would make the charge jury-demandable for even very low-level (Class C or Class D) offenses or pursuing normal fines with the same jury demandability as for natural persons. The revised statute also clarifies that no culpable mental state is required as to the fact that the organizational defendant is such, or as to the existence or amount of the pecuniary gain or pecuniary loss.

- This change improves the clarity and proportionality of the revised statutes.

(5) *The CCRC recommends specific maximum fines for every RCC penalty classification. The fines are generally higher than those currently in the Fine Proportionality Act provisions in current D.C. Code § 22–3571.01 for similar terms of imprisonment.*[10] *The higher authorized fines may provide an alternative punishment to incarceration for some persons, including legal entities like businesses and corporations,*[11] *while low-income and indigent persons would not be subject to the higher crimes under RCC § 22E-604(c).*

[10] The FPA authorizes a higher fine for 3-year felonies. This appears to be due to the fact that the FPA does not provide a distinct fine for 3-year felonies, instead grouping such fines with 5-year felonies which are subject to a $12,500 fine. For comparison: a fine-only offense is subject to a $100 fine under the FPA and a $250 fine under the RCC; a 30-day offense is subject to a $250 fine under the FPA and a $500 fine under the RCC; a 90-day offense is subject to a $500 fine under both the FPA and a $1,000 fine under the RCC; a 180-day offense is subject to a $1,000 fine under the FPA and a $2,500 fine under the RCC; a one-year offense is subject to a $2,500 fine under the FPA and a $5,000 fine under the RCC; a 3-year offense is subject to a $12,500 fine under the FPA and a $10,000 fine under the RCC; a 5-year offense is subject to a $12,500 fine under the FPA and a $25,000 fine under the RCC; a 10-year offense is subject to a $25,000 fine under the FPA and a $50,000 fine under the RCC; a 15-year offense is subject to a $37,500 fine under the FPA and a $75,000 fine under the RCC; a 20-year offense is subject to a $50,000 fine under the FPA and a $100,000 fine under the RCC; a 30-year offense is subject to a $125,000 fine under the FPA and a $250,000 fine under the RCC. The RCC further provides escalating fines up to $1,000,000 for 40-, 60-, and 80-year offenses whereas the FPA provides fines above $125,000 only where death results (regardless of the imprisonment penalty) and sets that penalty at $250,000.

[11] With respect to Subtitle III of Title 22E, property offenses, "person" is specifically defined to include non-natural persons. *See* RCC § 22E-701 (defining person to mean "an individual, whether living or dead, as well as a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity."). For other RCC and D.C. Code offenses, "person" generally includes non-natural entities. *See* D.C. Code § 45-604 ("The word 'person' shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

- These changes improve the consistency and proportionality of the revised statutes.

(6) *The CCRC recommends reorganizing the alternative fines based on pecuniary loss or gain and for organizational defendants to clarify that the increases to fines do not stack. The revised statute's subsection (c) specifies that either the pecuniary loss/gain provisions, or the organizational defendant provisions may be applied. This is consistent with limitations in the current provisions in D.C. Code §§ 22-3571.01 and 22-3571.02, and does not further change District law.*

- This change improves the clarity and proportionality of the revised statutes.

(7) *The CCRC recommends moving the definitions of "pecuniary gain" and "pecuniary loss" from RCC § 22E-604 to RCC § 22E-701.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

(8) *The CCRC recommends revising the definition of "organizational defendant" to refer to "any actor other than a natural person, including a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity." This phrasing is not substantively different, but the language more clearly is distinguished from RCC references to a "natural person" and the specific list of entities parallel the list of legal entities in the RCC definition of "person."*

- This change clarifies the revised statutes.

(9) *The CCRC recommends the removal of prior subsections (e) and (f) that refer to differences in penalties for attempts under RCC § 22E-301 and general penalty enhancements under RCC § 22E-605. These provisions are unnecessary given the section's introductory statement that the fines apply "unless otherwise expressly specified by statute," and the provisions are potentially confusing as to why any other exceptions to the fines are not included.*

- This change clarifies the revised statutes.

RCC § 22E-605. Limitations on Penalty Enhancements.

(1) *OAG, App. C at 39-40, recommends the RCC provision (previously subsection (a)) regarding applicability of the general penalty enhancements to other offenses with equivalent elements be amended to define the term "equivalent" and to redraft the reference to "gradations" to instead refer to "lesser included offenses." OAG also says the Commission should clarify in the commentary that case law in* Bigelow v. United States, *498 A.2d 210 (D.C. 1985) remains valid law, allowing the stacking of penalty enhancements that reflect different legislative purposes and do not have the same requirements.*

- The RCC does not incorporate this comment because the prior subsection (a) and accompanying commentary has been deleted as unnecessary. Rather than have a general provision on the interaction of general penalty enhancements and all offenses, the RCC more specifically addresses the applicability of a general penalty enhancement in those few situations

where application of such an enhancement may result in disproportionate penalties. For example, in the offense of possession of a firearm by an unauthorized person, RCC § 22E-4105(d)(3), the revised statute already states that, "A person shall not be subject to prosecution for violation of subsection (a) or subparagraph (b)(2)(A) of this section and a repeat offender penalty enhancement in RCC § 22E-606 for the same conduct." As described below, several types of offenses are specifically excluded from the scope of the general penalty enhancement for an offense committed during pretrial release, RCC § 22E-608(d). These more specific ways of addressing how the general penalty enhancements apply to particular offenses make the prior RCC § 22E-605(a) unnecessary, and so the subsection is deleted. These changes do not affect the validity of the holding in *Bigelow v. United States*, 498 A.2d 210 (D.C. 1985).

(2) *USAO, App. C at 50, comments that it "agrees that [prior] subsections (b) and (c) "codify procedural requirements for penalty enhancements…required in* Apprendi*…and subsequent case law." [These prior subsections are now subsections (a) and (b) in RCC § 22E-605.]*

(3) *The CCRC recommends referring to the penalty enhancements in Chapter 6 as "general penalty enhancements" and rephrasing the provisions in RCC § 22E-605 to refer to "an offense" being "subject to penalty enhancement" rather than a "person" being "subject to additional punishment."*

- This change clarifies the revised statutes.

RCC § 22E-606. Repeat Offender Penalty Enhancements.

(1) *OAG, App. C at 40-41, recommends the revised statute or Commentary address the meaning of the terms "occasion" and "course of conduct" as used in the revised statute, including any relevant case law.*

- The RCC partially incorporates this recommendation by updating the RCC repeat offender penalty enhancement statutory language to eliminate the phrase "course of conduct." The revised statute retains, however, the undefined term "occasion" which is used in the current repeat offender provision in D.C. Code § 22-1804a. There is no case law on point, and the ordinary meaning of the word is intended.[12] This change clarifies the revised statutes.

(2) *OAG, App. C at 41, recommends the revised statute exclude from what constitutes a "prior conviction" any convictions that have been sealed by a court on grounds of actual innocence.*

- The RCC incorporates this recommendation by amending the revised statute to exclude from what constitutes a "prior conviction" all

[12] Codification or explanation in commentary of a more precise definition without being too narrow or referring to other ambiguous terminology may be difficult. *See, e.g.*, D.C. Sentencing Commission, *2019 Voluntary Sentencing Guidelines Manual* §7.10 (in part defining "event" by reference to a happening at the same time and place, but also referring to having the same "nucleus of facts").

convictions sealed on any grounds, including actual innocence. This change improves the proportionality of the revised statutes.

(3) *PDS, App. C at 42, recommends elimination of all repeat offender penalty enhancements. PDS says that repeat offender penalty enhancements: "represent a triple counting of criminal conduct and work a grave miscarriage of justice for individuals who have already paid their debt to society in the form of a prior sentence" and "exacerbate existing racial disparities in the criminal justice system and increase sentences that are already too long."*

- The RCC partially incorporates this recommendation by narrowing the scope of misdemeanor offenses subject to a repeat offender enhancement to offenses against persons in Subtitle I of Title 22E, and sharply lowering the penalties under the enhancement. The revised repeat offender statutes increase the applicable penalty by less than half the otherwise applicable penalty, as compared to the current D.C. Code which authorizes treble penalties up to life without parole. Nearly all of the jurisdictions with comprehensively revised criminal codes based on the Model Penal Code provide a recidivist penalty enhancement.[13] While there is little or no evidence that such penalty enhancements deter criminal behavior, the fact that nearly all U.S. jurisdictions statutorily enhance penalties in some fashion based on criminal history suggests that such enhancements may reflect the increased seriousness and blameworthiness of criminal behavior. Whether and to what extent the District's voluntary sentencing guidelines also consider prior convictions in its guidance for sub-statutory penalties is a separate and secondary issue to what maximum sentences are legislatively authorized. The authorization of a statutory maximum penalty does not imply or endorse the use of such penalties in any but the most extreme cases, and it is not intended to impair efforts to address misdemeanor and felony conduct through alternatives to incarceration. These changes improve the proportionality of the revised statutes.

(4) *USAO, App. C at 275-276, recommends adding a Sexual Offense Repeat Offender Penalty Enhancement for all prior and co-occurring convictions under Chapter 13 and equivalent offenses.[14] USAO states that it is concerned that there must be two or more prior convictions and that this enhancement only applies to the number of prior convictions, rather than to the total number of victims.*

- The RCC partially incorporates this recommendation by revising the RCC repeat offender penalty enhancements to provide a penalty enhancement

[13] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-9; Ark. Code Ann. § 5-4-501; Ariz. Rev. Stat. Ann. § 13-703; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-40; Del. Code Ann. tit. 11, § 4214; Haw. Rev. Stat. Ann. § 706-661; 730 Ill. Comp. Stat. Ann. 5/5-5-3.2; Ind. Code Ann. § 35-50-2-8; Ky. Rev. Stat. Ann. § 532.080; Me. Rev. Stat. tit. 17-A, § 1252; Minn. Stat. Ann. § 609.1095; Mo. Ann. Stat. § 558.016; Mont. Code Ann. § 46-18-502; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. Ann. § 2C:43-7.1; N.Y. Penal Law § 70.04; N.D. Cent. Code Ann. § 12.1-32-09; Ohio Rev. Code Ann. § 2929.14; 42 Pa. Stat. and Cons. Stat. Ann. § 9714; S.D. Codified Laws § 22-7-7; Tenn. Code Ann. § 40-35-106; Tex. Penal Code Ann. § 12.42; Utah Code Ann. § 76-3-203.5; Wis. Stat. Ann. § 939.619; Wash. Rev. Code Ann. § 9.94A.570.

[14] *See* D.C. Code § 22-3020(a)(5).

for a "misdemeanor offense under Subtitle I of this title," which includes various misdemeanor sex crimes in RCC Chapter 13[15] that are not otherwise subject to the felony repeat offender enhancement. The felony repeat offender penalty enhancement also authorizes higher liability for a person with at least one prior conviction for a comparable crime, and the misdemeanor repeat offender penalty enhancement applies to a person who has two prior convictions for a "misdemeanor offense under Subtitle I of this title," or has prior convictions that meet the threshold for the felony repeat offender penalty enhancement. This enhancement authorizes increased liability for offenses against persons (including sex offenses) in a manner similar to the current misdemeanor repeat offender enhancement in D.C. Code § 22-1804(a) and the aggravating circumstance in D.C. Code § 22-3020(a)(5) for many sex crimes when the actor committed crimes against two or more victims. This change improves the proportionality of revised offenses.

(5) *The CCRC recommends using the definition of "prior conviction" previously in RCC § 22E-4105 (now relocated to RCC § 22E-701) in the updated RCC § 22E-606, Repeat Offender Penalty Enhancement. This definition replaces the prior RCC definition of "prior conviction" that was unique to RCC § 22E-606. Differences between the new definition (carried over from RCC § 22E-4105) and the prior definition (unique to RCC § 22E-606) primarily concern the exclusion of convictions 10 years and older. The updated RCC § 22E-606(a)(2)(A), Repeat Offender Penalty Enhancement statute now separately requires felony offenses to have been committed within 10 years. So, even though the definition no longer includes a 10-year window, the updated Repeat Offender Penalty Enhancement statute itself now imposes such a requirement for liability under RCC § 22E-606(a)(2)(A). Note, however, that there is no 10-year window in the updated Repeat Offender Penalty Enhancement for prior convictions for a felony offense against persons under Subtitle I, see RCC § 22E-606(a)(1).*

- This change improves the clarity, consistency, and logical organization of the revised statutes.

(6) *The CCRC recommends using the definition of "comparable offense" in RCC § 22E-701 ("Comparable offense" means a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime.") instead of the prior RCC definition of "equivalent" specific to the repeat offender enhancement provision ("equivalent" means a criminal offense with elements that would necessarily prove the elements of a District criminal offense.). The definitions are substantially the same except the definition of "comparable offense" has some jurisdictional clarifications.*

- This change improves the clarity, consistency, and logical organization of the revised statutes.

[15] These offenses include: § 22E-1304, Sexually Suggestive Conduct with a Minor; § 22E-1305, Enticing a Minor into Sexual Conduct; § 22E-1306, Arranging for Sexual Conduct with a Minor; and RCC § 22E-1307, Nonconsensual Sexual Conduct.

(7) *The CCRC does not recommend a separate gradation for crimes of violence, instead differentiating between prior convictions for felony offenses in Subtitle I of Title 22 which are both somewhat narrower (e.g., not including burglary and arson) and broader (e.g., including human trafficking) than the current "crime of violence" definition. Only one prior conviction for a felony offense in Subtitle I of Title 22E is necessary for a felony repeat offender penalty enhancement to apply.*

- This change improves the consistency and proportionality of the revised statutes.

(8) *The CCRC recommends different penalties for the repeat offender penalty enhancement depending on the class of the instant offense. This allows for graduated, proportionate penalty enhancements depending on the seriousness of the current offense.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-607. Pretrial Release Penalty Enhancements.

(1) *OAG, App. C at 41, recommends the revised statute use the phrase "in fact" for consistency with other enhancements and to clarify that no culpable mental state is required for the enhancement. OAG also recommends that the statute use a term other than "defendant," consistent with the style in other RCC provisions.*

- The RCC incorporates this recommendation by amending the revised statute to use the defined term "actor" and use the defined term "in fact" to refer to the circumstance that the actor is on release under D.C. Code § 23-1321. This change improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends different penalties for the pretrial release penalty enhancement depending on the class of the instant offense, instead of distinguishing penalties for misdemeanors, felonies, and crimes of violence. This allows for graduated, proportionate penalty enhancements depending on the seriousness of the current offense.*

- This change improves the proportionality of the revised statutes.

(3) *The CCRC recommends adding to the exceptions to the pretrial release penalty enhancement Third Degree Escape from a Correctional Facility or Officer under RCC § 22E-3401(c), Tampering with a Detection Device under RCC § 22E-3402(a)(1)(B). The tampering with a detection device offense under RCC § 22E-3402(a)(1)(B) specifically refers to the conduct occurring during pretrial release, and escape from a correctional facility or officer under RCC § 22E-3401(c) covers persons in a halfway house pretrial.*

- This change improves the proportionality of the revised statutes.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(1) *OAG, App. C at 41, says that the penalty enhancement has narrower application than the current bias-related crime penalty and recommends that the revised hate crime penalty enhancement be expanded to cover all offenses covered under current law, including property offenses.*

- The RCC incorporates this recommendation by revising the language of the hate crime penalty enhancement to more clearly state that the enhancement applies to property crimes as well as crimes that intimidate or cause physical harm to another person. The revised statute now applies, in relevant part, when an actor "commits the offense with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons…" This change clarifies the revised statutes and does not change District law.

(2) *PDS, App. C at 45, recommends removing the categories of marital status, personal appearance, family responsibility, and matriculation from the protected characteristics listed in the revised hate crime enhancement statute. PDS says that when used in the criminal (versus civil) context, the categories may be applied in unintended ways, such as using prejudice based on marital status and family responsibility in a case where a "defendant kills an ex-husband because of a bitter divorce or because the ex-husband fails to take on family responsibility." PDS notes that these categories are not recognized in other states' hate crime laws.*

- The RCC incorporates this recommendation by eliminating marital status, personal appearance, family responsibility, and matriculation from the protected characteristics listed in the revised hate crime enhancement statute. As noted in the updated commentary, there have been no allegations of hate crimes based on these categories according to MPD statistics. This changes District law in a manner that clarifies and improves the proportionality of the revised statutes.

(3) *USAO, App. C at 50, says that labeling the statute a "hate crime" is a change from current law and notes a typographical error in the numbering of subheadings.*

- The RCC incorporates this recommendation by noting the change of name as a non-substantive, clarificatory change in the commentary, and correcting the noted typographical error. This change clarifies the revised statutes and commentary.

(4) *The CCRC recommends changing the culpable mental state requirement from "with intent" to "with purpose." This change does not affect the inchoate nature of what follows, but it does require the actor to consciously desire (in whole or part) to harm someone because of prejudice—as compared to being merely aware that they are harming someone because of prejudice. A purpose culpable mental state avoids bringing into litigation questions about a person being aware of their own motivations and is consistent with the goal of targeting criminal conduct motivated by desires to harm someone because of their prejudice.*

- This change improves the clarity of the revised statutes.

(5) *The CCRC recommends clarifying in the statute and commentary that the actor's purpose of harming someone because of prejudice need be only a but for cause, not the sole or primary cause. The prior revised statute did not explicitly state this, though the commentary made the point.*

- This change improves the clarity of the revised statutes.

(6) *The CCRC recommends setting the penalty at an increase of one penalty class to the otherwise applicable penalty classification for the offense.*

- This change improves the consistency and proportionality of the revised statutes.

(7) *The CCRC recommends relocating the definition of "homelessness" from the hate crime penalty enhancement to the full list of definitions in RCC § 22E-701. The definition is used not only in the revised hate crime penalty enhancement but in the civil provisions.*

- This change improves the clarity and organization of the revised statutes.

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(1) *The CCRC recommends updating the current civil provisions in D.C. Code §§ 22-3702, 22-3704 to track the revised hate crime penalty enhancement's articulation of elements, just as the current civil provisions track the current bias enhancement's articulation of elements in D.C. Code § 22-3701. This change aligns the civil provisions with the revised statute, changing District law to the same extent that the revised hate crime penalty enhancement changes current District law.*

- This revision improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends updating the current civil provision in D.C. Code § 22-3704(c) to make an actor's parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor responsible for any civil damages assessed against an actor under 18 years of age. The current D.C. Code language is ambiguous as to whether guardians are included (the text refers to guardians in part of D.C. Code § 22-3704(c), but not throughout), does not define "guardian," and does not define "minor." It is also unclear whether any biological parent, regardless whether the parent has custody, is liable. The revised statute clarifies all these points consistent with standardized terminology and language used in RCC § 22E-408, Special Responsibility for Care, Discipline, or Safety Defense.*

- This revision improves the clarity of the revised statutes.

(3) *The CCRC recommends eliminating the provision in current D.C. Code § 22-3704(b), which states that whether a person has been subjected to conduct under the bias-related crime statute "shall be determined by reliable, probative, and substantial evidence." The statute does not define the meaning of these terms and there is no case law on point as to whether codification of this standard—particularly the use of the term "substantial"—is intended to limit the otherwise applicable rules of evidence in a civil proceeding. To resolve this ambiguity, the revised statute eliminates reference to "reliable, probative, and substantial evidence."*

- This change clarifies the revised statute.

Chapter 7. Definitions.

RCC § 22E-701. Generally Applicable Definitions.

"Felony"

(1) *OAG, App. C at 29-30, recommends changing the organization of the definition of "felony" to have separate subparagraphs for offenses over one year and those punishable by death. OAG says this would clarify the revised statute.*

- The RCC incorporates this recommendation to reorganize the definition of "felony" by making separate subparagraphs for offenses over one year and those punishable by death. This change improves the clarity and organization of the revised statutes.

(2) *OAG, App. C. at 30, recommends specifying that certain grades of parental kidnapping are designated as felonies, regardless of the maximum allowable penalty, for the purposes of D.C. Code § 23-563. To facilitate such a specification in the revised parental kidnapping statute, OAG says the definitions of "felony" and "misdemeanor" should be amended to include "Unless otherwise provided by statute…"*

- The RCC does not incorporate this recommendation with respect to the definitions of "felony" and "misdemeanor" because it is unnecessary and potentially confusing. RCC § 22E-104 specifies that, "Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title." This general provision avoids the need to repeat throughout the general part that there may be exceptions in the special part of the RCC. Specifying the possibility of exceptions only for the definitions of "felony" and "misdemeanor" would be confusing as to whether such exceptions are possible elsewhere in the general part. Elsewhere, the revised statutes have addressed the specific OAG concern regarding parental kidnapping. The revised parental kidnapping statute, RCC § 16-1022, separately provides in paragraph (h)(6): "Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." This specifies that the provisions under D.C. Code § 23-563 apply to first and second degree parental kidnapping even though it would otherwise be deemed a misdemeanor under RCC § 22E-601.

(3) *The CCRC recommends rephrasing the definition of "felony" to refer to an offense "punishable by" more than one year (or, in other jurisdictions, death) rather than an offense "with an authorized term" of imprisonment more than one year (or, in other jurisdictions, death). This change avoids confusion about "death" (in other jurisdictions) being an "authorized term of imprisonment."*

- This change clarifies, but does not substantively change, the revised statutes.

(4) *The CCRC recommends moving this definition from RCC § 22E-601 to RCC § 22E-701.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

"Homelessness"

(1) *The CCRC recommends non-substantive rephrasing of the definition of "homelessness" to move the phrase "the status or circumstance of an individual who" in front of the colon (to avoid the duplication in the current text) and deleting the adjective "welfare" before "motels" (to avoid confusion).*

- This change clarifies, but does not substantively change, the revised statutes.

"Misdemeanor"

(1) *OAG, App. C. at 30, recommends specifying that certain grades of parental kidnapping are designated as felonies, regardless of the maximum allowable penalty, for the purposes of D.C. Code § 23-563. To facilitate such a specification in the revised parental kidnapping statute, OAG says the definitions of "felony" and "misdemeanor" should be amended to include "Unless otherwise provided by statute…"*

- The RCC does not incorporate this recommendation with respect to the definitions of "felony" and "misdemeanor" because it is unnecessary and potentially confusing. RCC § 22E-104 specifies that, "Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title." This general provision avoids the need to repeat throughout the general part that there may be exceptions in the special part of the RCC. Specifying the possibility of exceptions only for the definitions of "felony" and "misdemeanor" would be confusing as to whether such exceptions are possible elsewhere in the general part. Elsewhere, the revised statutes have addressed the specific OAG concern regarding parental kidnapping. The revised parental kidnapping statute, § 16-1022, separately provides in subparagraph (i)(6): "Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." This specifies that the provisions under D.C. Code § 23-563 apply to first and second degree parental kidnapping even though it would otherwise be deemed a misdemeanor under RCC § 22E-601.

(2) *The CCRC recommends rephrasing the definition of "misdemeanor" to refer to an offense "punishable by" a term of imprisonment that is one year or less.*

- This change clarifies, but does not substantively change, the revised statutes.

(3) *The CCRC recommends moving this definition from RCC § 22E-601 to RCC § 22E-701.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

"Pecuniary gain"

(1) *The CCRC recommends rephrasing the definition to add the adjectival phrase "that is monetary or readily measured in money" to modify the meaning of "profit." This clarifies in the definition the meaning of "pecuniary."*

- This change clarifies, but does not substantively change, the revised statutes.

(2) *The CCRC recommends moving this definition from RCC § 22E-604 to RCC § 22E-701.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

"Pecuniary loss"

(1) *The CCRC recommends moving this definition from RCC § 22E-604 to RCC § 22E-701.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

"Prior conviction"

(1) *The CCRC recommends moving the definition from RCC § 22E-4105, Possession of a Firearm by an Unauthorized Person, to RCC § 22E-701, unchanged.*

- This change improves the logical organization, but does not substantively change, the revised statutes.

(2) *The CCRC recommends using this definition (carried over from RCC § 22E-4105) in the updated RCC § 22E-606, Repeat Offender Penalty Enhancement. This definition replaces the prior RCC definition of "prior conviction" that was unique to RCC § 22E-606. Differences between the new definition (carried over from RCC § 22E-4105) and the prior definition (unique to RCC § 22E-606) primarily concern the exclusion of convictions 10 years and older. The updated RCC § 22E-606(a)(2)(A), Repeat Offender Penalty Enhancement statute now separately requires felony offenses to have been committed within 10 years. So, even though the definition no longer includes a 10-year window, the updated Repeat Offender Penalty Enhancement statute itself now imposes such a requirement for liability under RCC § 22E-606(a)(2)(A). Note, however, that there is no 10-year window in the updated Repeat Offender Penalty Enhancement for prior convictions for a felony offense against persons under Subtitle I, see RCC § 22E-606(a)(1).*

- This change improves the clarity, consistency, and logical organization of the revised statutes.

APPENDIX J -
COMPILATION OF PRIOR CHAPTER 6 NATIONAL LEGAL TRENDS ENTRIES

This appendix contains the relation to national legal trends entries (hereinafter, "entries"), which the CCRC staff previously produced in conjunction with prior drafts of the statutory provisions addressed in the First Draft of Report #52 *Cumulative Update to the Revised Criminal Code Chapter 6 (March 20, 2020)* (Report). These entries have been excerpted from the staff commentary accompanying those prior drafts and are presented in this appendix in the same form as when they were originally released.

These entries are included in this Report for reference purposes only, and should be viewed with a few important caveats in mind. First, these entries reflect the analysis of national legal trends that informed the CCRC staff's work at the time of their initial release. Since that time, however, the relevant national legal trends and/or staff's understanding of them may have subsequently changed or shifted. Second, these entries track older versions of proposed CCRC legislation, which may significantly depart from the corresponding CCRC legislation recommended in this Report. Third, the internal references and citations (e.g., supra and infras) utilized in these entries have not been updated, and, therefore, are no longer accurate.

RCC § 22E-601. Offense Classifications.

Relation to National Legal Trends. The RCC follows the trend among American jurisdictions to use a classification system for offense penalties, although the number of classes varies (for details, see Commentary to RCC § 22E-603, below). The RCC also uses modern, widely-accepted definitions for felony and misdemeanor.[1]

RCC § 22E-602. Authorized Dispositions.

Relation to National Legal Trends. RCC § 22E-602 follows the recent recommendations of the American Law Institute (ALI) Sentencing project[2] and several other jurisdictions[3] by creating a centralized list of possible sanctions for criminal offenses. As the ALI recently noted, in many jurisdictions, sentencing provisions remain "overly complex, disorganized, and scattered."[4] This impedes the aim of making sentencing laws accessible and understandable.[5]

Although the ALI recommendations would include the authorization for each type of sentencing disposition within the Model Penal Code itself, such a consolidation of sentencing provisions into Title 22A would unduly disrupt the organization of other titles of the D.C. Code. RCC § 22E-602 collects and provides centralized notice of possible sentencing dispositions in Title 22E through cross-referencing that leaves the placement of authorizing statutes in their current location.

RCC § 22E-603. Authorized Terms of Imprisonment.

Relation to National Legal Trends. Subsection § 22A-803(a) follows national trends, almost uniform in jurisdictions that have undergone comprehensive criminal code reform, insofar as it creates standardized penalty classes according to the authorized length of imprisonment. Thirty-seven states provide some form of statutory classification system similar to § 22A-803(a).[6] The Proposed Federal Criminal Code[7] and the Model Penal Code[8] each recommend the use of three felony classes and two misdemeanor classes. The D.C. Basic Criminal Code

---

[1] *See* FELONY, Black's Law Dictionary (10th ed. 2014) ("A serious crime usu. punishable by imprisonment for more than one year or by death."); MISDEMEANOR, Black's Law Dictionary (10th ed. 2014) ("A crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement [usu. for a brief term] in a place other than prison [such as a county jail].").

[2] Model Penal Code: Sentencing § 6.02 cmt. h at 7 (Tentative Draft No. 3, 2014).

[3] Ala. Code § 13A-5-2; Alaska Stat. Ann. § 12.55.015; Ark. Code Ann. § 5-4-104; Conn. Gen. Stat. Ann. § 53a-28; Del. Code Ann. tit. 11, § 4204; Haw. Rev. Stat. Ann. § 706-605; 730 Ill. Comp. Stat. Ann. 5/5-4.5-15; Ky. Rev. Stat. Ann. § 532.030; Mo. Ann. Stat. § 557.011; N.Y. Penal Law § 60.01; Tenn. Code Ann. § 40-35-104.

[4] Model Penal Code: Sentencing § 6.02 (Tentative Draft No. 3, 2014).

[5] *Id*.

[6] Ala. Code § 13A-5-6; Alaska Stat. Ann. § 12.55.125; Ariz. Rev. Stat. Ann. § 13-702; Ark. Code Ann. § 5-4-401; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-35a; Del. Code Ann. tit. 11, § 4205; Fla. Stat. Ann. § 775.082; Haw. Rev. Stat. Ann. § 706-659; 730 Ill. Comp. Stat. Ann. 5/5-4.5-25; Ind. Code Ann. § 35-50-2-4; Iowa Code Ann. § 902.1; Ky. Rev. Stat. Ann. § 532.060; Me. Rev. Stat. tit. 17-A, § 125; Mo. Ann. Stat. § 558.011; N.H. Rev. Stat. Ann. § 625:9; N.J. Stat. Ann. § 2C:43-6; N.M. Stat. Ann. § 31-18-15; N.Y. Penal Law § 70.00; N.C. Gen. Stat. Ann. § 15A-1340.17; N.D. Cent. Code Ann. § 12.1-32-01; Ohio Rev. Code Ann. § 2929.14; Or. Rev. Stat. Ann. § 161.605; 18 Pa. Stat. and Cons. Stat. Ann. § 106; S.C. Code Ann. § 16-1-20; S.D. Codified Laws § 22-6-1; Tenn. Code Ann. § 40-35-112; Tex. Penal Code Ann. § 12.32; Utah Code Ann. § 76-3-203; Va. Code Ann. § 18.2-10; Wash. Rev. Code Ann. § 9A.20.021; Wis. Stat. Ann. § 939.50.

[7] Proposed Federal Criminal Code § 3002.

[8] Model Penal Code §§ 6.01, 6.08.

proposed the use of six felony classes and three misdemeanor classes.[9]

Regarding the use of eight felony classes in RCC § 22A-803(a), this number of classification distinctions places the District among the most graduated systems of offense classification nationally. Of those thirty-seven jurisdictions that do have a statutory scheme of classifying offenses by penalty, nearly all have a structure that involves multiple felony levels. Some jurisdictions have as few as three felony levels,[10] whereas others have as many as nine.[11] More recently, however, the trend in state reforms has been towards more refined proportionality distinctions in offense classification. For example, a recent code reform project in Indiana concluded with a recommendation that the number of felony classes be increased from four to six.[12] Missouri recently increased the number of penalties from four to five.[13] And in Illinois, the state's Commission on Criminal Justice and Sentencing Reform is considering increasing the number of drug offense classifications and thereby create "a scheme that is more graduated."[14]

Recently, the American Law Institute (ALI) has recommended increasing the number of felony classes in the Model Penal Code to five,[15] in recognition of the use of determinate sentencing and sentencing guidelines, as opposed to the previous parole system.[16] Previously, the 1963 MPC contained only three felony classes, but the MPC drafters were clear that they presumed an indeterminate sentencing regime (with parole eligibility) and that three classes are the "absolute minimum" that a code requires.[17]

Regarding the precise imprisonment penalties in RCC § 22A-803(a), the District follows nearly every other state in authorizing life without parole for some offenses.[18] Below this top penalty class, variation among jurisdictions as to the availability of supervised release or parole for "life" sentences in other jurisdictions and the operation of separately codified enhancements

---

[9] D.C. Basic Criminal Code § 22-2010.

[10] *E.g.*, Tex. Penal Code Ann. § 12.32.

[11] *E.g.*, Wis. Stat. Ann. § 939.50.

[12] See Press Release, Indiana Senate Republicans, Sen Steele: Criminal Code Reform Moves to Governor's Desk (Mar. 13, 2014), *available at* http://www.indianasenaterepublicans.com/news/2014/03/13/2014/sen.-steele-criminal-code-reform-moves-to-governor-s-desk/ (last visited Dec. 7, 2016). *See also*, CRIMINAL CODE EVALUATION COMMISSION, REVIEW OF CRIMINAL CODE (July 2012), *available at* http://www.in.gov/legislative/interim/committee/2012/committee/reports/CCECFB1.pdf (last visited Dec. 7, 2016).

[13] See Meghan Luecke, *S.B. 491 Modifies provisions relating to criminal law*, https://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/documents/SB491Summary.pdf (last visited Dec. 7, 2016) ("This act creates a new classification for felonies to be known as Class E, and a new classification for misdemeanors to be known as Class D . . . To reflect the change in the authorized terms of imprisonment, crimes once classified as Class C felonies were changed to Class D felonies and crimes once classified as Class D felonies were changed to Class E felonies throughout the statutes.").

[14] Illinois Commission on Criminal Justice and Sentencing Reform, *Potential Sentencing Reforms for Consideration*, *available at* http://www.icjia.org/cjreform2015/pdf/Potential%20Sentencing%20Reforms%20For%20Consideration.pdf (last visited Dec. 7, 2016).

[15] Model Penal Code: Sentencing § 6.01 (Tentative Draft No. 2, 2011).

[16] Model Penal Code Sentencing (second) § 6.06 cmt. a. at 5 (Tentative Draft No. 2, 2014) ("In most prison cases under the new Code, sentencing courts will impose 'determinate' sentences that are closely and predictably related to actual confinement terms.").

[17] Model Penal Code Commentary § 6.01 cmt. 2 at 37.

[18] A sentence of life imprisonment without the possibility of early release, usually termed "life without parole" or "LWOP," is authorized in every American jurisdiction. Eighteen of the 19 non-death penalty jurisdictions (Alaska is the exception) allow for LWOP in some instances, as do all 31 death penalty jurisdictions. See Death Penalty Information Center, Life without Parole, at http://www.deathpenaltyinfo.org/life-without-parole (last visited Apr. 19, 2017).

complicates comparisons.[19] However, the District's felony classifications may provide somewhat more severe penultimate maximum penalties (forty-five years for Class 2 and thirty years for Class 3) compared to most other jurisdictions.[20] In particular, it is notable that the U.S. Sentencing Commission (USSC) considers, for statistical purposes, any sentence of greater than 470 months (slightly less than 40 years) to be a life sentence and, conversely, it treats any life

[19] The shift of many, but not all, jurisdictions from indeterminate to determinate sentencing with various rules for good time release makes evaluation of the meaning of a sentence to life with the possibility for supervised release difficult to analyze. However, it should be noted that prisoners admitted to life sentences in 1997 were expected to serve 29 years, up sharply from the 21 years expected for prisoners admitted in 1991. See Marc Mauer, Ryan S. King, and Malcolm C. Young, The Meaning of "Life": Long Prison Sentences in Context (Sentencing Project 2004), at 12. Even allowing for continued increases in this average time since 1997, the minimum of 38.5 years (assuming maximum good time credit) for a Class B 45 year sentence under the RCC may be significantly more severe.

[20] Below "life" with possibility of supervised release and LWOP penalties, a thirty year maximum as in the RCC Class 3 is near the average authorized in other jurisdictions. See Model Penal Code: Sentencing § 6.06 reporter's note b(3) at 29-30 (Tentative Draft No. 2, 2014) (citing Code of Ala. § 13A-5-6(a)(2) (20-year maximum for Class B felonies); Alaska Stat. § 12.55.125(c) (20 years for most aggravated Class A felony; offenses graded above this class include homicide, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping); Ariz. Rev. Stat. § 13-604(K) (35 years for most aggravated second-degree felony); Ark. Code § 5-4-401(a)(2) (30-year maximum for Class A felonies: "Class Y" is most serious felony level); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (6) (48 years for most aggravated second-degree felony); Conn. Gen. Stat. § 53a-35a (25 years for most serious felony other than murder); 11 Del. Code § 4205(b)(2) (maximum of 25 years for Class B felonies); Fla. Stat. § 775.082(3)(b) (30-year maximum for first-degree felonies; "life felonies" and "capital felonies" are eligible for more severe penalties); Haw. Stat. § 706-659 (20-year maximum for class A felonies; 4 classes of homicide are eligible for more severe penalties); Ill. Stat. c. 730 § 5/5-8-1 (30-year maximum for Class X felonies, one grade below first-degree murder); Ind. Code § 35-50-2-4 (50-year maximum for Class A felonies, one grade below murder); Ia. Code § 902.9(2) (25-year maximum for class B felonies); Ky. Rev. Stat. §§ 532.030 (capital felony); 532.060(2)(b) (20-year maximum for Class B felonies; Class A maximum is life term: Capital offenses eligible for death penalty or life without parole); Me. Rev. Stat. 17-A § 1252(2)(A) (30-year maximum for Class A crimes; only murder graded above this category, with a maximum life sentence); Mo. Rev. Stat. § 558.011(1)(2) (15-year maximum for Class B felonies; maximum for Class A is 30 years or life imprisonment; capital crimes are graded above Class A); Neb. Rev. Stat. § 28-105(1) (50-year maximum for Class IC felonies; Class IB has life maximum; Class IA has life-without-parole maximum; Class I has death penalty); Nev. Rev. Stat. § 193.130(2)(b) (20-year maximum for Class B felonies; maximum penalties for Class A are death or life without parole); N.J. Rev. Stat. § 2C:43-6(a)(1) (20-year maximum for crimes of first degree); N.M. Stat. §§ 31-18-15(A)(3) & 31-18-15.1(C) (24-year maximum for most aggravated first-degree felonies, except for exceptions eligible for life imprisonment or the death penalty); N.Y. Penal Law § 70.00(2)(b) (25-year maximum for Class B felonies); N.D. Code § 12.1-32-01(2) (20-year maximum for Class A felonies; maximum for Class AA felonies is life without parole); Or. Rev. Stat. § 161.605(1) (20-year maximum for Class A felonies; more severe penalties available for murder and aggravated murder); 18 Pa. C.S. § 1103 (20-year maximum for felonies of first degree; 3 grades of murder are graded above); S.C. Code § 16-1-20(A)(1) (30-year maximum for Class A felonies; punishments for murder separately graded); S.D. Codified Laws § 22-6-1(4) (50-year maximum for Class 1 felonies; Classes A, B, and C, graded above, include death penalty and life prison terms); Tenn. Code Ann. § 40-35-111(b)(1) (60-year maximum for Class A felonies; penalties for murder, including capital punishment and life sentences, separately provided); Tex. Penal Code § 12.33(a) (20-year maximum for felonies of the second degree; felonies of first degree have maximum of life imprisonment; death penalty separately provided); Utah Code Ann. § 76-3-203(2) (15-year maximum for felonies of the second degree; felonies of the first degree have maximum of life imprisonment; death penalty separately provided); Va. Code § 18.2-10(c) (20-year maximum for Class 3 felonies: maximum for Class 2 is life imprisonment; maximum 17 for Class 1 is death); Wash. Rev. Code § 9A.20.021(b) (10-year maximum for Class B felonies; maximum for 18 Class A is life imprisonment); Wis. Stat. § 939.50(3)(b) (60-year maximum for Class B felonies; maximum for 19 Class A is life imprisonment)).

sentence as a sentence of 470 months.[21] At the bottom, by contrast, the District's felony classifications provide for somewhat less severe statutory penalties (three years for Class 8) compared to most jurisdictions.[22]

The ALI has recently recommended that the most severe punishment be set at life without parole (LWOP)[23], though it did so hesitatingly. The ALI Sentencing Project reporters noted that "a sentence of life without possibility of release is close in severity to a death sentence,"[24] that the Supreme Court has banned the imposition of LWOP for juvenile defendants convicted of non-homicide crimes[25]; that the Supreme Court has banned the *mandatory* imposition of LWOP for homicide crimes[26]; and that other developed nations have banned LWOP on the basis that it violates basic human rights.[27] For these reasons, the reporters stated that the ALI only endorses the use of LWOP "when it is the only alternative to the death penalty."[28] Thus, "the Institute does not approve of the 'creep' of life sentences without parole to offenses beyond those that would otherwise be eligible for the death penalty," i.e., murder.[29] With respect to the penultimate class, following many states, the ALI recommends a penultimate penalty class set at a twenty-year maximum.[30] For the lowest level felony, the ALI recommends a three year penalty.[31]

Subsections 22A-803(b) and (c) cross-reference other provisions of the RCC, concerning

---

[21] *See* United States Sentencing Commission, Sourcebook 2016 Appendix A, at S-163. The USSC bases this number on the "average life expectancy of federal criminal offenders given the average age of federal offenders." *Id*.

[22] See Model Penal Code: Sentencing § 6.06 reporter's note b(4) at 30 (Tentative Draft No. 2, 2014) (citing Code of Ala. § 13A-5-6(a)(3) (maximum of 10 years for least serious felony grade); Alaska Stat. § 12.55.125(e) (5 years); Ariz. Rev. Stat. § 13-701(C)(5) (1 year); Ark. Code § 5-4-401(a)(5) (6 years); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (4)(b)(II)(6) (3 years); Conn. Gen. Stat. § 53a-35a (5 years); 11 Del. Code § 4205(b)(7) (2 years); Fla. Stat. § 775.082(3)(d) (5 years); Haw. Stat. § 706-660(2) (5 years); Ill. Stat. c. 730 § 5/5-8-1(7) (3 years); Ind. Code § 35-50-2-7(a) (3 years); Ia. Code § 902.9(5) (5 years); Ky. Rev. Stat. § 532.060(2)(d) (5 years); Me. Rev. Stat. 17-A § 1252(2)(C) (5 years for "Class C" crimes; equivalent of lowest felony grade); Mo. Rev. Stat. § 558.011(1)(4) (4 years); Neb. Rev. Stat. § 28-105(1) (5 years); Nev. Rev. Stat. § 193.130(2)(e) (4 years); N.H. Rev. Stat. § 625:9(III)(a)(2) (7 years); N.J. Rev. Stat. § 2C:43-6(a)(3) (5 years for crimes "of the third degree"; equivalent of lowest felony grade); N.M. Stat. §§ 31-18-15(A)(10) (18 months); N.Y. Penal Law § 70.00(2)(e) (4 years); N.D. Code § 12.1-32-01(4) (5 years); Or. Rev. Stat. § 161.605(3) (5 years); 18 Pa. C.S. § 1103(3) (7 years); S.C. Code § 16-1-20(A)(6) (5 years); S.D. Codified Laws § 22-6-1(9) (2 years); Tenn. Code Ann. § 40-35-111(b)(5) (6 years); Tex. Penal Code § 12.35(a) (2 years); Utah Code Ann. § 76-3-203(3) (5 years); Va. Code § 18.2-10(f) (5 years); Wash. Rev. Code § 9A.20.021(c) (5 years); Wis. Stat. § 939.50(3)(i) (3 years and 6 months)).

[23] Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014).

[24] Model Penal Code: Sentencing § 6.06 reporter's note b(2) (Tentative Draft No. 2, 2014). *See also*, Proposed Federal Criminal Code § 3601 (codifying a sentence of life imprisonment).

[25] *Graham v. Florida*, 560 U.S. 48, 82 (2010).

[26] *Miller v. Alabama*, 567 U.S. 460 (2012).

[27] *See Vinter and Others v. United Kingdom*, available at http://hudoc.echr.coe.int/eng?i=001-122664 (last visited Apr. 10, 2017). *See also*, Model Penal Code: Sentencing § 6.06 reporter's note b(2) (Tentative Draft No. 2, 2014) (noting that "[a] few nations, such as Germany, France, and Italy, have declared natural-life sentences unconstitutional" and that "[i]n the International Criminal Court, the most severe penalty available for any crime, including war crimes and genocide, is life imprisonment reviewable by the Court after a period of 25 years.").

[28] Model Penal Code: Sentencing § 6.06 cmt. b(2) at 13 (Tentative Draft No. 2, 2014).

[29] *Id* at 14.

[30] Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014). *See also*, Proposed Federal Criminal Code § 3201 (penultimate class set at a thirty-year maximum).

[31] Model Penal Code: Sentencing § 6.06 (Tentative Draft No. 2, 2014). *See also*, Proposed Federal Criminal Code § 3201 (penalty for lowest class of felony set at a seven-year maximum).

penalties for attempts and offenses with penalty enhancements. See Section 22A-301 regarding comparison of the RCC attempt statute to other jurisdictions and Section 22A-805 regarding comparison of the RCC penalty enhancements to other jurisdictions.

RCC § 22E-604. Authorized Fines.

Relation to National Legal Trends. Subsection § 22A-803(a) follows national trends, insofar as it provides a set schedule of fines applicable to standardized penalty classes.[32] Similarly the ALI's Model Penal Code recommends a set schedule of fines,[33] as does the Proposed Federal Criminal Code.[34]

Subsection (b) is generally supported by common law tradition and jurisprudence regarding constitutional claims in other jurisdictions. The Anglo-American tradition—dating back to the Magna Carta[35]—has long required that fines allow for a defendant to maintain his or her livelihood.[36] The United States Constitution provides at least some limitation on "excessive fines" in the Eighth Amendment,[37] and the due process clause provides some degree of protection from consequences stemming from a defendant's inability to pay fines. The Supreme Court has held that a defendant whose terms of probation includes the payment of criminal fines may not have his probation revoked based solely on failure to pay if the defendant was too impecunious to fulfill his obligation.[38] The RCC modestly states that an analysis of the defendant's ability to pay be applied up front at sentencing, not just at a possible revocation hearing.[39]

However, notwithstanding the longstanding recognition that a defendant's ability to pay a fine should be considered when imposing such a sanction, only a few jurisdictions have

[32] *E.g.*, Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-41; Haw. Rev. Stat. Ann. § 706-640; Va. Code Ann. § 18.2-10. Wash. Rev. Code Ann. § 9A.20.021; Wis. Stat. Ann. § 939.50.

[33] Model Penal Code § 6.03. *See also*, Model Penal Code: Sentencing § 6.04 (Tentative Draft No. 3, 2014).

[34] Proposed Federal Criminal Code § 3301.

[35] Magna Carta, 9 Hen. III, ch. 14 (1225). ("A free-man shall not be amerced for a small offence, but only according to the degree of the offence; and for a great delinquency, according to the magnitude of the delinquency, saving his contenement [*salvo contenemento suo*]: and a merchant in the same manner, saving his merchandise, and a villain, if he belong to another, shall be amerced after the same manner, saving to him his wainage, if he shall fall into our mercy; and none of the aforesaid amercements shall be assessed, but by the oath of honest and lawful men of the neighbourhood."). So important is this provision of the Great Charter that "a leading nineteenth century legal historian suggests that '[v]ery likely there was no clause in Magna Carta more grateful to the masses of the people than that about amercements.'" Nicholas M. McLean, Article, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 854 (2013) (quoting F. W. Maitland, Pleas of the Crown for the County of Gloucester xxxiv (1884)).

[36] *See* Nicholas M. McLean, Article, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 865-72 (2013) (discussing role of fines in early and 19th century American law).

[37] U.S. Const. Amend. XVIII.

[38] *See Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available"). *Id*. at 674 ("[b]y sentencing [a defendant] to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turn[s] a fine into a prison sentence.").

[39] *See also*, *United States. Levesque*, 546 F.3d 78 (1st Cir. 2008) (holding that district courts ordering asset forfeiture pursuant to criminal case must consider the financial circumstances of the defendant).

explicitly codified provisions similar to subsection (b).[40]

Recent sentencing trends have given greater consideration to the defendant's circumstances when imposing fines. For example, the U.S. Sentencing Guidelines states that fines should be imposed unless "the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."[41] The Proposed Federal Criminal Code also limits the imposition of fines based on the defendant's ability to pay "restitution or reparation to the victim of the offense."[42]

The ALI's latest work on the Model Penal Code (Sentencing) project recommends a similar limitation to subsection (b) on the imposition of economic sanctions. The provision says:

> (6) No economic sanction [other than victim compensation] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.[43]

As the ALI notes, limiting fines based on ability to reasonably pay "is required not because criminals deserve society's munificence, but because it is a proven route to increased public safety."[44] Studies have shown that fines can have effect of making it more difficult for offenders to successfully reintegrate into the community.[45]

Similarly, the American Bar Association's Criminal Justice Section has also published sentencing standards, which recommend that "[a]n offender's ability to pay should be a factor in determining the amount of the sanction. Sentencing courts, in imposing a fine on an individual, should consider the offender's obligations, particularly family obligations."[46]

---

[40] But see Haw. Rev. Stat. Ann. § 706-641 ("In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose."); N.Y. Penal Law § 80.00 ("When imposing a fine pursuant to the provisions of this paragraph, the court shall consider the profit gained by defendant's conduct, whether the amount of the fine is disproportionate to the conduct in which defendant engaged, its impact on any victims, and defendant's economic circumstances, including the defendant's ability to pay, the effect of the fine upon his or her immediate family or any other persons to whom the defendant owes an obligation of support."); Or. Rev. Stat. Ann. § 161.645 ("In determining whether to impose a fine and its amount, the court shall consider: (1) The financial resources of the defendant and the burden that payment of a fine will impose, with due regard to the other obligations of the defendant; and (2) The ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court."); 18 U.S.C.A. § 3572 (a)(1)-(2) (a) In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in […] (1) the defendant's income, earning capacity, and financial resources; (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose…").

[41] U.S.S.G. 5E1.2.

[42] Proposed Federal Criminal Code § 3302(1).

[43] Model Penal Code: Sentencing § 6.04 (Tentative Draft No. 3, 2014).

[44] Model Penal Code: Sentencing § 6.04 cmt. b at 58 (Tentative Draft No. 3, 2014).

[45] See REBEKAH DILLER, ET. AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), *available at* https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry (last visited April 24, 2017). After examining sentencing practice in certain states, the report states that "[i]n all fifteen of the examined states, criminal justice debt and related collection practices create a significant barrier for individuals seeking to rebuild their lives after a criminal conviction." *Id.*

[46] ABA, Standards for Criminal Justice, Standard 18-3.16 (3d ed. 1994), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blkold.html.

Other jurisdictions also provide for higher penalties based on pecuniary loss, as in subsection (c),[47] as well as higher penalties as applied to organizational defendants, as in subsection (d).[48]

Subsections 22A-804 (e) and (f) cross-reference other provisions of the RCC, concerning penalties for attempts and offenses with penalty enhancements. See Section 22A-301 regarding comparison of the RCC attempt statute to other jurisdictions and Section 22A-805 regarding comparison of the RCC penalty enhancements to other jurisdictions.

Comparable to the definitions in subsection 22A-804 (g) several jurisdictions define organizational defendants and pecuniary loss.[49]

RCC § 22E-605. Limitations on Penalty Enhancements.

Relation to National Legal Trends. Most states do not have statutory provisions addressing whether general penalty enhancements may be applied to equivalent offenses, although there is some precedent for addressing overlap with specific offenses in specific penalty enhancements.[50]

Most states also have not adopted general rules of procedure that set out the standards demanded by *Apprendi*. Only a few state codes state that enhancements only apply after having been proven beyond a reasonable doubt.[51] None of these states codify the requirement that the enhancements be alleged in a charging document. Yet, states seem to commonly adopt *Apprendi* standards for specific enhancements.[52] These states more frequently address the burden of proof (i.e., requiring proof beyond a reasonable doubt), and less frequently codify notice requirements (i.e., requiring the enhancement be alleged in the indictment or information).

Neither the Model Penal Code nor the Proposed Federal Criminal Code address the burden of proof required when a court is asked to apply an enhancement. However, both of these model codes were drafted prior to the Supreme Court's decision in *Apprendi*.

---

[47] *E.g.*, Ala. Code § 13A-5-11; Alaska Stat. Ann. § 12.55.185; Conn. Gen. Stat. Ann. § 53a-44; Del. Code Ann. tit. 11, § 4208; Haw. Rev. Stat. Ann. § 706-640; 730 Ill. Comp. Stat. Ann. 5/5-4.5-50; Ind. Code Ann. § 35-50-5-2; N.J. Stat. Ann. § 2C:43-3; N.Y. Penal Law § 80.00; Or. Rev. Stat. Ann. § 161.625.

[48] *E.g.*, Alaska Stat. Ann. § 12.55.035; N.Y. Penal Law § 80.10; Tenn. Code Ann. § 40-35-111; Tex. Penal Code Ann. § 12.51.

[49] *E.g.*, Alaska Stat. Ann. § 12.55.185 ("'pecuniary gain' means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed."); N.J. Stat. Ann. § 2C:43-3 ("For purposes of this section the term 'gain' means the amount of money or the value of property derived by the offender and 'loss' means the amount of value separated from the victim or the amount of any payment owed to the victim and avoided or evaded and includes any reasonable and necessary expense incurred by the owner in recovering or replacing lost, stolen or damaged property, or recovering any payment avoided or evaded, and, with respect to property of a research facility, includes the cost of repeating an interrupted or invalidated experiment or loss of profits."); Or. Rev. Stat. Ann. § 161.625 ("As used in this section, 'gain' means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority before the time sentence is imposed.").

[50] *See, e.g.*, Mont. Code Ann. § 45-5-222 (excepting overlapping crimes of malicious intimidation or harassment from hate crimes penalty enhancement).

[51] Ariz. Rev. Stat. Ann. § 13-701; Haw. Rev. Stat. Ann. § 706-662; N.H. Rev. Stat. Ann. § 651:6; N.C. Gen. Stat. Ann. § 15A-1340.16.

[52] Ark. Code Ann. § 5-4-702; Colo. Rev. Stat. Ann. § 18-1.3-803; Ind. Code Ann. § 35-50-2-11; Iowa Code Ann. § 902.7; Mo. Ann. Stat. § 558.021; N.M. Stat. Ann. § 31-18-20; N.C. Gen. Stat. Ann. § 15A-1340.16; Or. Rev. Stat. Ann. § 161.610; Tenn. Code Ann. § 40-35-202; Utah Code Ann. § 76-3-203.5.

Subsection 22A-805(d) cross-references other provisions of the RCC concerning liability for conduct constituting multiple offenses. See Section 22A-70[X] regarding the relation to national legal trends of RCC recommendations for sentencing when multiple penalty enhancements are applied to an offense.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

Relation to National Legal Trends. RCC § 22A-806 would bring the District's repeat offender penalty enhancement more in line with national norms. In particular, adoption of the framework in subsections (a) – (c), differentiating the repeat offender provision by the severity of the instant and prior offenses, would bring the District into greater conformity with most other jurisdictions.

Nearly all of the jurisdictions with comprehensively revised criminal codes based on the Model Penal Code provide a recidivist penalty enhancement.[53] However, in many jurisdictions, the recidivist penalty enhancement is integrated with the jurisdiction's sentencing guidelines. All sixteen states with non-statutory sentencing guidelines systems make use of criminal history as a major factor in setting an appropriate sentence.[54] However, of these sixteen states, just six use criminal history both as a guidelines factor and as a basis for a standalone statutory enhancement as the District does.[55] States that do not make use of a guidelines system also routinely codify some kind of repeat offender or recidivist enhancement.[56]

The requirements of repeat offender penalty enhancements vary widely across states. Nearly all states make felonies subject to repeat offender penalty enhancements,[57] but a few also permit such penalty enhancements for misdemeanors,[58] as the District does. Most states require two prior convictions before applying a repeat offender enhancement, but a minority of states, like the District, have "two-strikes" provisions that apply repeat offenders for committing a

[53] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-9; Ark. Code Ann. § 5-4-501; Ariz. Rev. Stat. Ann. § 13-703; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-40; Del. Code Ann. tit. 11, § 4214; Haw. Rev. Stat. Ann. § 706-661; 730 Ill. Comp. Stat. Ann. 5/5-5-3.2; Ind. Code Ann. § 35-50-2-8; Ky. Rev. Stat. Ann. § 532.080; Me. Rev. Stat. tit. 17-A, § 1252; Minn. Stat. Ann. § 609.1095; Mo. Ann. Stat. § 558.016; Mont. Code Ann. § 46-18-502; N.H. Rev. Stat. Ann. § 651:6; N.J. Stat. Ann. § 2C:43-7.1; N.Y. Penal Law § 70.04; N.D. Cent. Code Ann. § 12.1-32-09; Ohio Rev. Code Ann. § 2929.14; 42 Pa. Stat. and Cons. Stat. Ann. § 9714; S.D. Codified Laws § 22-7-7; Tenn. Code Ann. § 40-35-106; Tex. Penal Code Ann. § 12.42; Utah Code Ann. § 76-3-203.5; Wis. Stat. Ann. § 939.619; Wash. Rev. Code Ann. § 9.94A.570.

[54] Robina Institute, Criminal History Enhancements Sourcebook at 2 (2015), *available at* https://robinainstitute.umn.edu/areas-expertise/criminal-history-enhancements ("An offender's criminal history (record of prior convictions) is a major sentencing factor in all American jurisdictions that have implemented sentencing guidelines—offenders in the highest criminal history category often have recommended prison sentences that are many times longer than the recommended sentences for offenders in the lowest category."). The Robina Institute identified sixteen states (plus the federal system and the District) that it considers to have sentencing guidelines systems. States with statutory guidelines system, e.g. California and Ohio, were excluded the Robina Institute's analysis.

[55] Ala. Code § 13A-5-9; Ark. Code Ann. § 5-4-501; Del. Code Ann. tit. 11, § 4214; Minn. Stat. Ann. § 609.1095; 42 Pa. Stat. and Cons. Stat. Ann. § 9714; Utah Code Ann. § 76-3-203.5.

[56] E.g., Alaska Stat. Ann. § 12.55.125; Colo. Rev. Stat. Ann. § 18-1.3-401; Conn. Gen. Stat. Ann. § 53a-40; Ind. Code Ann. § 35-50-2-8; Me. Rev. Stat. tit. 17-A, § 1252; Mo. Ann. Stat. § 558.016; N.J. Stat. Ann. § 2C:43-7.1; N.Y. Penal Law § 70.04; N.D. Cent. Code Ann. § 12.1-32-09; S.D. Codified Laws § 22-7-7; Tex. Penal Code Ann. § 12.42; Wis. Stat. Ann. § 939.619.

[57] See *id.*

[58] Me. Rev. Stat. tit. 17-A, § 1252; Mo. Ann. Stat. § 558.016; N.H. Rev. Stat. Ann. § 651:6.

serious felony with one prior conviction for a serious felony.[59] Some states limit the prior offenses that count toward establishing a repeat offender penalty enhancement to those committed within a certain time frame,[60] or provide that the priors must have been committed while the defendant was an adult.[61] Some states limit the types of prior convictions that count to certain kinds of offenses, such as crimes of violence.[62] Some states also do not permit convictions that have been pardoned on the ground of innocence.[63] Most states admit felony convictions from other jurisdictions.[64] Some states specifically include convictions by tribal courts.[65] The American Bar Association has called for gradation of repeat offender enhancements according to the severity of the instant offense and time limits on the applicability of prior convictions.[66]

Some states grade repeat offender enhancements, providing varying penalties. These states might have specific enhancements for misdemeanors as compared to felonies,[67] but it is more common to have grading distinctions between felonies and serious or violent felonies.[68] Some states even differentiate repeat offender enhancements for each felony class in their code.[69]

Notwithstanding the commonality of repeat offender enhancements in state criminal codes, an array of policy-based criminal justice reforms across the country recently have aimed at reducing their severity.[70] Most notably, California, whose "three strikes" law was the subject of the Supreme Court's case in *Ewing v. California*, has (by popular referendum) recently added the requirement that the instant offense be a "serious or violent" felony in order for the defendant to qualify for a sentence of up to life.[71] Georgia excluded some drug convictions from the scope

[59] § 26.6(b)Recidivist statutes, 6 Crim. Proc. § 26.6(b) (4th ed.).
[60] E.g., 730 Ill. Comp. Stat. Ann. 5/5-5-3.2; Ky. Rev. Stat. Ann. § 532.080.
[61] E.g., Haw. Rev. Stat. Ann. § 706-661; Ky. Rev. Stat. Ann. § 532.080; Minn. Stat. Ann. § 609.1095.
[62] E.g., N.Y. Penal Law § 70.04; S.D. Codified Laws § 22-7-8.
[63] E.g., Ind. Code Ann. § 35-50-2-8.
[64] *See* Wayne R. LaFave et al., Criminal Procedure § 26.6(b) (4th ed.) ("The majority rule is that a state counts convictions from other jurisdictions when the offense would have been a felony if committed in that state. A minority of states count convictions from other jurisdictions if the offense was considered a felony in the other jurisdiction, punishable by death or more than one year of imprisonment.").
[65] *See, e.g.*, Mass. Gen. Laws Ann. ch. 279, § 25.
[66] STANDARD 18-3.5 CRIMINAL HISTORY; RECIDIVISM, ABA Standards for Criminal Justice 18-3.5 3rd Ed. (1994) ("(a) The legislature should authorize more severe sentences for convicted offenders with prior convictions. The extent of enhancement should be reasonably related to the sentence severity levels authorized for the offense of conviction. (b) Standards for enhancement of sentence on the basis of criminal history should take into account the nature and number of prior convictions and the time elapsed since an offender's most recent prior conviction and completion of service of sentence. The legislature should fix time periods after which offenders' prior convictions may not be taken into account to enhance sentence; these periods may vary with the nature of the prior offenses. (c) The agency performing the intermediate function should guide sentencing courts to the appropriate weight to be given to an offender's criminal history. (d) If a jurisdiction has an "habitual offender" statute or comparable law regarding recidivists, the statute should provide that sentences imposed because of prior convictions should be reasonably related in severity to the level of sentence appropriate for the offense of current conviction.").

[67] Mo. Ann. Stat. § 558.016; N.H. Rev. Stat. Ann. § 651:6.
[68] E.g., Compare Wis. Stat. Ann. § 939.619 with Wis. Stat. Ann. § 939.62; compare N.Y. Penal Law § 70.04 with N.Y. Penal Law § 70.06; Minn. Stat. Ann. § 609.1095;
[69] E.g., Alaska Stat. Ann. § 12.55.125; Tex. Penal Code Ann. § 12.42. See also Ind. Code Ann. § 35-50-2-8.
[70] *But, see* Mass. Gen. Laws Ann. ch. 279, § 25 (amended in 2012 to expand the crimes subject to recidivist penalty enhancements and increase the punishment for such enhancements to life without parole (LWOP)).
[71] Cal. Penal Code § 1170.12.

of possible prior convictions that trigger its recidivist enhancement.[72] North Carolina narrowed its recidivist enhancement's effects somewhat, by reducing the penalty associated with it for certain felony classes.[73] Montana has made the conditions for its repeat offender enhancement more strenuous.[74]

There also has been significant expert and scholarly criticism of repeat offender provisions. Such criticisms are based in various penal theories, including retributivism, the various arguments arising from utility, and incapacitation.[75] Often, these criticisms are hotly disputed, and justifications for enhanced sentences based on criminal history are also offered from the exact same theoretical perspectives as those opposing such enhanced sentences.

Some retributivists, for example, argue that using criminal history essentially punishes the defendant twice for a single offense. "If a defendant has already discharged the previous sentence of the court, is he not being sentenced a second time for the same criminal conduct?"[76] Other recidivists respond that increasing punishment for subsequent crimes is not an increase in punishment, but a decrease in the leniency the state is willing to afford the defendant.[77]

Utilitarians also criticize the use of criminal history, both in its application to the individual defendant (specific deterrence) and in its value in deterring crime broadly (general deterrence).[78] With respect to specific deterrence, utilitarians maintain that "there is little evidence that longer sentences actually promote specific deterrence. A number of studies conclude that the length of time spent in prison does not affect recidivism rates."[79] A Department of Justice study examined the effects of lengthy sentences on recidivism and concluded that "[t]hese results offer little support for the policy trends, prominent since this project began, that have supported increased use of confinement as a sentencing choice, emphasized longer terms, or accepted specific deterrence to reduce offenders' recidivism."[80] As for general deterrence, "[m]any question whether general deterrence works . . . arguing that most people are either unaware of penalties or do not think they will be caught when they commit a crime."[81] Furthermore, empirical studies suggest that there is no evidence that sentence length corresponds to a general deterrence effect.[82]

Additionally, there has been discussion on the use of criminal records to advance interests in incapacitation. In a certain sense, incapacitation refers to a species of specific deterrence, insofar as it seeks to ensure that a person will not enter society and reoffend; however, the

---

[72] Ga. Code Ann. § 17-10-7. Maryland and Kentucky similarly addressed the use of enhancements for drug offenders. *See* Pew Charitable Trusts, "Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States", http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment (last visited May 19, 2017).

[73] N.C. Gen. Stat. Ann. § 14-7.6.

[74] E.g., 2017 Mont. Laws Ch. 321 (H.B. 133).

[75] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1151-53 (2010).

[76] Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316 (1997).

[77] Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 316 (1997).

[78] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1152 (2010).

[79] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1152 (2010).

[80] DON M. GOTTFREDSON, NAT'L INSTIT. OF JUSTICE, U.S. DEP'T OF JUSTICE, EFFECTS OF SENTENCING DECISIONS ON CRIMINAL CAREERS, at 9 (1999).

[81] Russell, *supra* note 60, at 1153.

[82] *Id*. (citing a large body of literature).

emphasis is on rendering the person incapable of doing so by imprisoning such an offender for a sufficiently lengthy period of time. Using criminal history to predict a person's future dangerousness, however, has been criticized as a "crude approximation" that can "result in the incarceration of offenders who present little danger to public safety . . . ."[83] According to critics, such false positives "represent policy failure, needless expenditures, and great and avoidable unfairness," and therefore should be avoided.[84]

Lastly, outside the traditional, philosophical justifications for punishment, experts have expressed increasing concern that criminal history as a mechanism for ratcheting up punishment is the primary (or at least a significant) driver of the pernicious racial disparities present in American criminal justice. The American Law Institute (ALI) has maintained that "it is imperative that the sentencing system do nothing to exacerbate the preexisting racial disparities arising from life conditions in segregated and disadvantaged communities, or disparities introduced in earlier stages of the criminal justice process."[85] In furtherance of this goal, the ALI has considered an "accumulating body of research" and concluded that "criminal-history formulas in sentencing are responsible for much of the 'unexplained' disparities in black and white incarceration rates - that is, disparities that cannot be 'accounted for' by differential rates of crime commission, arrest, and conviction."[86]

The ALI has not developed a position with respect to statutory repeat offender enhancements, however, with respect to the use of criminal history in sentencing, the ALI has stated that sentencing commissions should be aware "that offenders have already been punished for their prior convictions," that "the use of criminal history by itself may over-predict those risks," and that "the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups."[87] As noted above, the CCRC is not aware of any District-specific studies that have attempted to show whether the consideration of criminal history disproportionately affects black offenders. Nevertheless, the general phenomena and its possible perpetuation within the Revised Criminal Code is an issue of concern.

RCC § 22E-607. Pretrial Release Penalty Enhancements.

Relation to National Legal Trends. OCDR is relatively uncommon as an enhancement or separate crime in American jurisdictions. This may stem from the fact that most jurisdictions do not use a pretrial release system comparable to the District's system, instead relying on bail to ensure defendants appear in court. Nevertheless, at least ten states (as well as the federal code[88]) do have similar statutes.[89]

Regarding the *actus reus* of these other states' OCDR-like penalty enhancements, two states have an additional requirement that there be a conviction for the first offense, unlike the

[83] MPC Sentencing § 6B.07 cmt. c(2) (Proposed Final Draft, Apr. 10, 2017).
[84] *Id*.
[85] *Id*. at § 6B.07 cmt. c(3) (Proposed Final Draft, Apr. 10, 2017).
[86] *Id*.
[87] MPC Sentencing § 6B.07 (Proposed Final Draft, Apr. 10, 2017).
[88] 18 U.S.C.A. § 3147.
[89] Ariz. Rev. Stat. Ann. § 13-708(D); Conn. Gen. Stat. Ann. § 53a-40b; 730 Ill. Comp. Stat. Ann. 5/5-8-4; Ind. Code Ann. § 35-50-1-2; Kan. Stat. Ann. § 21-6606; N.H. Rev. Stat. Ann. § 597:14-b; N.J. Stat. Ann. § 2C:44-5; N.Y. Penal Law § 70.25; Ohio Rev. Code Ann. § 2929.13; Tenn. Code Ann. § 40-35-114.

District. Tennessee and New Jersey state that the penalty enhancement only applies if the person has been convicted of both the first offense that is the basis for the defendant's release status and the second offense which the defendant committed on release.[90] Four more states apply a consecutive sentence rule to penalize OCDR-like conduct, thereby implicitly requiring that the defendant be convicted of the first offense. Therefore, it seems that the majority of states that make use of OCDR-like offenses do, in some way, require that the defendant be guilty of both the first and second offenses.

There are two main approaches regarding penalties for OCDR-type enhancements in other jurisdictions. The first is to enhance the penalty in a manner similar to the current D.C. Code and RCC proposal, by increasing the statutory maximum of the offense committed on release. Similar to the RCC, five states and the federal code apply different enhanced penalties for the commission of felonies and misdemeanors.[91] No state makes use of the "crimes of violence" category as a grading factor, although New Jersey does enumerate a list of seemingly dangerous offenses that are subject to an increase in the statutory penalty if those dangerous offenses are committed while on release.[92]

The second main approach to OCDR penalties, taken by five jurisdictions, is to order that the sentences for the first and second offense be served consecutively (without actually enhancing the offense penalties).[93] These jurisdictions generally do not differentiate between the commission of a felony or a misdemeanor on release.[94]

Two other jurisdictions take different approaches to offenses committed while on release. Ohio uses release status as a factor in determining the type of punishment (i.e., the imposition of a "community control sanction").[95] Tennessee uses release status as a factor in the application of its statutory sentencing guidelines system.[96]

With respect to model codes, the Model Penal Code, the Proposed Federal Criminal Code, the Kentucky Revision Project, and the Illinois Reform Project do not provide an OCDR-like offense in their sentencing provisions.

Finally, it is notable that state courts differ on whether the provisions of *Apprendi* apply to OCDR-type penalty enhancements. Because *Apprendi* commonly has been interpreted to omit "legal determinations" from its general rule,[97] the question regarding OCDR-type offenses is often framed as whether release status constitutes a legal determination that can be made by a judge and not by the factfinder.[98] Of those jurisdictions that have addressed the question, there is

---

[90] N.J. Stat. Ann. § 2C:44-5(h); Tenn. Code Ann. § 40-35-114.

[91] Ariz. Rev. Stat. Ann. § 13-708(D); Conn. Gen. Stat. Ann. § 53a-40b; N.H. Rev. Stat. Ann. § 597:14-b; 18 U.S.C.A. § 3147.

[92] N.J. Stat. Ann. § 2C:44-5(h).

[93] 730 Ill. Comp. Stat. Ann. 5/5-8-4; Ind. Code Ann. § 35-50-1-2; Kan. Stat. Ann. § 21-6606; N.J. Stat. Ann. § 2C:44-5; N.Y. Penal Law § 70.25. New Jersey actually applies both approaches: one provision, limited to seemingly dangerous offenses, makes use of an increased penalty; another provision that applies to all offenses orders consecutive service of sentences.

[94] But compare N.J. Stat. Ann. § 2C:44-5(h) with N.J. Stat. Ann. § 2C:44-5(a).

[95] Ohio Rev. Code Ann. § 2929.13.

[96] Tenn. Code Ann. § 40-35-114.

[97] *State v. Fagan*, 905 A.2d 1101, 1118 (2006) ("numerous federal courts that have applied *Apprendi* and its progeny have understood that these cases clearly do not limit a judge's authority to make legal determinations that precede a jury's fact-finding and imposition of sentence.").

[98] *Id.* at 1118-19 (collecting cases). Many cases discussed and cited in *Fagan* concern related, but distinct, enhancements for crimes committed while on probation or parole. *See id.* (collecting cases); e.g., *People v.*

no uniform answer. For example, Connecticut holds that release status is a legal determination excepted from *Apprendi*, while Arizona except release status from *Apprendi*.[99] Federal courts have frequently avoided the question by holding that *Apprendi* only applies if the actual sentence exceeds the statutory maximum.[100] It has been rare that a defendant is sentenced to imprisonment greater than the statutory maximum permitted and a federal court has had to consider the question directly.[101] In sum, there appears to be no generalizable national legal trend with respect to the application of *Apprendi* to OCDR.

RCC § 22E-608. Hate Crime Penalty Enhancement.

Relation to National Legal Trends. Forty-five other American jurisdictions sanction the commission of crimes motivated by hate, though they are divided in the structure and form of their sanctions.[102] A majority of these states, twenty-four, treat discriminatory motivation as a penalty enhancement or aggravating factor in sentencing.[103] The remaining twenty-one states treat hate crimes as separate offenses.[104] The federal code also treats hate crime as a separate

---

Montoya, 141 P.3d 916, 922 (Colo. App. 2006) (holding that parole and probation status falls within exception to *Apprendi*).

[99] *Compare Fagan*, 905 A.2d at 1119 *with State v. Gross*, 31 P.3d 815, 819 (Ariz. 2001). In other situations similar to release (like parole or probation status), courts are equally split. Compare *State v. Jones*, 149 P.3d 636, 638 (Wash. 2006) with *State v. Perez*, 102 P.3d 705, 709 (Or. Ct. App. 2004), rev'd on other grounds, 131 P.3d 168 (Or. 2006).

[100] *See United States v. Samuel*, 296 F.3d 1169 (D.C. Cir. 2002) (holding that *Apprendi* does not apply to OCDR enhancement as codified in the federal Sentencing Guidelines, because the Guidelines do not permit the enhancement to exceed the statutory maximum); *United States v. Randall*, 287 F.3d 27, 30 (1st Cir. 2002); *United States v. Confredo*, 528 F.3d 143, 153 (2nd Cir. 2008).

[101] *United States v. Lewis*, 660 F.3d 189, 190 (3rd. Cir. 2011). As late as 2011, the Third Circuit claimed that the issue presented in *Lewis* was one of "first impression," and that no circuit had been faced with the case of the federal OCDR statute increasing the defendant's sentence beyond the statutory maximum. Pursuant to the district court's instructions, the jury had convicted the defendant of OCDR as a separate offense, which the Third Circuit held was error. But the Third Circuit also stated that "The error in treating § 3147 as an offense, here, turned out to be a wise move from an Apprendi standpoint, as the jury found that the elements of § 3147 had been proven beyond a reasonable doubt, thus allowing the judge to impose a sentence that exceeded the statutory maximum sentence for the underlying crime. Therefore, the District Court committed no error in sentencing Lewis to 138 months' imprisonment." *Id*. at 195. It appears that the Third Circuit would, therefore, not permit OCDR to fall within the *Apprendi* exception. *See also*, *United States v. Gillon*, 348 F.3d 755, 757 (8th Cir. 2003) ("assum[ing] without deciding that under current law it was error to omit the factual basis for the enhancement from the indictment," the omission of OCDR from the indictment was harmless error).

[102] *See* Sara Ainsworth, Nadia Bryan, *Hate Crime Regulation and Challenges*, 17 GEO. J. GENDER & L. 303, 317 n. 144 (2016) (providing statutory citations).

[103] *See id*. at 321 n. 151 (providing statutory citations).

[104] As compiled from the Ainsworth and Bryan article, the states included are: Alaska Stat. Ann. § 12.55.155; Ariz. Rev. Stat. Ann. § 13-701; Cal. Penal Code § 422.55; Colo. Rev. Stat. Ann. § 18-9-121; Idaho Code Ann. § 18-7902; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Kan. Stat. Ann. § 21-6815; Ky. Rev. Stat. Ann. § 532.031; La. Stat. Ann. § 14:107.2; Me. Rev. Stat. tit. 5, § 4684-B; Md. Code Ann., Crim. Law § 10-304; Mass. Gen. Laws Ann. ch. 265, § 39; Mich. Comp. Laws Ann. § 750.147b; N.M. Stat. Ann. § 31-18B-3; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; S.C. Code Ann. § 16-5-10; S.D. Codified Laws § 22-19B-1; Wash. Rev. Code Ann. § 9A.36.080; W. Va. Code Ann. § 61-6-21; Wis. Stat. Ann. § 939.645. By CCRC staff's own examination, however, the list is somewhat different. Although determining what is an offense and what is an enhancement is a task where minds can reasonably differ, staff's list of hate crime offenses includes: Cal. Penal Code § 422.6; Colo. Rev. Stat. Ann. § 18-9-121; Conn. Gen. Stat. Ann. § 53-37a; Idaho Code Ann. § 18-7902; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Mass. Gen. Laws Ann. ch. 265, § 39; Mich.

offense.[105] Neither the Model Penal Code, the Proposed D.C. Basic Criminal Code, nor the Proposed Federal Criminal Code, by contrast, codify a hate crime enhancement or hate crime offense. More recent code reform efforts, such as the Kentucky Code Revision Project and the Illinois Reform Project, also do not provide enhancements for bias.

The particular language that states use in their hate crime statutes' varies widely. A slight plurality of states either say the enhancement applies if the defendant commits the offense "because of" the victim's status (seven states)[106] or require the defendant be "motivated" to commit the offense because of the victim's status (five states).[107] Eleven states sanction defendants who commit a criminal act with "intent to intimidate or harass another because of the actual or perceived race"[108] or close variants. Seven states punish those who "select" the victim because of the victim's status.[109] The remaining states use a collection of various terms. Only Florida uses language that, like the District currently, suggests an objective standard for determining whether a person's offense is connected to their prejudiced beliefs.[110]

Regarding the protected characteristics involved in a hate crime charge, all forty-five states have legislation regarding racial, religious, and ethnic bias.[111] Thirty states reference sexual orientation bias, twenty-seven states reference gender bias, and thirty-one concern disability bias.[112] Among the less common attributes, twelve states protect against crimes based on age bias, ten protect transgender or gender identity bias, and five protect against political affiliation bias.[113] The federal code's hate crime statute protects race, color, religion, national origin, gender, sexual orientation, gender identity, and disability,[114] which the Federal Sentencing Guidelines also incorporate as a sentencing factor (with the addition of "gender identity" as a protected status).[115] The list of protected characteristics in RCC § 22A-807 is more expansive than other jurisdictions: it includes all of the above statuses (race, religion, ethnicity, sexual orientation, gender, disability, age, gender identity or expression, and political

---

Comp. Laws Ann. § 750.147b; Mont. Code Ann. § 45-5-221; N.J. Stat. Ann. § 2C:16-1; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; 12 R.I. Gen. Laws Ann. § 12-19-38; S.C. Code Ann. § 16-5-10; S.D. Codified Laws § 22-19B-1; Wash. Rev. Code Ann. § 9A.36.080; Va. Code Ann. § 61-6-21.

[105] 18 U.S.C.A. § 249.

[106] Ariz. Rev. Stat. Ann. § 13-701; Iowa Code Ann. § 729A.2; Ky. Rev. Stat. Ann. § 532.031; Md. Code Ann., Crim. Law § 10-304; Miss. Code. Ann. § 99-19-301; Neb. Rev. Stat. Ann. § 28-111; Nev. Rev. Stat. Ann. § 193.1675; N.Y. Penal Law § 485.05; N.C. Gen. Stat. Ann. § 14-3; Ohio Rev. Code Ann. § 2927.12; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; Wash. Rev. Code Ann. § 9A.36.080.

[107] Ala. Code § 13A-5-13; Kan. Stat. Ann. § 21-6815; Mo. Ann. Stat. § 557.035; N.M. Stat. Ann. § 31-18B-3; Vt. Stat. Ann. tit. 13, § 1455.

[108] Colo. Rev. Stat. Ann. § 18-9-121; Conn. Gen. Stat. Ann. § 53-37a; Idaho Code Ann. § 18-7902; Mass. Gen. Laws Ann. ch. 265, § 39; Mich. Comp. Laws Ann. § 750.147b; N.J. Stat. Ann. § 2C:16-1; N.D. Cent. Code Ann. § 12.1-14-04; Okla. Stat. Ann. tit. 21, § 850; Or. Rev. Stat. Ann. § 166.155; S.D. Codified Laws § 22-19B-1; Utah Code Ann. § 76-3-203.3.

[109] Del. Code Ann. tit. 11, § 1304; Haw. Rev. Stat. Ann. § 706-662; La. Stat. Ann. § 14:107.2; 12 R.I. Gen. Laws Ann. § 12-19-38; Tenn. Code Ann. § 40-35-114; Tex. Crim. Proc. Code Ann. art. 42.014; Va. Code Ann. § 18.2-57; Wis. Stat. Ann. § 939.645.

[110] *Compare* D.C. Code § 22-3703 ("demonstrates") *with* Fla. Stat. Ann. § 775.085 ("evidences").

[111] *See* Ainsworth& Bryan, *supra* note 81, at 317 n. 143-44 (providing statutory citations).

[112] *See id.* at 318 -319 n. 145-147 (providing statutory citations).

[113] *See id*. at 320 n. 148-50 (providing statutory citations).

[114] 18 U.S.C.A. § 249.

[115] U.S. SENTENCING GUIDELINE MANUAL § 3A1.1 (2017).

affiliation), and also includes several characteristics many states do not (personal appearance, matriculation, family responsibility, and homelessness).[116]

With respect to mental states, a majority of the forty-five jurisdictions with hate crime statutes specify some sort of culpable mental state requirement in the statutes. Of those states that specify a mental state, twenty-two refer to knowledge, intent, or their seeming equivalents.[117] Seven states arguably use a less demanding mental state, a variation on "malice,"[118] though all but one of these[119] further stipulate that the person act "maliciously, and with specific intent" or "maliciously and intentionally." Sixteen jurisdictions do not specify a mental state in their hate crimes statutes. [120] The Revised Criminal Code's adoption of "intent" is in line with national practice, at least among those jurisdictions that define a mental state for the enhancement.

A few jurisdictions have statutes that clarify the extent of the causal nexus between the crime and the improper motive, e.g., requiring the discriminatory motive to be "in whole or substantial part"[121] the cause of the crime or, explicitly stating that there may be other motives[122]. Some of the other jurisdictions that don't statutorily specify the extent of the causal nexus have faced significant litigation over the issue, often arising in the context of a crime that may have begun with another non-hate motive but which transformed into a possible hate crime due to the defendant's shifting motivations during the commission of the offense.[123] To avoid this problem, and consistent with the drafting of other provisions, the Revised Criminal Code does not require the defendant's blameworthy intent to have been the sole or primary reason for

---

[116] Some states do have categories not protected by the Revised Criminal Code. New Mexico's hate crime statute covers "ancestry." N.M. Stat. Ann. § 31-18B-3. Vermont includes "service in the U.S. Armed Forces" as a protected status. Vt. Stat. Ann. tit. 13, § 1455. These two statuses, however, are not commonly protected.

[117] Alaska Stat. Ann. § 12.55.155; Cal. Penal Code § 422.6; Colo. Rev. Stat. Ann. § 18-9-121; Del. Code Ann. tit. 11, § 1304; Haw. Rev. Stat. Ann. § 706-662; Ky. Rev. Stat. Ann. § 532.031; Me. Rev. Stat. tit. 5, § 4684-A; Mass. Gen. Laws Ann. ch. 265, § 39; Mo. Ann. Stat. § 557.035; Mont. Code Ann. § 45-5-221; Nev. Rev. Stat. Ann. § 193.1675; N.J. Stat. Ann. § 2C:16-1; N.Y. Penal Law § 485.05; N.D. Cent. Code Ann. § 12.1-14-04; Or. Rev. Stat. Ann. § 166.155; 12 R.I. Gen. Laws Ann. § 12-19-38; Tenn. Code Ann. § 40-35-114; Tex. Crim. Proc. Code Ann. art. 42.014; Va. Code Ann. § 18.2-57; Wash. Rev. Code Ann. § 9A.36.080; W. Va. Code Ann. § 61-6-21; Wis. Stat. Ann. § 939.645.

[118] Conn. Gen. Stat. Ann. § 53-37a ; Idaho Code Ann. § 18-7902; Mich. Comp. Laws Ann. § 750.147b; Okla. Stat. Ann. tit. 21, § 850; 18 Pa. Stat. and Cons. Stat. Ann. § 2710; S.D. Codified Laws § 22-19B-1; Vt. Stat. Ann. tit. 13, § 1455.

[119] Vt. Stat. Ann. tit. 13, § 1455.

[120] Ala. Code § 13A-5-13; Ariz. Rev. Stat. Ann. § 13-701; Fla. Stat. Ann. § 775.085; 720 Ill. Comp. Stat. Ann. 5/12-7.1; Iowa Code Ann. § 729A.2; Kan. Stat. Ann. § 21-6815; La. Stat. Ann. § 14:107.2; Md. Code Ann., Crim. Law § 10-304; Minn. Stat. Ann. § 609.2231; Miss. Code. Ann. § 99-19-301; Neb. Rev. Stat. Ann. § 28-111; N.H. Rev. Stat. Ann. § 651:6; N.M. Stat. Ann. § 31-18B-3; N.C. Gen. Stat. Ann. § 14-3; Ohio Rev. Code Ann. § 2927.12; S.C. Code Ann. § 16-5-10. (Note, however, that the lack of specified culpable mental state in a given statute does not necessarily indicate that one is not otherwise required. E.g., codes in IL, KS, and OH contain default general provisions may apply a mental state of recklessness automatically, even if not specified in a given statute. 720 Ill. Comp. Stat. Ann. 5/4-3 ; Kan. Stat. Ann. § 21-5202; Ohio Rev. Code Ann. § 2901.21. Also, research was not performed to determine the extent to which case law may require a mental state in jurisdictions without a statutorily-specified culpable mental state.)

[121] N.Y. Penal Law § 485.05; see also Ky. Rev. Stat. Ann. § 532.031 (""a primary factor,") and N.H. Rev. Stat. Ann. § 651:6 (""substantially motivated").

[122] Fla. Stat. Ann. § 775.085 ("regardless of the existence of any other motivating factor or factors"); Iowa Code Ann. § 729A.2 ("entirely or in part").

[123] See, e.g., *People v. Schutter*, 695 N.W.2d 360, 364 (2005) ("what may have started out as merely road rage escalated into an act of ethnic intimidation").

the conduct—e.g., the prejudiced intent to harm or intimidate may have been in addition to an intent to rob a victim.[124]

Besides examining the issue of multiple motives, more recent litigation has focused on the significance of the discriminatory motive. On this point, some state[125] and federal courts[126] have recognized that the discriminatory motive must be the "but-for" cause of the purported hate crime. The Supreme Court's reasoning about the meaning of "because of" language in *Burrage v. United States*[127] further supports interpreting the most states' hate crime statutes as requiring the discriminatory motive to be the but-for causation of the predicate crime.[128]

Nearly all post-*Mitchell* constitutional challenges to hate crimes statutes in other jurisdictions have failed. However, one notable exception is the 2015 decision of the New Jersey Supreme Court striking part of its hate crime statute that violated constitutional due process protections in *State v. Pomianek.*[129] New Jersey criminalized committing a crime under three possible circumstances, two of which required culpable mental states ("with a purpose to intimidate" or "with knowledge").[130] The third alternative means of being subject to the penalty enhancement focused not on the state of mind of the accused, but the victim's reasonable perception of the crime as being committed because of a prohibited characteristic.[131] The New Jersey Supreme Court found the lack of a subjective mental state requirement in this third alternative unconstitutional,[132] noting that the Supreme Court in *Mitchell* had upheld only "intentionally" committing crimes because of a protected characteristic.[133] The *Pomianek* court rejected the statute's language allowing a person to be subject to the hate crime statute without being aware that he was acting out of bias in committing the crime.[134] While the *Pomianek* court stressed that it was the only state to have a hate crimes statute relying upon the victim's perceptions,[135] its reasoning about the unconstitutionality of a hate crimes statute based on strict liability or a reasonableness standard may be applicable to hate crime statutes that do not require subjective awareness of the bias motivation by the perpetrator.

[124] But, as noted below, the prejudiced intent must have been the but-for cause of the instant conduct.
[125] See, e.g., *People v. Lindberg*, 190 P.3d 664, 693–95 (Cal.2008); *State v. Hennings*, 776 N.W.2d 112, 2009 WL 2960616 at *6–8 (Iowa Ct.App.2009), aff'd in relevant part, 791 N.W.2d 828 (Iowa 2010).
[126] *See, e.g., United States v. Miller*, 767 F.3d 585, 593 (6th Cir. 2014); *United States v. Hill*, 182 F. Supp. 3d 546, 549 (E.D. Va. 2016).
[127] 134 S. Ct. 881 (2014).
[128] *Id*. at 889 ("In sum, it is one of the traditional background principles "against which Congress legislate[s]," [] that a phrase such as "results from" imposes a requirement of but-for causation" (internal citation omitted)).
[129] 110 A.3d 841, 856 (2015).
[130] N.J.S.A. 2C:16–1.
[131] *State v. Pomianek*, 110 A.3d 841, 850 (2015).
[132] *Id*. at 853.
[133] *Id*. at 852.
[134] *Id*. at 854..
[135] *Id*. at 855.

STATUTORY TEXT FOR REPORT #52 CHAPTER 6

RCC Title 22E

Chapter 6. Offense Classes, Penalties, & Enhancements.

Chapter 7. Definitions.

RCC § 22E-601. Offense Classifications.

(a) *Offense classifications.* Each offense in this title is classified as a:
- (1) Class 1 felony;
- (2) Class 2 felony;
- (3) Class 3 felony;
- (4) Class 4 felony;
- (5) Class 5 felony;
- (6) Class 6 felony;
- (7) Class 7 felony;
- (8) Class 8 felony;
- (9) Class 9 felony;
- (10) Class A misdemeanor;
- (11) Class B misdemeanor;
- (12) Class C misdemeanor;
- (13) Class D misdemeanor; or
- (14) Class E misdemeanor.

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-602. Authorized Dispositions.

(a) Unless otherwise expressly specified by statute, a court may sentence a person upon conviction to sanctions that include:
- (1) A term of imprisonment under RCC § 22E-603;
- (2) A fine under RCC § 22E-604;
- (3) Probation under D.C. Code § 16-710;
- (4) Restitution or reparation under D.C. Code § 16-711;
- (5) Community service under D.C. Code § 16-712;
- (6) Post-release supervision under D.C. Code § 24-903; and
- (7) Work release under D.C. Code § 24-241.01.

(b) A court may sentence a person upon conviction to either imprisonment under RCC § 22E-603 or a fine under RCC § 22E-604, but not both, for the following statutes prosecuted by the Attorney General for the District of Columbia:
- (1) [RESERVED.]

RCC § 22E-603. Authorized Terms of Imprisonment.

(a) *Authorized terms of imprisonment.* Unless otherwise expressly specified by statute, the maximum term of imprisonment authorized for an offense is:
- (1) For a Class 1 felony, 60 years;
- (2) For a Class 2 felony, 48 years;
- (3) For a Class 3 felony, 36 years;
- (4) For a Class 4 felony, 24 years;
- (5) For a Class 5 felony, 18 years;
- (6) For a Class 6 felony, 12 years;

(7) For a Class 7 felony, 8 years;
(8) For a Class 8 felony, 5 years;
(9) For a Class 9 felony, 3 years;
(10) For a Class A misdemeanor, 1 year;
(11) For a Class B misdemeanor, 180 days;
(12) For a Class C misdemeanor, 90 days;
(13) For a Class D misdemeanor, 30 days; and
(14) For a Class E misdemeanor, no imprisonment.

(b) *Definitions*. The terms "felony" and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-604. Authorized Fines.

(a) *Authorized fines*. Unless otherwise expressly specified by statute, the maximum fine for an offense is:
(1) For a Class 1 felony, $1,000,000;
(2) For a Class 2 felony, $750,000;
(3) For a Class 3 felony, $500,000;
(4) For a Class 4 felony, $250,000;
(5) For a Class 5 felony, $100,000;
(6) For a Class 6 felony, $75,000;
(7) For a Class 7 felony, $50,000;
(8) For a Class 8 felony, $25,000;
(9) For a Class 9 felony, $10,000;
(10) For a Class A misdemeanor, $5,000;
(11) For a Class B misdemeanor, $2,500;
(12) For a Class C misdemeanor, $1,000;
(13) For a Class D misdemeanor, $500; and
(14) For a Class E misdemeanor, $250.

(b) *Alternative fines for pecuniary loss or gain, or organizational defendants*. A court may fine an actor:
(1) Up to twice the pecuniary loss or pecuniary gain when:
(A) The offense, in fact, results in either pecuniary loss to a person other than the actor, or pecuniary gain to any person; and
(B) The information or indictment alleges the amount of the pecuniary loss or pecuniary gain and that the actor is subject to a fine double the amount of the pecuniary loss or pecuniary gain; or
(2) Up to three times the amount otherwise provided by statute for the offense when the actor, in fact, is an organizational defendant and the information or indictment alleges the actor is an organizational defendant and is subject to a fine treble the maximum amount otherwise authorized.

(c) *Limits on fines.* Notwithstanding any other provision of law, a court may not impose a fine that would impair the ability of the person to make restitution or deprive the person of sufficient means for reasonable living expenses and family obligations.

(d) *Definitions*.

(1) The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," "misdemeanor," "pecuniary gain," and "pecuniary loss" have the meanings specified in RCC § 22E-701.
(2) In this section, "organizational defendant" means any actor other than a natural person, including a trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government, government agency, or government-owned corporation, or any other legal entity.

RCC § 22E-605. Charging and Proof of Penalty Enhancements.

(a) *Charging of penalty enhancements.* An offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless notice of the penalty enhancement is specified in the information or indictment for the offense.
(b) *Standard of proof for penalty enhancements*. Except for the establishment of prior convictions under D.C. Code § 23-111, an offense is not subject to a general penalty enhancement under this chapter or any other penalty enhancement expressly specified by statute unless each objective element and culpable mental state of the penalty enhancement is proven beyond a reasonable doubt.

RCC § 22E-606. Repeat Offender Penalty Enhancement.

(a) *Felony repeat offender penalty enhancement.* A felony repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a felony offense and at the time has:
(1) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or
(2) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
(A) Committed within 10 years; and
(B) Not committed on the same occasion.
(b) *Misdemeanor repeat offender penalty enhancement.* A misdemeanor repeat offender penalty enhancement applies to an offense when, in fact, the actor commits a misdemeanor offense under Subtitle I of this title and at the time has:
(1) Two or more prior convictions for a misdemeanor offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion;
(2) One or more prior convictions for a felony offense under Subtitle I of this title, or a comparable offense, not committed on the same occasion; or
(3) Two or more prior convictions for District of Columbia felony offenses, or comparable offenses that were:
(A) Committed within the prior ten years; and
(B) Not committed on the same occasion.
(c) *Proceedings to establish previous convictions.* No person shall be subject to additional punishment for a felony or misdemeanor repeat offender penalty enhancement in this section unless the requirements of D.C. Code § 23-111 are satisfied.

(d) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine:
    (1) A felony repeat offender penalty enhancement under subsection (a) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
        (A) For a Class 1 or Class 2 felony, 10 years and $50,000;
        (B) For a Class 3 or Class 4 felony, 6 years and $40,000;
        (C) For a Class 5 or Class 6 felony, 3 years and $30,000;
        (D) For a Class 7 or Class 8 felony, 2 years and $20,000; and
        (E) For a Class 9 felony, 1 year and $10,000; and
    (2) A misdemeanor repeat offender penalty enhancement under subsection (b) of this section increases the authorized term of imprisonment and fine for the offense above the otherwise authorized penalty classification:
        (A) For a Class A or Class B misdemeanor, 90 days and $500; and
        (B) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.
(e) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "comparable offense," "felony," "misdemeanor," and "prior conviction" have the meanings specified in RCC § 22E-701.

RCC § 22E-607. Pretrial Release Penalty Enhancement.

(a) *Pretrial release penalty enhancement.* A pretrial release penalty enhancement applies to an offense when, in fact, at the time the actor commits the offense the actor is on pretrial release under D.C. Code § 23-1321.
(b) *Exceptions.* Notwithstanding any other provision of law, a penalty enhancement in this section does not apply to an offense of Contempt under D.C. Code § 11-741, Third Degree Escape from a Correctional Facility or Officer under RCC § 22E-3401(c), Tampering With a Detection Device under RCC § 22E-3402(a)(1)(B), or violation of a condition of release under D.C. Code § 23-1329 for the same conduct.
(c) *Penalties.* Subject to the limitation in RCC § 22E-602(b) regarding imposition of both a term of imprisonment and a fine, a pretrial release penalty enhancement increases the authorized term of imprisonment and fine for an offense above the otherwise authorized penalty classification:
    (1) For a Class 1 or Class 2 offense, 10 years and $50,000
    (2) For a Class 3 or Class 4 felony, 6 years and $40,000;
    (3) For a Class 5 or Class 6 felony, 3 years and $30,000;
    (4) For a Class 7 or Class 8 felony, 2 years and $20,000;
    (5) For a Class 9 felony, 1 year and $10,000;
    (6) For a Class A or B misdemeanor, 90 days and $500; and
    (7) For a Class C, Class D, or Class E misdemeanor, 10 days and $50.
(d) *Definitions.* The term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "felony," and "misdemeanor" have the meanings specified in RCC § 22E-701.

RCC § 22E-608. Hate Crime Penalty Enhancement.

(a) *Hate crime penalty enhancement.* A hate crime penalty enhancement applies to an offense when the actor commits the offense with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.

(b) *Penalties.* A hate crime penalty enhancement increases the otherwise applicable penalty classification for any offense or gradation of an offense by one class.

(c) *Definitions.* The term "purpose" has the meaning specified in RCC § 22E-206; and the terms "actor," "homelessness," "property," "pecuniary loss," and "person acting in the place of a parent per civil law," have the meanings specified in RCC § 22E-701.

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

(a) *Civil Provisions on Data Collection and Publication.*

(1) The Metropolitan Police Department shall afford each crime victim the opportunity to submit with their complaint a written statement that contains information to support a claim that the conduct that occurred is a crime subject to a hate crime penalty enhancement under RCC § 22E-608.

(2) The Mayor shall collect and compile data on the incidence of crime subject to a hate crime penalty enhancement under this section, provided that such data shall be used for research or statistical purposes and shall not contain information that may reveal the identity of an individual crime victim.

(3) The Mayor shall publish an annual summary of the data collected under paragraph (b)(2) of this section and transmit the summary and recommendations based on the summary to the Council.

(b) *Civil Action.*

(1) Irrespective of any criminal prosecution or the result of a criminal prosecution, a civil cause of action in a court of competent jurisdiction for appropriate relief shall be available for any person who alleges that they have been subjected to conduct that constitutes a criminal offense committed with the purpose, in whole or part, of intimidating, physically harming, damaging the property of, or causing a pecuniary loss to any person or group of persons because of prejudice against the perceived race, color, religion, national origin, sex, age, sexual orientation, gender identity or expression as defined in D.C. Code § 2-1401.02(12A), homelessness, physical disability, or political affiliation of a person or group of persons.

(2) In a civil action under paragraph (b)(1) of this section, the relief available shall include:

(A) An injunction;

(B) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;

(C) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or

(D) Reasonable attorneys' fees and costs.

(3) An actor's parent, or a person acting in the place of a parent per civil law, who is responsible for the health, welfare, or supervision of the actor shall be liable for any damages that an actor under 18 years of age is required to pay in a civil action brought under paragraph (b)(1) of this section, if any action or omission of the parent or person acting in the place of a parent per civil law contributed to the conduct of the actor.

(c) *Definitions.* The terms "actor" and "person acting in the place of a parent per civil law" have the meanings specified in RCC § 22E-701.

RCC § 22E-701. Generally Applicable Definitions.

"Felony" means:

(A) An offense punishable by a term of imprisonment that is more than one year; or

(B) In other jurisdictions, an offense punishable by death.

"Homelessness" means the status or circumstance of an individual who:

(A) Lacks a fixed, regular, and adequate nighttime residence; or

(B) Has a primary nighttime residence that is:

(1) A supervised, publicly- or privately-operated shelter designed to provide temporary living accommodations, including motels, hotels, congregate shelters, and transitional housing for the mentally ill;

(2) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(3) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

"Misdemeanor" means an offense punishable by a term of imprisonment that is one year or less.

"Pecuniary gain" means before-tax profit that is monetary or readily measured in money, including additional revenue or cost savings.

"Pecuniary loss" means actual harm that is monetary or readily measurable in money.

"Prior conviction" means a final order, by any court of the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, that enters judgment of guilt for a criminal offense. The term "prior conviction" does not include:

(A) An adjudication of juvenile delinquency;

(B) A conviction that is subject to successful completion of a diversion program or probation under D.C. Code § 48-904.01(e);

(C) A conviction that has been vacated, sealed, or expunged; or

(D) A conviction for which a person has been granted clemency or a pardon.

RCC DRAFT COMBINED PENALTY CLASSIFICATION SHEET (3-20-20)

(PER SECOND DRAFT OF REPORT #41 AND THIS FIRST DRAFT OF REPORT #52)

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
210	Accomplice (Same as Predicate)															
301	Attempt (50% of Predicate)															
302	Solicitation (50% of Predicate)															
303	Conspiracy (50% of Predicate)															
606	Misdemeanor Repeat Offender Enhancement (Sub.											90D	90D	10D	10D	
606	Felony Repeat Offender Enhancement		10	10	6	6	3	3	2	2	1					
607	Pretrial Release Penalty Enhancement		10	10	6	6	3	3	2	2	1	90D	90D	10D	10D	
608	Hate Crime Enhancement (+1 Class)															
1101	Enhanced 1st Murder	1	x													
1101	1st Murder	2		x												
1101	Enhanced 2nd Murder	3			x											
1101	2nd Murder	4				x										
1102	Enhanced Vol. Manslaughter	4				x										
1102	Vol. Manslaughter	5					x									
1102	Enhanced Invol. Manslaughter	6						x								
1102	Invol. Manslaughter	7							x							
1103	Negligent Homicide	8								x						
1201	1st Robbery	5					x									
1201	2nd Robbery	6						x								
1201	3rd Robbery	7							x							
1201	4th Robbery	8								x						
1201	5th Robbery	9									x					
1202	1st Assault	6						x								
1202	2nd Assault	7							x							
1202	3rd Assault	8								x						
1202	4th Assault	9									x					
1202	5th Assault	A										x				
1202	6th Assault	B											x			
1203	Enhanced 1st Menacing	8								x						
1203	1st Menacing	9									x					
1203	Enhanced 2nd Menacing	A										x				
1203	2nd Menacing	B											x			
1204	1st Threats	B											x			
1204	2nd Threats	C												x		
1205	1st Offensive Physical Contact	B											x			
1205	2nd Offensive Physical Contact	C												x		
1205	3rd Offensive Physical Contact	D													x	
1801	Enhanced Stalking	9									x					

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
1801	Stalking	A										x				
1301	Enhanced 1st Sex Assault	3			x											
1301	1st Sex Assault	4				x										
1301	Enhanced 2nd Sex Assault	4				x										
1301	2nd Sex Assault	5					x									
1301	Enhanced 3rd Sex Assault	6						x								
1301	3rd Sex Assault	7							x							
1301	Enhanced 4th Sex Assault	7							x							
1301	4th Sex Assault	8								x						
1302	Enhanced 1st Sex Abuse of Minor	3			x											
1302	1st Sex Abuse of Minor	4				x										
1302	Enhanced 2nd Sex Abuse of Minor	4				x										
1302	2nd Sex Abuse of Minor	5					x									
1302	Enhanced 3rd Sex Abuse of Minor	5					x									
1302	3rd Sex Abuse of Minor	6						x								
1302	Enhanced 4th Sex Abuse of Minor	5					x									
1302	4th Sex Abuse of Minor	6						x								
1302	Enhanced 5th Sex Abuse of Minor	6						x								
1302	5th Sex Abuse of Minor	7							x							
1302	Enhanced 6th Sex Abuse of Minor	7							x							
1302	6th Sex Abuse of Minor	8								x						
1303	1st Sex Exploitation Adult	7							x							
1303	2nd Sex Exploitation Adult	8								x						
1304	Sexually Suggestive Conduct with a Minor	A										x				
1305	Enticing a Minor Into Sexual Conduct	8								x						
1306	Arranging for Sexual Conduct with a Minor	8								x						
1307	1st Nonconsensual Sexual Conduct	9									x					
1307	2nd Nonconsensual Sexual Conduct	A										x				
1401	Aggravated Kidnapping	4				x										
1401	Kidnapping	5					x									
1402	Aggravated Criminal Restraint	8								x						
1402	Criminal Restraint	A										x				
1501	1st Criminal Abuse of Minor	6						x								
1501	2nd Criminal Abuse of Minor	8								x						
1501	3rd Criminal Abuse of Minor	9									x					
1502	1st Criminal Neglect of Minor	8								x						
1502	2nd Criminal Neglect of Minor	A										x				
1502	3rd Criminal Neglect of Minor	B											x			

RCC §	RCC Offense Name	RCC Class	1 60Y - 720M	2 48Y - 576M	3 36Y - 432M	4 24Y- 288M	5 18Y- 216M	6 12Y- 144M	7 8Y- 96M	8 5Y- 60M	9 3Y- 36M	A 1Y- 12M	B 0Y- 180D	C 0Y- 90D	D 0Y- 30D	E 0Y- 0D
1503	1st Criminal Abuse of a Vulnerable Adult or	6						x								
1503	2nd Criminal Abuse of a Vulnerable Adult or	8								x						
1503	3rd Criminal Abuse of a Vulnerable Adult or	9									x					
1504	1st Criminal Neglect of a Vulnerable Adult or	8								x						
1504	2nd Criminal Neglect of a Vulnerable Adult or	A										x				
1504	3rd Criminal Neglect of a Vulnerable Adult or	B											x			
1601	Enhanced Forced Labor or Services	4				x										
1601	Forced Labor or Services	5					x									
1602	Enhanced Forced Commercial Sex	3			x											
1602	Forced Commercial Sex	4				x										
1603	Enhanced Trafficking in Labor or Services	5					x									
1603	Trafficking in Labor or Services	6						x								
1604	Enhanced Trafficking in Commerical Sex	5					x									
1604	Trafficking in Commerical Sex	6						x								
1605	Enhanced Sex Trafficking of Minors	4				x										
1605	Sex Trafficking of Minors	5					x									
1606	1st Benefitting from Human Trafficking	6						x								
1606	2nd Benefitting from Human Trafficking	7							x							
1607	Misuse of Documents in Furtherance of Human	8								x						
1608	1st Commercial Sex with a Trafficked Person	3			x											
1608	2nd Commercial Sex with a Trafficked Person	4				x										
2101	1st Theft ($500000+)	7							x							
2101	2nd Theft ($50000+)	8								x						
2101	3rd Theft ($5000+)	9									x					
2101	4th Theft ($500+)	A										x				
2101	5th Theft (Any)	C												x		
2102	Unauthorized Use of Property	D													x	
2103	Unauthorized Use of Motor Vehicle	A										x				
2104	Shoplifting	D													x	
2105	First Unlawful Creation or Possession Recording	C												x		
2105	Second Unlawful Creation or Possession Recording	D													x	
2106	Unlawful Operation of Recording Device in Motion	D													x	
2201	1st Fraud ($500000+)	7							x							
2201	2nd Fraud ($50000+)	8								x						
2201	3rd Fraud ($5000+)	9									x					
2201	4th Fraud ($500+)	A										x				
2201	5th Fraud (Any)	C												x		
2202	1st Payment Card Fraud ($500000+)	7							x							

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
2202	2nd Payment Card Fraud ($50000+)	8								x						
2202	3rd Payment Card Fraud ($5000+)	9									x					
2202	4th Payment Card Fraud ($500+)	A										x				
2202	5th Payment Card Fraud (Any)	C												x		
2203	1st Check Fraud	9				altn					x					
2203	2nd Check Fraud	C												x		
2204	1st Forgery	8								x						
2204	2nd Forgery	9									x					
2204	3rd Forgery	A										x				
2205	1st Identity Theft ($500000+)	7							x							
2205	2nd Identity Theft ($50000+)	8								x						
2205	3rd Identity Theft ($5000+)	9									x					
2205	4th Identity Theft ($500+)	A										x				
2205	5th Identity Theft (Any)	C												x		
2207	1st Unlawful Labeling of Recording	C												x		
2207	2nd Unlawful Labeling of Recording	D													x	
2208	1st Financial Exploitation of a Vulnerable Adult or	6						x								
2208	2nd Financial Exploitation of a Vulnerable Adult or	7							x							
2208	3rd Financial Exploitation of a Vulnerable Adult or	8								x						
2208	4th Financial Exploitation of a Vulnerable Adult or	9									x					
2208	5th Financial Exploitation of a Vulnerable Adult or	B											x			
2301	1st Extortion ($500000+)	6						x								
2301	2nd Extortion ($50000+)	7							x							
2301	3rd Extortion ($5000+)	8								x						
2301	4th Extortion ($500+)	9									x					
2301	5th Extortion (Any)	B											x			
2401	1st Possession of Stolen Property ($500000+)	8								x						
2401	2nd Possession of Stolen Property ($50000+)	9									x					
2401	3rd Possession of Stolen Property ($5000+)	A										x				
2401	4th Possession of Stolen Property ($500+)	B											x			
2401	5th Possession of Stolen Property (Any)	D													x	
2402	1st Trafficking Stolen Property ($500000+)	7							x							
2402	2nd Trafficking Stolen Property ($50000+)	8								x						
2402	3rd Trafficking Stolen Property ($5000+)	9									x					
2402	4th Trafficking Stolen Property ($500+)	A										x				
2402	5th Trafficking Stolen Property (Any)	C												x		
2403	1st Alteration of a Motor Vehicle Identification	9									x					
2403	2nd Alteration of a Motor Vehicle Identification	B											x			

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
2404	Alteration of Bicycle Identification Number	D													x	
2501	1st Arson	5					x									
2501	2nd Arson	7							x							
2501	3rd Arson	9									x					
2502	Reckless Burning	A										x				
2503	1st Criminal Damage to Property ($500000+)	7							x							
2503	2nd Criminal Damage to Property ($50000+)	8								x						
2503	3rd Criminal Damage to Property ($5000+)	9									x					
2503	4th Criminal Damage to Property ($500+)	A										x				
2503	5th Criminal Damage to Property (Any)	C												x		
2504	Criminal Graffiti	D													x	
2601	1st Trespass	B											x			
2601	2nd Trespass	C												x		
2601	3rd Trespass	D													x	
2701	Enhanced 1st Burglary	7							x							
2701	1st Burglary	8								x						
2701	Enhanced 2nd Burglary	8								x						
2701	2nd Burglary	9									x					
2701	Enhanced 3rd Burglary	9									x					
2701	3rd Burglary	A										x				
2702	Possession Tools to Commit Property Crime	D													x	
3401	1st Escape from Correctional Facility or Officer	8								x						
3401	2nd Escape from Correctional Facility or Officer	A										x				
3401	3rd Escape from Correctional Facility or Officer	C												x		
3402	Tampering with a Detection Device	B											x			
3403	1st Correctional Facility Contraband	9									x					
3403	2nd Correctional Facility Contraband	A										x				
4101	1st Possession of a Prohibited Weapon or Accessory	8								x						
4101	2nd Possession of a Prohibited Weapon or	9									x					
4102	1st Carrying a Dangerous Weapon (firearm school	8								x						
4102	2nd Carrying a Dangerous Weapon (firearm)	9									x					
4102	3rd Carrying a Dangerous Weapon (dang weap)	B											x			
4103	1st Possession of a Dangerous Weapon With Intent	8								x						
4103	2nd Possession of a Dangerous Weapon With Intent	A										x				
4104	1st Possession of a Dangerous Weapon During a	9									x					
4104	2nd Possession of a Dangerous Weapon During a	A										x				
4105	1st Possession of a Firearm by an Unauthorized	8								x						
4105	2nd Possession of a Firearm by an Unauthorized	9									x					

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
4106	Negligent Discharge of Firearm	A										x				
4107	Alteration of a Firearm Identification Mark	A										x				
4111	Unlawful Sale of a Pistol	9									x					
4112	Unlawful Transfer of a Firearm	9									x					
4113	Sale of a Firearm Without a License	9									x					
4115	Unlawful Sale of a Firearm by a Licensed Dealer	A										x				
4116	Use of False Information for Purchase or Licensure	A										x				
4201	Disorderly Conduct	D													x	
4202	Public Nuisance	D													x	
4203	Blocking a Public Way	D													x	
4204	Unlawful Demonstration	D													x	
4301	Rioting	A										x				
4302	Failure to Disperse	D													x	
48-904.01a	1st Possession of a Controlled Substance (Schedule	C												x		
48-904.01a	2nd Possession of a Controlled Substance (Any)	D													x	
48-904.01b	Enhanced 1st Trafficking of a Controlled Substance	6						x								
48-904.01b	1st Trafficking of a Controlled Substance	7							x							
48-904.01b	Enhanced 2nd Trafficking of a Controlled	7							x							
48-904.01b	2nd Trafficking of a Controlled Substance	8								x						
48-904.01b	Enhanced 3rd Trafficking of a Controlled Substance	8								x						
48-904.01b	3rd Trafficking of a Controlled Substance	9									x					
48-904.01b	Enhanced 4th Trafficking of a Controlled Substance	9									x					
48-904.01b	4th Trafficking of a Controlled Substance	A										x				
48-904.01b	Enhanced 5th Trafficking of a Controlled Substance	A										x				
48-904.01b	5th Trafficking of a Controlled Substance	B											x			
48-904.01c	Enhanced 1st Trafficking of a Counterfeit	6						x								
48-904.01c	1st Trafficking of a Counterfeit Substance	7							x							
48-904.01c	Enhanced 2nd Trafficking of a Counterfeit	7							x							
48-904.01c	2nd Trafficking of a Counterfeit Substance	8								x						
48-904.01c	Enhanced 3rd Trafficking of a Counterfeit	8								x						
48-904.01c	3rd Trafficking of a Counterfeit Substance	9									x					
48-904.01c	Enhanced 4th Trafficking of a Counterfeit	9									x					
48-904.01c	4th Trafficking of a Counterfeit Substance	A										x				
48-904.01c	Enhanced 5th Trafficking of a Counterfeit	A										x				
48-904.01c	5th Trafficking of a Counterfeit Substance	B											x			
48-904.10	Possession of Drug Manufacturing Paraphernalia	D													x	
48-904.11	Trafficking of Drug Paraphernalia	D													x	
7-2502.01	1st Possession of an Unregistered Firearm,	A										x				

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0D
7-2502.01	2nd Possession of an Unregistered Firearm,	B											x			
7-2502.15	Possession of a Stun Gun	B											x			
7-2502.17	Carrying an Air or Spring Gun	D													x	
7-2507.02	Enhanced Unlawful Storage of a Firearm	9									x					
7-2507.02	Unlawful Storage of a Firearm	A										x				
7-2509.06	Carrying a Pistol in an Unlawful Manner	D													x	
1312	Indecent Sexual Proposal to a Minor	8								x						
1313	Incest	A										x				
1802	Enhanced Electronic Stalking	9									x					
1802	Electronic Stalking	A										x				
1803	Enhanced 1st Voyeurism	8								x						
1803	1st Voyeurism	9									x					
1803	Enhanced 2nd Voyeurism	A										x				
1803	2nd Voyeurism	B											x			
1804	Enhanced Unauthorized Disclosure of Sexual	9									x					
1804	Unauthorized Disclosure of Sexual Recordings	A										x				
1805	Distribution of an Obscene Image	C												x		
1806	Distribution of an Obscene Image to a Minor	B											x			
1807	1st Trafficking an Obscene Image of a Minor	7							x							
1807	2nd Trafficking an Obscene Image of a Minor	8								x						
1808	1st Possession of an Obscene Image of a Minor	8								x						
1808	2nd Possession of an Obscene Image of a Minor	9									x					
1809	1st Arranging a Live Performance of a Minor	7							x							
1809	2nd Arranging a Live Performance of a Minor	8								x						
1810	1st Attending a Live Performance of a Minor	8								x						
1810	2nd Attending a Live Performance of a Minor	9									x					
4205	Breach of Home Privacy	C												x		
4206	1st Indecent Exposure	B											x			
4206	2nd Indecent Exposure	C												x		
1403	Blackmail	8								x						
2210	1st Trademark Counterfeiting	A										x				
2210	2nd Trademark Counterfeiting	C												x		
16-1024	1st Parental Kidnapping	A										x				
16-1024	2nd Parental Kidnapping	B											x			
16-1024	3rd Parental Kidnapping	D													x	
16-1024	4th Parental Kidnapping	E														x
25-1001	Possession of an Open Container of Alcohol in a	C												x		

RCC §	RCC Offense Name	RCC Class	1 60Y - 720M	2 48Y - 576M	3 36Y - 432M	4 24Y- 288M	5 18Y- 216M	6 12Y- 144M	7 8Y- 96M	8 5Y- 60M	9 3Y- 36M	A 1Y- 12M	B 0Y- 180D	C 0Y- 90D	D 0Y- 30D	E 0Y- 0M
210	Accomplice (Same as Predicate)															
301	Attempt (50% of Predicate)															
302	Solicitation (50% of Predicate)															
303	Conspiracy (50% of Predicate)															
606	Misdemeanor Repeat Offender											90D	90D	10D	10D	
606	Felony Repeat Offender Enhancement		10	10	6	6	3	3	2	2	1					
607	Pretrial Release Penalty Enhancement		10	10	6	6	3	3	2	2	1	90D	90D	10D	10D	
608	Hate Crime Enhancement (+1 Class)															
1101	Enhanced 1st Murder	1	x													
1101	1st Murder	2		x												
1101	Enhanced 2nd Murder	3			x											
1301	Enhanced 1st Sex Assault	3			x											
1602	Enhanced Forced Commercial Sex	3			x											
1608	1st Commercial Sex with a Trafficked	3			x											
1302	Enhanced 1st Sex Abuse of Minor	3			x											
1101	2nd Murder	4				x										
1102	Enhanced Vol. Manslaughter	4				x										
1301	1st Sex Assault	4				x										
1301	Enhanced 2nd Sex Assault	4				x										
1302	1st Sex Abuse of Minor	4				x										
1401	Aggravated Kidnapping	4				x										
1601	Enhanced Forced Labor or Services	4				x										
1602	Forced Commercial Sex	4				x										
1605	Enhanced Sex Trafficking of Minors	4				x										
1608	2nd Commercial Sex with a Trafficked	4				x										
1302	Enhanced 2nd Sex Abuse of Minor	4				x										
1102	Vol. Manslaughter	5					x									
1201	1st Robbery	5					x									
1301	2nd Sex Assault	5					x									
1302	2nd Sex Abuse of Minor	5					x									
1401	Kidnapping	5					x									
1601	Forced Labor or Services	5					x									
1603	Enhanced Trafficking in Labor or	5					x									
1604	Enhanced Trafficking in Commerical	5					x									
1605	Sex Trafficking of Minors	5					x									

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0M
2501	1st Arson	5					x									
1302	Enhanced 3rd Sex Abuse of Minor	5					x									
1302	Enhanced 4th Sex Abuse of Minor	5					x									
1102	Enhanced Invol. Manslaughter	6						x								
1201	2nd Robbery	6						x								
1202	1st Assault	6						x								
1301	Enhanced 3rd Sex Assault	6						x								
1302	3rd Sex Abuse of Minor	6						x								
1302	4th Sex Abuse of Minor	6						x								
1501	1st Criminal Abuse of Minor	6						x								
1503	1st Criminal Abuse of a Vulnerable	6						x								
1603	Trafficking in Labor or Services	6						x								
1604	Trafficking in Commerical Sex	6						x								
1606	1st Benefitting from Human Trafficking	6						x								
2208	1st Financial Exploitation of a	6						x								
2301	1st Extortion ($500000+)	6						x								
48-904.01b	Enhanced 1st Trafficking of a	6						x								
48-904.01c	Enhanced 1st Trafficking of a	6						x								
1302	Enhanced 5th Sex Abuse of Minor	6						x								
1102	Invol. Manslaughter	7							x							
1201	3rd Robbery	7							x							
1202	2nd Assault	7							x							
1301	3rd Sex Assault	7							x							
1301	Enhanced 4th Sex Assault	7							x							
1302	5th Sex Abuse of Minor	7							x							
1303	1st Sex Exploitation Adult	7							x							
1606	2nd Benefitting from Human	7							x							
1807	1st Trafficking an Obscene Image of a	7							x							
1809	1st Arranging a Live Performance of a	7							x							
2101	1st Theft ($500000+)	7							x							
2201	1st Fraud ($500000+)	7							x							
2202	1st Payment Card Fraud ($500000+)	7							x							
2205	1st Identity Theft ($500000+)	7							x							
2208	2nd Financial Exploitation of a	7							x							
2301	2nd Extortion ($50000+)	7							x							

RCC §	RCC Offense Name	RCC Class	1 60Y - 720M	2 48Y - 576M	3 36Y - 432M	4 24Y- 288M	5 18Y- 216M	6 12Y- 144M	7 8Y- 96M	8 5Y- 60M	9 3Y- 36M	A 1Y- 12M	B 0Y- 180D	C 0Y- 90D	D 0Y- 30D	E 0Y- 0M
2402	1st Trafficking Stolen Property	7							x							
2501	2nd Arson	7							x							
2503	1st Criminal Damage to	7							x							
2701	Enhanced 1st Burglary	7							x							
48-904.01b	1st Trafficking of a Controlled	7							x							
48-904.01b	Enhanced 2nd Trafficking of a	7							x							
48-904.01c	1st Trafficking of a Counterfeit	7							x							
48-904.01c	Enhanced 2nd Trafficking of a	7							x							
1302	Enhanced 6th Sex Abuse of Minor	7							x							
1103	Negligent Homicide	8								x						
1201	4th Robbery	8								x						
1202	3rd Assault	8								x						
1203	Enhanced 1st Menacing	8								x						
1301	4th Sex Assault	8								x						
1302	6th Sex Abuse of Minor	8								x						
1303	2nd Sex Exploitation Adult	8								x						
1305	Enticing a Minor Into Sexual Conduct	8								x						
1306	Arranging for Sexual Conduct with a	8								x						
1312	Indecent Sexual Proposal to a Minor	8								x						
1402	Aggravated Criminal Restraint	8								x						
1403	Blackmail	8								x						
1501	2nd Criminal Abuse of Minor	8								x						
1502	1st Criminal Neglect of Minor	8								x						
1503	2nd Criminal Abuse of a Vulnerable	8								x						
1504	1st Criminal Neglect of a Vulnerable	8								x						
1607	Misuse of Documents in Furtherance of	8								x						
1803	Enhanced 1st Voyeurism	8								x						
1807	2nd Trafficking an Obscene Image of a	8								x						
1808	1st Possession of an Obscene Image of	8								x						
1809	2nd Arranging a Live Performance of a	8								x						
1810	1st Attending a Live Performance of a	8								x						
2101	2nd Theft ($50000+)	8								x						
2201	2nd Fraud ($50000+)	8								x						
2202	2nd Payment Card Fraud ($50000+)	8								x						
2204	1st Forgery	8								x						

RCC §	RCC Offense Name	RCC Class	1 60Y - 720M	2 48Y - 576M	3 36Y - 432M	4 24Y- 288M	5 18Y- 216M	6 12Y- 144M	7 8Y- 96M	8 5Y- 60M	9 3Y- 36M	A 1Y- 12M	B 0Y- 180D	C 0Y- 90D	D 0Y- 30D	E 0Y- 0M
2205	2nd Identity Theft ($50000+)	8								x						
2208	3rd Financial Exploitation of a	8								x						
2301	3rd Extortion ($5000+)	8								x						
2401	1st Possession of Stolen Property	8								x						
2402	2nd Trafficking Stolen Property	8								x						
2503	2nd Criminal Damage to Property	8								x						
2701	1st Burglary	8								x						
2701	Enhanced 2nd Burglary	8								x						
3401	1st Escape from Correctional Facility or	8								x						
4101	1st Possession of a Prohibited Weapon	8								x						
4102	1st Carrying a Dangerous Weapon	8								x						
4103	1st Possession of a Dangerous Weapon	8								x						
4105	1st Possession of a Firearm by an	8								x						
48-904.01b	2nd Trafficking of a Controlled	8								x						
48-904.01b	Enhanced 3rd Trafficking of a	8								x						
48-904.01c	2nd Trafficking of a Counterfeit	8								x						
48-904.01c	Enhanced 3rd Trafficking of a	8								x						
1201	5th Robbery	9									x					
1202	4th Assault	9									x					
1203	1st Menacing	9									x					
1307	1st Nonconsensual Sexual Conduct	9									x					
1501	3rd Criminal Abuse of Minor	9									x					
1503	3rd Criminal Abuse of a Vulnerable	9									x					
1801	Enhanced Stalking	9									x					
1802	Enhanced Electronic Stalking	9									x					
1803	1st Voyeurism	9									x					
1804	Enhanced Unauthorized Disclosure of	9									x					
1808	2nd Possession of an Obscene Image of	9									x					
1810	2nd Attending a Live Performance of a	9									x					
2101	3rd Theft ($5000+)	9									x					
2201	3rd Fraud ($5000+)	9									x					
2202	3rd Payment Card Fraud ($5000+)	9									x					
2203	1st Check Fraud	9									x					
2204	2nd Forgery	9									x					
2205	3rd Identity Theft ($5000+)	9									x					

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0M
2208	4th Financial Exploitation of a	9									x					
2301	4th Extortion ($500+)	9									x					
2401	2nd Possession of Stolen Property	9									x					
2402	3rd Trafficking Stolen Property	9									x					
2403	1st Alteration of a Motor Vehicle	9									x					
2501	3rd Arson	9									x					
2503	3rd Criminal Damage to Property	9									x					
2701	2nd Burglary	9									x					
2701	Enhanced 3rd Burglary	9									x					
3403	1st Correctional Facility Contraband	9									x					
4101	2nd Possession of a Prohibited Weapon	9									x					
4102	2nd Carrying a Dangerous Weapon	9									x					
4104	1st Possession of a Dangerous Weapon	9									x					
4105	2nd Possession of a Firearm by an	9									x					
4111	Unlawful Sale of a Pistol	9									x					
4112	Unlawful Transfer of a Firearm	9									x					
4113	Sale of a Firearm Without a License	9									x					
48-904.01b	3rd Trafficking of a Controlled	9									x					
48-904.01b	Enhanced 4th Trafficking of a	9									x					
48-904.01c	3rd Trafficking of a Counterfeit	9									x					
48-904.01c	Enhanced 4th Trafficking of a	9									x					
7-2507.02	Enhanced Unlawful Storage of a	9									x					
1202	5th Assault	A										x				
1203	Enhanced 2nd Menacing	A										x				
1304	Sexually Suggestive Conduct with a	A										x				
1307	2nd Nonconsensual Sexual Conduct	A										x				
1313	Incest	A										x				
1402	Criminal Restraint	A										x				
1502	2nd Criminal Neglect of Minor	A										x				
1504	2nd Criminal Neglect of a Vulnerable	A										x				
1801	Stalking	A										x				
1802	Electronic Stalking	A										x				
1803	Enhanced 2nd Voyeurism	A										x				
1804	Unauthorized Disclosure of Sexual	A										x				
2101	4th Theft ($500+)	A										x				

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0M
2103	Unauthorized Use of Motor Vehicle	A										x				
2201	4th Fraud ($500+)	A										x				
2202	4th Payment Card Fraud ($500+)	A										x				
2204	3rd Forgery	A										x				
2205	4th Identity Theft ($500+)	A										x				
2210	1st Trademark Counterfeiting	A										x				
2401	3rd Possession of Stolen Property	A										x				
2402	4th Trafficking Stolen Property	A										x				
2502	Reckless Burning	A										x				
2503	4th Criminal Damage to Property	A										x				
2701	3rd Burglary	A										x				
3401	2nd Escape from Correctional Facility	A										x				
3403	2nd Correctional Facility Contraband	A										x				
4103	2nd Possession of a Dangerous Weapon	A										x				
4104	2nd Possession of a Dangerous Weapon	A										x				
4106	Negligent Discharge of Firearm	A										x				
4107	Alteration of a Firearm Identification	A										x				
4115	Unlawful Sale of a Firearm by a	A										x				
4116	Use of False Information for Purchase	A										x				
4301	Rioting	A										x				
16-1024	1st Parental Kidnapping	A										x				
48-904.01b	4th Trafficking of a Controlled	A										x				
48-904.01b	Enhanced 5th Trafficking of a	A										x				
48-904.01c	4th Trafficking of a Counterfeit	A										x				
48-904.01c	Enhanced 5th Trafficking of a	A										x				
7-2502.01	1st Possession of an Unregistered	A										x				
7-2507.02	Unlawful Storage of a Firearm	A										x				
1202	6th Assault	B											x			
1203	2nd Menacing	B											x			
1204	1st Threats	B											x			
1205	1st Offensive Physical Contact	B											x			
1502	3rd Criminal Neglect of Minor	B											x			
1504	3rd Criminal Neglect of a Vulnerable	B											x			
1803	2nd Voyeurism	B											x			
1806	Distribution of an Obscene Image to a	B											x			

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0M
2208	5th Financial Exploitation of a	B											x			
2301	5th Extortion (Any)	B											x			
2401	4th Possession of Stolen Property	B											x			
2403	2nd Alteration of a Motor Vehicle	B											x			
2601	1st Trespass	B											x			
3402	Tampering with a Detection Device	B											x			
4102	3rd Carrying a Dangerous Weapon	B											x			
4206	1st Indecent Exposure	B											x			
16-1024	2nd Parental Kidnapping	B											x			
48-904.01b	5th Trafficking of a Controlled	B											x			
48-904.01c	5th Trafficking of a Counterfeit	B											x			
7-2502.01	2nd Possession of an Unregistered	B											x			
7-2502.15	Possession of a Stun Gun	B											x			
1204	2nd Threats	C												x		
1205	2nd Offensive Physical Contact	C												x		
1805	Distribution of an Obscene Image	C												x		
2101	5th Theft (Any)	C												x		
2105	First Unlawful Creation or Possession	C												x		
2201	5th Fraud (Any)	C												x		
2202	5th Payment Card Fraud (Any)	C												x		
2203	2nd Check Fraud	C												x		
2205	5th Identity Theft (Any)	C												x		
2207	1st Unlawful Labeling of Recording	C												x		
2210	2nd Trademark Counterfeiting	C												x		
2402	5th Trafficking Stolen Property (Any)	C												x		
2503	5th Criminal Damage to Property	C												x		
2601	2nd Trespass	C												x		
3401	3rd Escape from Correctional Facility	C												x		
4205	Breach of Home Privacy	C												x		
4206	2nd Indecent Exposure	C												x		
25-1001	Possession of an Open Container of	C												x		
48-904.01a	1st Possession of a Controlled	C												x		
1205	3rd Offensive Physical Contact	D													x	
2102	Unauthorized Use of Property	D													x	
2104	Shoplifting	D													x	

RCC §	RCC Offense Name	RCC Class	1	2	3	4	5	6	7	8	9	A	B	C	D	E
			60Y - 720M	48Y - 576M	36Y - 432M	24Y- 288M	18Y- 216M	12Y- 144M	8Y- 96M	5Y- 60M	3Y- 36M	1Y- 12M	0Y- 180D	0Y- 90D	0Y- 30D	0Y- 0M
2105	Second Unlawful Creation or	D													x	
2106	Unlawful Operation of Recording	D													x	
2207	2nd Unlawful Labeling of Recording	D													x	
2401	5th Possession of Stolen Property (Any)	D													x	
2404	Alteration of Bicycle Identification	D													x	
2504	Criminal Graffiti	D													x	
2601	3rd Trespass	D													x	
2702	Possession Tools to Commit Property	D													x	
4201	Disorderly Conduct	D													x	
4202	Public Nuisance	D													x	
4203	Blocking a Public Way	D													x	
4204	Unlawful Demonstration	D													x	
4302	Failure to Disperse	D													x	
16-1024	3rd Parental Kidnapping	D													x	
48-904.01a	2nd Possession of a Controlled	D													x	
48-904.10	Possession of Drug Manufacturing	D													x	
48-904.11	Trafficking of Drug Paraphernalia	D													x	
7-2502.17	Carrying an Air or Spring Gun	D													x	
7-2509.06	Carrying a Pistol in an Unlawful	D													x	
16-1024	4th Parental Kidnapping	E														x

AMERICAN LAW INSTITUTE,
MODEL PENAL CODE: SENTENCING, 6.06 SENTENCE OF INCARCERATION (2017)
(APRIL 10, 2017)

such as private prisons and jails, and private correctional-treatment contractors. See American Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010), at 64.

---

§ 6.06. Sentence of Incarceration.[34]

(1) A person convicted of a crime may be sentenced to incarceration as authorized in this Section. "Incarceration" in this Code includes confinement in prison or jail.

(2) The court may impose incarceration:

(a) when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or

(b) when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. When appropriate, the court may consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims.

(3) The length of term of incarceration shall be no longer than needed to serve the purposes for which it is imposed.

(4) Incarcerated offenders shall be guaranteed personal safety and subsistence, and shall be provided reasonable medical care, mental-health care, and opportunities to rehabilitate themselves and prepare for reintegration into the law-abiding community following their release.

(5) When deciding whether to impose a sentence of incarceration and the length of term, the court shall apply any relevant sentencing guidelines.

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

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

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

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

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

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

---

[34] This Section was originally approved in 2011; see Tentative Draft No. 2. This draft adds amendments recommended by the Reporters as indicated above, which have been approved by the Council.

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

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

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

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

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

(9) Offenders sentenced to a term of incarceration shall be released after serving the term imposed by the sentencing court reduced by credits for time served and good behavior as provided in §§ 6.07 and 305.1, unless sentence is modified under §§ 305.6 and 305.7.

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

The Reporters' proposed changes in this provision, already approved by the Council, are indicated below:

§ 6.06. Sentence of Incarceration ~~Imprisonment~~

(1) A person convicted of a crime may be sentenced to incarceration as authorized in this Section. "Incarceration" in this Code includes confinement in prison or jail.

(2) The court may impose incarceration:

(a) when necessary to incapacitate dangerous offenders, provided a sentence imposed on this ground is not disproportionately severe; or

(b) when other sanctions would depreciate the seriousness of the offense, thereby fostering disrespect for the law. When appropriate, the court may consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims.

(3) The length of term of incarceration shall be no longer than needed to serve the purposes for which it is imposed.

(4) Incarcerated offenders shall be guaranteed personal safety and subsistence, and shall be provided reasonable medical care, mental-health care, and opportunities to

rehabilitate themselves and prepare for reintegration into the law-abiding community following their release.

(5) When deciding whether to impose a sentence of incarceration and the length of term, the court shall apply any relevant sentencing guidelines.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Reporters' proposed changes in this Comment, already approved by the Council, are indicated below:

Comment: [35]

a. Scope. This Section revises and expands upon § 6.06 of the 1962 Model Penal Code ("Sentence of Imprisonment for Felony; Ordinary Terms"), which originally was presented in two alternative forms, and interlocked with former § 6.08 (misdemeanor penalties) and former §§ 6.07 and 6.09 (providing "extended terms" for felonies and misdemeanors under certain circumstances). See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985). The original Code's provisions on "extended terms" of incarceration have not been carried forward. Subsection (7), on misdemeanor penalties, revises § 6.08 of the 1962 Code and consolidates it within § 6.06. Subsections (2) and (3) address subjects formerly confronted in §§ 7.01, 7.03, and 7.04 of the original Code. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985).

New§ 6.06 establishes revised Code's general structure of "determinate" (rather than "indeterminate") prison sentences, and recommends a framework for the grading of offenses to fit within such a system. It also addresses the propriety of mandatory prison terms and the purposes of carceral sanctions. Within the revised Code, § 6.06 interlocks new § 7.02(4) ("Choices Among Sanctions") (Council Draft No. 5, 2015) on the question of when a sentence of incarceration should be imposed. An overview of § 6.06 is presented in this Comment *a*, followed by more extensive discussion in Comments *b* through *o*.

Determinate Sentencing System

The original version of § 6.06 was designed for an "indeterminate" sentencing system, in which parole boards and corrections officials held the lion's share of discretion to determine the lengths of prison terms. Trial courts were empowered only to set broad limits upon the discretionary decisions of those later-in-time actors, expressed in widely separated "minimum" and "maximum" terms for each prisoner. Much of the complexity, and the need for alternative mechanisms, in original §§ 6.06, 6.08, and 6.09 stemmed from the effort to define and coordinate the operation of both minimum and maximum penalties in specific classes of cases. Under the original Code, a judicially pronounced prison sentence was "indeterminate" or "indefinite" in the sense that it bore no predictable relation to the confinement term that would actually be served by the defendant. In an indeterminate structure, the "pronounced sentence" and "actual time served" were entirely different things. The revised provision reflects a much different approach.

[35] The bulk of this Comment has not been revised since § 6.06's approval in 2011. New material to accompany the black-letter amendments offered this draft is indicated by redlining in the text throughout the Comments. All Comments will be updated for the Code's hardbound volumes.

In most prison cases under the new Code, sentencing courts will impose "determinate" sentences that are predictably related to actual confinement terms.

Subsections (9) and (10) express the Institute's preference for a determinate sentencing system over a system in which parole boards hold substantial authority to set actual lengths of prison terms. The new Code's recommendation of removal of parole *release* discretion—going to the timing of release—casts no doubt on the desirability of postrelease *supervision* programs for releasees. On the contrary, the Code identifies the "reintegration of offenders into the law-abiding community" as a central purpose of the sentencing system. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007); § 7.09 (Tentative Draft No. 3, 2014). Determinacy in sentence duration is not at war with this goal; some corrections experts have even suggested that planning for post-incarceration services is made easier when prisoners' release dates are foreseeable well in advance.

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

The Institute's recommendation on this question follows extensive study and debate. Much relevant background is contained in Appendix B, Reporter's Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). The principle reasons for favoring a determinate rather than an indeterminate structure may be summarized as follows:

> (1) A parole board is more poorly positioned than a sentencing court to determine proportionate lengths of prison terms in specific cases in light of offense gravity, harm to victims, or offender blameworthiness. Judicial determinations of proportionality, especially when aided by sentencing guidelines and subject to appellate review, should not be supplanted by a parole board's different view.
>
> (2) There is no credible evidence that a parole board can better effectuate the utilitarian goals of the sentencing system than a sentencing court. In particular, there is no persuasive evidence that parole boards can separate those inmates who have been rehabilitated from those who have not. Likewise, there is no persuasive evidence that parole boards can assess the risk of future offending in individual cases with greater accuracy than sentencing courts on the day of original sentencing.
>
> (3) The procedural protections available to prisoners in the parole-release context are unacceptably poor when compared to those attending judicial sentencing decisions. The parole process lacks transparency, employs no enforceable decision rules, often generates little or no record of proceedings,

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

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

(5) In the last three decades, parole boards have shown themselves to be highly susceptible to political pressure. There are many instances in which the parole-release policy of a jurisdiction has changed overnight in response to a single high-profile crime. Increasingly, parole-release decisions have been skewed by risk aversion, as the institutional structure of parole holds individual board members responsible for the crimes committed by prison releasees—but no such risk follows decisions to refuse release.

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

Although there are fundamental differences between sentencing systems with and without parole-release mechanisms, no sentencing structure can be absolutely determinate. All existing American sentencing systems, even those that have long ago eliminated parole release, make room for a number of later-in-time official decisions—some of them after judicial imposition of sentence—that may alter the durations of prison stays. Subsection (4) cross-references the most important of these in the revised Code: § 6.07 (“Credit Against the Sentence for Time Spent in Custody”) (Council Draft No. 5, 2015), § 305.1 (“Reductions of Prison Terms for Good Behavior”) (Tentative Draft No. 2, 2011), § 305.6 (“Modification of Long-Term Prison Sentences; Principles for Legislation”) (Tentative Draft No. 2, 2011), and § 305.7 (“Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons”) (Tentative Draft No. 2, 2011). Under the institutional philosophy of the revised Code, provisions of this kind—pockets of indeterminacy

within a generally determinate structure—have been crafted to advance their underlying purposes without upsetting the Code's broad preference for a determinate system in which judges are the primary sentencing authorities.

Mandatory Prison Sentences

Subsection 6.06(8) is a new provision based on the Institute's longstanding position—joined by two Presidential crime commissions, the American Bar Association, the Federal Judicial Conference, and the United States Sentencing Commission—that no mandatory-minimum prison sentence should be enacted for any offense. For the first time in the Model Code, this policy is voiced in express statutory language. In the original Code, the Institute's strong objection to such laws was implicit in the absence of any required minimum penalty throughout the recommended statutory text. Categorical disapproval was stated affirmatively in an Official Comment, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-127.

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

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

Despite the amassed evidence, this remains an area of law in which knowledge and experience have had little impact on the lawmaking process. Privately, many legislators and other elected officials have confided that the short-term political rewards associated with the

enactment of new mandatory penalties, and the high perceived costs of opposing such penalties, make it difficult to act on their personal views that such laws are ineffective, wasteful, and needlessly severe. After two decades of dropping crime rates, however, the political milieu has been changing. In recent years, some state legislatures have trimmed the scope of their mandatory-penalty laws—almost always in response to circumstances of budgetary emergency. Most of these actions must be characterized as incremental, not sweeping in scope, but they supply evidence that a retreat from mandatory sentencing policies is politically possible when broader costs and benefits are taken clearly in view.

The revised Code attacks the institution of mandatory-minimum sentences in the broadest terms, and also in numerous targeted provisions. For the first time, the issue is addressed expressly in black-letter statutory language. Subsection (3) stops short of a "constitution-like" command that forbids (vainly) the future enactment of mandatory-minimum penalties. The Code is not a model constitution, and none of its provisions can preclude future legislative action. Even so, the revised Code offers a forceful declaration of policy in the present tense. It states categorically that a sentencing court "is not required to impose a minimum term of imprisonment for any offense under this Code." In jurisdictions that have enacted mandatory penalties, subsection (3) makes clear that the intent of the legislature is to supersede all such preexisting laws. As with all of the Code's recommendations, the desirability of subsection (3) is meant to project forward in time; it embodies a policy that is meant to be of lasting persuasive value.

The Institute recognizes that no criminal code in any U.S. jurisdiction is in conformity with the categorical prescription of subsection (8). Even in the best of scenarios, it could be many years before mandatory penalties are eradicated from the nation's criminal laws. To address this reality, the Code includes an array of new provisions, dispersed throughout the sentencing articles, that are intended to mute or bypass the effects of mandatory-minimum sentences in designated settings. These include § 6.02B(3) (Tentative Draft No. 3, 2014); § 6.11A(f) (Tentative Draft No. 2, 2011); § 6.14(3)(b) (Council Draft No. 5, 2015); § 6B.03(6) (Tentative Draft No. 1, 2007); § 6B.09(3) (Tentative Draft No. 2, 2011); § 7.XX(3)(c) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5, 2015); § 7.08(2) (Council Draft No. 5, 2015); § 7.09(5)(b) (Council Draft No. 5, 2015); § 305.1(3) (Tentative Draft No. 2, 2011); § 305.6(5) (Tentative Draft No. 2, 2011); § 305.7(8) (Tentative Draft No. 2, 2011); and§ 305.8(1.3) (Council Draft No. 5, 2015) (all of these provisions are more fully described in Comment *m* below). For legislatures that choose not to repeal their mandatory-penalty laws en masse, these targeted provisions offer significant incremental improvements.

b. Terminology. This provision addresses sentences of "incarceration" rather than "imprisonment." This is a change in usage from the original Code, but not a change in meaning. The new terminology clarifies that § 6.06 is intended to cover sentences of confinement whether served in prisons or jails. The new wording avoids possible confusion: American criminal-justice professionals frequently understand the term "imprisonment" to refer only to state prison sentences. Postconviction confinement in a local jail is usually not called a "prison term."

c. Purposes of incarceration. Subsection (2) speaks to the justified purposes of incarceration that should govern judicial decisionmaking in individual cases. The subsection is addressed only to the courts and applies only to the question of whether the sanction of incarceration should be used. Elsewhere, the Code outlines operative purposes for other sanction types.[36] Subsection 6.06(2) and its parallel provisions throughout the Code are "nested" within the comprehensive statement of system purposes in § 1.02(2) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5).

The nesting structure is not an invention of the revised Code. The original Model Penal Code contained both a provision on the general purposes of sentencing and a more specific provision on the subset among those general purposes that could justify sentences of imprisonment in individual cases. See Model Penal Code and Commentaries, Part I, §§ 1.01 to 2.13, § 1.02 (1985); Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01 (1985).

Likewise, the revised Code defines general purposes at the beginning of the sentencing articles, in § 1.02(2), but envisions that those goals will be applied selectively in different contexts, and with varying prioritization. It is a truism, but a useful one, that all objectives of the system cannot be pursued all of the time. Thus, depending on factors concerning the offense, the offender, the interests of crime victims, the type of sanction at issue, and the competencies of different official actors in the system, the principles governing sentencing decisions may be arranged in particularized ways.

[36] See Tentative Draft No. 3, § 6.02A(2) ("The purpose of deferred prosecution is to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred prosecution should be offered to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction."); id., § 6.02B(2) ("The purposes of deferred adjudication are to facilitate offenders' rehabilitation and reintegration into the law-abiding community and restore victims and communities affected by crime. Deferred adjudication should be offered to hold the individual accountable for criminal conduct through a formal court process, but justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction."); id., § 6.03(2) ("The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses."); Preliminary Draft No. 11, § 6.04A(2) ("The purposes of victim restitution are to compensate victims for injuries suffered as a direct result of criminal conduct and promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims."); Tentative Draft No. 3, § 6.04B(2) ("The purposes of fines are to exact proportionate punishments and further the goals of general deterrence and offender rehabilitation without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community."); id., § 6.04C(2) ("The purposes of asset forfeitures are to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies."); id., Alternative § 6.04D(2) ("The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correctional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.").

d. Confinement of dangerous offenders. Subsection (2)(a) prioritizes the removal of dangerous offenders from society as the defining utilitarian goal of incarceration. The original Code contained similar injunctions, see, for example, Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01(1)(a) (1985) ("A sentence of incarceration is appropriate when . . . [t]here is undue risk that during a period of probation the defendant will commit another crime."). Incapacitation as a means of crime prevention is recognized as one of the primary utilitarian goals of the sentencing system in § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5) (stating that one general purpose is the "incapacitation of dangerous offenders").

The pursuit of incapacitation policy is not intended to be unbounded, however. Subsection (2)(a) expressly acknowledges that, under the Code's foundational principles, no utilitarian objective may ever justify a punishment that is disproportionate in severity. See § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007; amended in Tentative Draft No. 4, 2016) (sentences in all cases must be "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"). The statutory constraint of proportionality in the revised Code is intended to impact far more cases than current Eighth Amendment jurisprudence. See § 7.09(5)(b) (this draft) ("The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.").

Any incapacitation policy under the Code is also constrained by the limits of empirical and predictive sciences. Reliance on risk assessment technologies that have not been demonstrated to achieve reasonable predictive accuracy is not permitted. These utilitarian constraints are discussed more fully in Tentative Draft No. 2 (2011), § 6B.09 (Evidence-Based Sentencing; Offender Treatment Needs and Risk of Reoffending). See also § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (utilitarian goals to be pursued only "when reasonably feasible"); and id., Comment *e* ("One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through the administration of a criminal sanction.").

One consistent objective throughout the revised Code is to render incapacitation policy transparent and subject to inspection, empirical evaluation, procedural protections, and normative and constitutional challenge in individual cases. See generally Tentative Draft No. 2, § 6B.09 (2011). If one broadly accepted purpose of imprisonment is to separate the free community from those we are "afraid of," effectuation of that policy should be in the light of day.

Assuming a system without parole-release discretion, the Code's incapacitation policy can be implemented only by courts at the individual-case level, with the assistance of sentencing guidelines, actuarial risk-assessment instruments, tools to measure offenders' progress toward a

lower risk of recidivism, and "needs-assessment" tools to structure programming and supervision plans best tailored to facilitate a particular inmate's successful reentry into society. Thus, individualized determinations of dangerousness, when this can be done with reasonable accuracy, should be a core responsibility of sentencing courts.

Among the most difficult decisions each jurisdiction must confront are the definitions and the statistical thresholds of "dangerousness" it will establish in its prison policy. Risk thresholds should almost certainly vary by offense.

There will be many difficult cases in the administration of risk-assessment strategies. It is the position of the Institute that open debate of grey-area scenarios in risk prediction, played out in the transparency of the courtroom, with effective adversarial testing, will be a healthy improvement over the current law and practices in most states.

The Code makes no room for "general" incapacitation policy, under which large classes of convicted offenders are incarcerated indiscriminately for longer periods than are otherwise justified—on the theory that bulk confinement will prevent the offenses that some portion of the larger group would have committed. It is the firm position of the Institute that public safety can be safeguarded more efficiently, and at far less human cost, through evidence-based policies that are wielded carefully and are continuously tested and improved.

e. Incarceration based on seriousness of the offense. Subsection (2)(b) moves beyond pure instrumentalism to posit that some offenses are so serious in their own right that their perpetrators are deserving of incarceration even if they present no special risk of recidivism. The first clause of subsection (2)(b) borrows from the original Code, Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 7.01(c) (1985) (sentencing court may impose prison when "a lesser sentence would depreciate the seriousness of the crime"). The second clause of subsection (2)(b) adds language inspired by the American Bar Association, Standards for Criminal Justice: Sentencing, Third Edition (1994), Standard 18-3.12(c)(iii) (use of incarceration "may be proper . . . if necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law"). Finally, subsection (2)(b) directs sentencing judges, in appropriate cases, to consider the risks of harm created by an offender's criminal conduct, or the total harms done to a large class of crime victims. The first clause recognizes that risk creation can be highly blameworthy and deserving of stern punishment. For example, an attempted murder is a "serious" crime even when the intended victim is not injured. The second clause recognizes that some offenses, such as environmental and financial crimes, may have diffuse effects on a large population of crime victims. Some victims may not even be aware of their injuries. Nonetheless, such broadly dispersed harms may be aggregated when sentencing courts weigh the seriousness of an offense under subsection (2)(b).

Subsection (2)(b) injects considerations of proportionality into incarceration policy. Some crimes are sufficiently serious that a society's collective views of deserved punishment demand the response of incarceration—and in some instances this rationale can justify a lengthy prison

term. Put simply, considerations of proportionality can set lower boundaries on appropriate punishment severity, just as they set ceilings. See § 1.02(2)(a)(i) and Comment *b* (Tentative Draft No. 1, 2007; Council Draft No. 5, 2015).

Subsection (2)(b) also recognizes that proportionality in sentencing can serve a communicative function to the broader society. Disproportionate sentences of any kind can undermine the perceived legitimacy of the justice system and inspire disrespect for the law in the community. See § 1.02(2)(b)(vii) (Tentative Draft No. 1, 2007; Council Draft No. 5, 2015). Subsection (2)(b) therefore continues prior Institute policy that imprisonment is justified when "a lesser sentence would depreciate the seriousness of the crime." Commentary to the original Code explained that this wording was intended to focus attention on the question of whether a nonprison sanction would have a "negative effect" on "public respect for the law."

The courts play an essential role under subsection (2)(b). Judgments of offense seriousness cannot be made solely at the systemic level by legislatures and sentencing commissions. A well-functioning system requires that judges hold power to individualize sentences in relation to an offender's blameworthiness in a particular case, and to the harms done or risked by the offender's conduct. In the revised Code's scheme, for example, members of the sentencing commission are called upon to use their best collective judgment to develop presumptive sentencing recommendations that are proportionate to "ordinary" or "typical" offenses and offenders within each guidelines classification. See Tentative Draft No. 1 (2007), § 6B.03(2) ("The commission shall set presumptive sentences for defined classes of cases that are proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders, based upon the commission's collective judgment of appropriate punishments for ordinary cases of the kind governed by each presumptive sentence."). The commission's judgments of proportionality in punishment are not meant to be relitigated from scratch in every case. Indeed, a judge who departs from the guidelines on proportionality grounds is in principle *acknowledging* that the commission created a proportionate guideline for an ordinary case, but the judge is also finding that, on the facts, the instant case is more serious than an "ordinary" or "typical" case. See § 7.XX(2)(a) ("A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines.").[37]

[37] See also Tentative Draft No. 1 (2007), § 1.02(2), Comment *b*:

[T]he ranges of penalties expressed in sentencing guidelines must not be viewed as fixed statements of the boundaries of proportionality for all cases. No matter how sagacious a commission may be, it does its work in the abstract, without exposure to the textured facts and circumstances of individual cases. At the end of the day, the trial and appellate courts must hold dispositive authority in particular cases to accept the judgments of proportionality reflected in sentencing guidelines, or to rule that the considerations in subsection (2)(a)(i) move an individual case above or below the range of penalties specified in guidelines, see Comment *d* below. In short, the sentencing

f. Omission of general deterrence as a basis for judicially imposed prison sentences; propriety of incarceration when other sanctions would depreciate the seriousness of the offense. Judgments about general deterrence are best made at the systemwide policymaking level, in light of credible empirical evidence, and are least likely to be administered effectively or uniformly by sentencing judges, one case at a time. On this score, the revised Code echoes the policy conclusion of the original Code:

> As a practical matter it is impossible to measure the amount of deterrence that will be engendered by a particular sentence. The positive effect of a given disposition on the community in terms of preventing or discouraging future offenses of the type involved is, in effect, a rationale that could easily be used to justify any result at any time. (Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 3(c) (1985), at p. 234.)

Section 6.06(2) does not foreclose legislatures and sentencing commissions from pursuing prison policies founded on theories of general deterrence, through the definition and grading of offenses, measures to increase the certainty and swiftness of apprehension and punishment, and the promulgation of sentencing guidelines. Legislatures and commissions are best situated to apply general deterrence policy to specific categories of offenses, such as white-collar crime. This is approved in the Code, so long as reasonable evidence supports the policy decisions that are made. See § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (utilitarian goals to be pursued only "when reasonably feasible"); and id., Comment *e* ("One test for the reasonable feasibility of a utilitarian penalty is whether there is a realistic basis to suppose that the specific utilitarian objective can be achieved through the administration of a criminal sanction."). Subsection (2) addresses only what is within the competency of sentencing courts to adjudicate in a particular case.

g. Purposes and the length of incarceration. Subsection (3) provides that the duration of incarceration terms "shall be no longer than needed" to serve their authorized purposes. This effects a fundamental tenet of the revised Code; see Tentative Draft No. 1, § 1.02(2)(a)(iii) (one general purpose of sentencing is "to render sentences no more severe than necessary to achieve the applicable purposes in subsections [1.02(2)(a)(i) and (a)(ii)").

h. Rehabilitation and incarceration. A prison term may not be imposed for the purpose of rehabilitation under § 6.06, but this is not the same as saying that rehabilitation plays no role in incarceration policy. Subsection (4) provides that government has a duty to provide reasonable opportunities for rehabilitation for those it imprisons, and must make reasonable efforts to prepare them for reintegration into the law-abiding community. Simply stated, the Code treats rehabilitation as a purpose "of" incarceration but not a reason "for" incarceration.

---

guidelines should be viewed as "first drafts" of proportionate sentences for ordinary cases, not as final pronouncements for all cases.

The new Code's decision to rule out rehabilitation as a reason "for" incarceration is contrary to that of the original Code. See Model Penal Code (1962), § 7.01(1)(b) (approving of the use of imprisonment when "the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution").

i. Conditions of confinement. This provision is new to the Code. The first edition of the Code predated the wave of prison-conditions litigation in the 1970s. It was written at a time when incarcerated populations were roughly one-sixth of their current totals, and before the increased use of private prisons and the advent of "supermax" prisons. A sentencing code for the 21st century cannot overlook these subject matters, with U.S. incarcerated populations now standing at more than two million individuals, even though the Code revision project has not embraced issues of prison administration or conditions of incarceration. (A separate project on these topics has been suggested by some ALI members, Advisers, and Council members.) For present purposes, subsection (4) states the most important aspirations for the field. These include absolute guarantees of the personal safety and subsistence of prisoners. Further, subsection (4) states that prisoners must be afforded reasonable medical care, mental-health care, and opportunities to rehabilitate themselves and prepare for reintegration into the law-abiding community.

Subsection (4) is the Code's cornerstone statement of how the societal goals of offender rehabilitation and reintegration are applied in the setting of prison and jail sentences. Neither goal, standing alone, can justify the use of incarceration in an individual case in the Code's scheme. However, when incarceration is imposed for other sufficient reasons, subsection (4) asserts that governments should take responsibility to give inmates reasonable opportunities to pursue their own rehabilitation and prepare for successful reentry upon release.

The revised Code also takes the view that most people convicted of crimes, even those who present a current high risk of serious reoffending, will not remain crime-prone forever. In many cases, the aging process alone takes ex-offenders beyond the period of their active criminal careers. In other instances, the pain of incarceration, the benefits of rehabilitative programming, or the mysterious process of personal growth can be expected to change a prisoner for the better. Thus, in some but not all cases, the classic goals of rehabilitation and incapacitation are intertwined. When deciding to imprison a defendant on grounds of incapacitation, the court must pass judgment on how long an incapacitative penalty will be needed, and this task sometimes translates into a calculation of the amount of time that the rehabilitative process will take. For many first-time prisoners, for example, who statistically present a much lower risk of recidivism than persons who have served multiple terms, a reasonable evidence-based judgment might be that a short period of confinement will be enough to put the defendant on the right course. Or, for a seriously drug-involved offender, the length of a judge's incapacitative sentence might turn on evidence that effective in-prison drug-treatment programs often take a year or two to yield results.

j. Sentencing guidelines. New subsection (4) reproduces language also found in the Sections of the Code devoted to probation, postrelease supervision, and economic sanctions, requiring that the courts "apply" sentencing guidelines promulgated by the sentencing commission when ordering such sanctions. This language does not render the guidelines mandatory. As explained elsewhere in the Code, proper application of the guidelines includes generous authority on the part of sentencing courts to depart from guidelines prescriptions when "substantial reasons" exist to impose a non-guidelines sentence in an individual case. See Tentative Draft No. 1 (2007), § 6B.04(1) ("The guidelines shall have presumptive legal force in the sentencing of individual offenders by sentencing courts, subject to judicial discretion to depart from the guidelines as set forth in § 7.XX"); id., § 7.XX(2) ("In sentencing an individual offender, sentencing courts may depart from the presumptive sentences set forth in the guidelines, or from other presumptive provisions of the guidelines, when substantial circumstances establish that the presumptive sentence or provision will not best effectuate the purposes stated in § 1.02(2)(a)."). Within the Code's framework of structured judicial discretion, departures from presumptive sentencing guidelines are encouraged when they are well-founded in the operative purposes of the sentencing system.

k. Maximum authorized terms for felony offenses. The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. In part this is because the Code is agnostic as to the number of felony grades that should exist in a criminal code; see § 6.01(1) and Comments *a* through *c* (Tentative Draft No. 2, 2011). Maximum penalties necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for instance, rather than five.

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

Instead, the Code confronts problems of prison-sentence severity through numerous other means, including the adoption of a sound institutional structure for the creation and application of rational sentencing policies, with a judiciary statutorily empowered at both the trial and appellate levels to combat disproportionality in punishment. On this subject, much weight is borne by other Sections of the Code. In the 1962 Code, the statutory ceilings in § 6.06 were the

sole enforceable limitations upon sentence severity for the majority of prison cases. Under the revised Code's sentencing system, severity is regulated primarily through sentencing guidelines, the courts' departure power under guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms (beyond the historically weak constitutional protections under the Eighth Amendment) for subconstitutional proportionality review of excessively harsh penalties.

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

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

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

The Model Penal Code itself has had a complex relationship to the death penalty—both in its 1962 and present-day iterations. The original Code took no position on the abolition or retention of capital punishment, but included detailed statutory recommendations addressed to states that chose to retain the penalty; see Model Penal Code and Commentaries, Part II, §§ 210.0 to 213.6, § 210.6 (1980). This provision was influential in state legislatures, and helped some states devise capital-punishment laws that survived the constitutional challenges of the 1970s. In part because of this history, the Institute undertook a reexamination of its policy in the 2000s. The results of that process are easily summarized: The new Code will contain no death penalty, and the capital-punishment provision in the 1962 Code has been formally withdrawn by the Institute. See Message from ALI Director Lance Liebman (October 23, 2009) (reporting adoption of resolution that "the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally

adequate system for administering capital punishment."); see also Report to the ALI Concerning Capital Punishment: Prepared at the Request of ALI Director Lance Liebman by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law) (2008), reprinted in Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (2009).

In light of these developments, it might appear that the revised § 6.06 speaks only to death-penalty-abolition states. That is not the case. The provision is addressed to all American jurisdictions on the premise that the policy questions surrounding maximum prison sentences are largely similar in death-penalty and non-death-penalty states. Put differently, death-penalty states should resist the pressure to distend their full-punishment scale toward greater severity because of the presence of a capital-sentencing provision, while non-death-penalty states cannot wholly ignore the existence of capital punishment when defining their subcapital-penalty scales. The Institute recognizes that its decision to excise the death penalty from the Model Penal Code does not remove it from policy debate.

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

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

Subsection (6)(a) states that, "in the case of a felony of the first degree, the prison term shall not exceed life imprisonment." In the normal course, all life sentences imposed under this Section will be reconsidered at a much later date. Subsection (9) allows for reduction of this maximum term under either § 305.6 or § 305.7 (both in Tentative Draft No. 2, 2011). Section 305.6 creates a sentence-modification power, to be exercised by a judicial panel or other judicial decisionmaker, for prison sentences that result in time served of more than 15 years, including life sentences under subsection (6)(a). Section 305.7 responds to exceptional circumstances, including the prisoner's advanced age or physical or mental infirmity, exigent family circumstances, or other compelling reasons that justify a modified penalty in light of the purposes of sentencing in § 1.02(2) (Tentative Draft No. 1, 2007). These are meaningful, but not remarkably generous, release provisions. Taking both sentence-modification mechanisms into account, the prospects of freedom for prisoners serving life sentences under subsection (6) are significantly reduced from those under the original Model Penal Code.

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

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

The increasing use of whole-life sentences in this country has been driven largely by their role in the death-penalty debate. In many jurisdictions, life without parole serves as the chief

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

The Institute's new position has been forged with reluctance. Viewed as an independent policy question, that is, if capital punishment were not part of the nation's legal landscape, the Institute would not endorse penalties of life imprisonment with no chance of release. Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time—even very long periods of time. The sanction denies the possibility of dramatically altered circumstances, spanning a prisoner's acts of heroism to the pathos of disease or disability, that might alter the moral calculus of permanent incarceration. It also assumes that rehabilitation is not possible or will never be detectable in individual cases. Such compound certainties, reaching into a far-distant future, are not supportable. See § 305.6 and Comment *b* (Tentative Draft No. 2, 2011) (creating a process for reassessment and possible modification of exceptionally long prison sentences after a period of 15 years).

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

In states that make use of the death penalty, it is sound policy to give capital-sentencing juries the option of natural-life sentences in lieu of a death sentence, or to inform juries that the trial court will impose a penalty of life without possibility of release if they do not vote in favor of execution. Such an instruction is often constitutionally required, but is good policy apart from any constitutional mandate. In order to make the jury charge possible, a natural-life sentence must be among the authorized penalties for death-eligible offenses. The revised Code contemplates that this be done, but in the most circumscribed manner. Life without parole is not included in the general framework of statutory maximum penalties in § 6.06, and would not exist under the strictures of subsections (6) and (9). When appropriate under the principles discussed in this Comment, the sanction should be attached to specific crimes, or especially aggravated

instances of those crimes, that are defined elsewhere in the Code. The present Code revision countenances but does not attempt that task.

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

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

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

Outside the small category of death-penalty-eligible crimes, the absolute maximum penalty prescribed in the new Code is a life sentence *with* the possibility of release, or an "ordinary" life term. The most important release mechanism for offenders serving such penalties is the sentence-modification process created in § 305.6. This is the only release provision of general application to all prisoners who have served a substantial portion of long prison terms. In

some instances the "compassionate release" criteria in § 305.7 may also warrant a sentence reduction for life prisoners.

It is important to recognize that the ordinary life sentence in the Code's scheme is a punishment of tremendous magnitude, and is not dramatically more lenient than an LWOP sentence. In assessing the sanction's proportionality as a response to serious victimizations, in both the policymaking or adjudicative settings, its true gravity should not be undervalued. It is a punishment to be used with solemnity and restraint, and crime victims should not devalue its retributive force. Objectively, it is a more severe form of the ordinary life sentence than exists in many systems. Compared with the 1962 Code, for example, the revised Code cuts far back on the realistic chances that a prisoner serving a simple life term will ever be released. Instead of first-release eligibility after 1 to 10 years, with reconsideration in each successive year for those denied, the Code now institutes a minimum term of 15 years, with recurring eligibility at intervals as long as 10 years. Further, the revised Code installs no statutory presumption of release at first eligibility, or at any point in a long prison term, and instead reposes sentence-modification discretion in a judicial authority, aided by sentencing guidelines. See § 305.6 (Tentative Draft No. 2, 2011). In short, the extant vehicles for sentence reduction in the new Code do not approach the free-ranging release discretion granted to paroling agencies in indeterminate-sentencing systems. Many offenders who receive simple life prison terms under the Code will never regain their freedom.

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

(3) *Penultimate maximum penalties.* All States with comprehensive grading schemes must fix maximum sentence severity at the "penultimate" level of felonies, one tier below those offenses justifying a life prison sentence. This problem is taken up in subsection (6)(b). Although

the revised Code is intended to be adaptable to many state criminal codes, and assumes that there will be many variations in crime definitions across jurisdictions, the offenses involved will probably include the most serious forms of manslaughter, some lower degrees of murder where they exist, many classes of aggravated assaults, sexual assaults, and robberies, and the most serious of economic crimes. The question posed is what penalty should be available for the worst cases, on their individual facts, in this group. The original Code, with only three degrees of felonies, placed the penultimate maximum at 20 years under § 6.07(2), which set out the longest "extended term" prison sentence available for second-degree felonies. This same statutory ceiling is carried forward in the revised § 6.06(6)(b), albeit in bracketed language. It also reflects the legislative judgments reflected in many contemporary criminal codes, albeit in the low range of current practice. Prison terms for single offenses in excess of 20 years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes, see § 1.02(2)(a) (Tentative Draft No. 1, 2007).

The maximum term in subsection (6)(b) is intended for use in the most extreme cases at the penultimate tier of crime seriousness. Great care should be taken by the sentencing commission when recommending punishments at this level, and by sentencing courts when considering their use in individual cases. It should be kept in mind that a 20-year sentence, when imposed in the new Code's determinate sentencing scheme, will often be a more severe penalty than the identical pronounced sentence in an indeterminate system. Under the original Code, offenders sentenced to a 20-year maximum term would be eligible for presumptive release by the parole board after no more than four years, assuming the usual award of good-time credits, see original§§ 6.07(2), 305.1, 305.9. In the revised Code, a 20-year sentence yields a presumptive release date after 14 years, assuming the prisoner earns all available good-time credits; see § 305.1 (Tentative Draft No. 2, 2011). The very worst among offenders may serve the full 20-year maximum in either system. Still, under a determinate scheme with sentencing guidelines, and meaningful appellate sentence review, pronounced sentences with a 20-year maximum should be imposed less frequently under the approach of the revised Code than under the 1962 Code. In the Code's new sentencing structure, judgments about which offenders are deserving of this degree of punishment are concentrated at the "front end" of the system rather than the "back end."

(4) *Least serious felonies.* There are some crimes that are seen by legislatures as deserving of the opprobrium of classification as "felonies," yet do not justify imposition of substantial incarceration terms. Sometimes new felony legislation is enacted in part for symbolic purposes, even though the conduct involved is not meaningfully distinguishable from the most serious misdemeanors. Accordingly, most American jurisdictions with comprehensive grading schemes have felt the need for at least one gradation of felony offenses subject to a maximum sentence of no more than several years. Subsection 6.06(6)(e) recommends, in brackets, a ceiling of three years for the lowest felony classification, no matter how many other gradations of felony a jurisdiction has chosen to create. The ceiling in subsection (6)(e) also serves as the default

maximum sentence for unclassified felonies; see § 6.01(3) (Tentative Draft No. 2, 2011). Although the Institute is confident that the bracketed three-year ceiling is at or near its correct position, a somewhat lower maximum term would be consistent with the underlying policy of the provision.

l. Maximum authorized terms for misdemeanor offenses. While subsection (7) follows the original Code's subdivision of misdemeanor offenses into two classes, the maximum available penalties for misdemeanors and petty misdemeanors are considerably lower than those recommended in the 1962 Code. Under original § 6.09(1)(a), the maximum available penalty for a misdemeanor was three years. For a petty misdemeanor, under original § 6.09(1)(b), the maximum was two years. The maximums stated in proposed subsection (2), albeit in brackets, follow the overwhelming practice of contemporary American jurisdictions. Only a handful of states currently authorize penalties in excess of one year of incarceration for the most serious of misdemeanor offenses.

m. Disapproval of mandatory-minimum prison sentences. The revised Code continues the "firm position of the Institute that legislatively mandated minimum sentences are unsound," as stated in the 1962 Code in an Official Comment. See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 7(a) (1985), at 124-125. Subsection (8) now elevates the Institute's policy to black-letter statutory language, and states that a sentencing court "is not required to impose a minimum term of imprisonment for any offense under this Code." The subsection will have the substantive effect, in adopting jurisdictions with preexisting mandatory penalties in their criminal codes, of repealing all such provisions. Subsection (8) declares unequivocally that it "supersedes any contrary provision in the Code."

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

Statutorily mandated prison terms ostensibly shift sentencing discretion from the courts to the legislature, on the theory that sentencing outcomes can be determined by legislative command without the variability of case-level decisionmaking. Even if such legislatively directed uniformity were possible, it would be an undesirable policy goal. Throughout the revised Code, judicial discretion is viewed as the indispensable centerpiece of the criminal sentencing process. See § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007) (a fundamental purpose of the sentencing system is to "preserve judicial discretion to individualize sentences within a framework of law"). No legislature can envision ahead of time the particularized facts of all cases that will come before the courts. It is inherently unsound to assume that all offenses within a given category must necessarily be aggravated to the same high level of seriousness, or will be uniformly devoid of mitigating circumstances. It is equally infirm to suppose that all offenders

will present identical profiles of blameworthiness, or that the harms done or risked to crime victims will in every case be equivalent. The interests of victims, and the community at large, in seeing proportionate penalties visited on criminal offenders, are frustrated by a one-size-fits-all punishment scheme.

Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.

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

In the preparation of the revised Code, one clear imperative has been to address, where possible, the perceived expansion in prosecutorial sentencing power that has occurred over the past several decades, and to prevent the undue enlargement of such power. See, for example, § 6A.05(3)(b) and Comment *c* (Tentative Draft No. 1, 2007);§ 6B.06(6) and Comment *h* (id.); § 6B.07(4) and Reporter's Note to Comment *f* (id.); § 6B.08(1)(f) and Comment *e* (id.) (this provision submitted for informational purposes only, and not for approval); § 7.07B(6) and (7) and Comments *i* and *j* (id.). One of the most effective ways to strike a proper balance between

judicial and prosecutorial power is to ensure that judges retain final discretion to set penalties in individual cases, so that judges' hands cannot be tied by the government's prior charging and bargaining decisions. See §§ 1.02(2)(b)(i) (id.); 6B.03(4) (id.); 6B.04(1) (id.); 7.XX(2) (id.). In this respect, there is no current mechanism in American law more misconceived than mandatory penalty laws. Once conviction is entered for an offense carrying a mandatory sentence, the judge has no formal authority to deviate from the minimum term—and no appellate court has freedom to hold otherwise. In many instances, other later-in-time decisionmakers in the sentencing system are likewise stripped of their customary decisional powers, such as when mandatory-penalty laws provide that offenders shall not be parolable or eligible for good-time credits. To the extent that mandatory sentencing provisions are defended for their ability to even out punishment disparities borne of the vagaries of case-specific sentencing discretion, this is a hollow claim. Case-specific discretion is not eliminated or even reduced in its magnitude; it is merely relocated and concentrated in the office of the prosecutor.

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

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

See §§ 7.XX(2), (3) (Tentative Draft No. 1, 2007); 7.09(5)(b) (id.) (the latter provision not yet presented for approval).

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

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

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

The case for mandatory penalties is especially weak in a well-designed sentencing-guidelines scheme. Experience shows that greater sentence uniformity may be achieved with guidelines than with mandatory-penalty provisions, while not stripping sentencing courts of their authority to individualize sanctions in appropriate cases. The revised Code's guidelines system is carefully designed to avoid both intra- and inter-offense disproportionalities in sanctions imposed, and assumes that meaningful judicial sentencing discretion is required to realize these aspirations. The Code trusts sentencing judges both to respect guidelines presumptions in run-of-the-mill cases, and to depart from the guidelines when the circumstances of particular cases demand non-guidelines sentences. Conceived properly, judicial sentencing discretion is indispensable to the pursuit of true proportionality in punishment, measured by the diverse complexities of criminal cases in the real world, and to avoid the false uniformity of simplistically invariant punishments. Statutory mandatory penalties are not needed in a

guidelines system in part because the guidelines can do a better job or, more pointedly, can succeed where mandatory sentencing provisions fail. Worse still, mandatory-minimum sentences subvert the guidelines system's goals by functioning as rigid statutory "trumps" that override the graduated policy judgments built into the guidelines structure as a whole.

A survey of the utilitarian objectives of sentencing law, see § 1.02(2)(a)(ii) (Tentative Draft No. 1), further weakens the case for mandatory-penalty laws. No one maintains that mandatory sentences are directed toward the rehabilitation of offenders, their reintegration into the law-abiding community, or the restitution of crime victims. And, as the drafters of the original Code concluded, the use of mandatory penalties does little or nothing to further goals of general deterrence or the incapacitation of dangerous criminals.

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

Nor do mandatory-minimum sentences find justification on incapacitation grounds. While it is true that incarcerated persons cannot commit offenses in the free community—and so, in a sense, every prison sentence is 100 percent incapacitative—a successful incapacitation policy requires that prisoners confined for extended terms must be persons who would have in fact committed serious offenses had they been free. Sustained detention of harmless individuals, apart from its heavy moral costs, is therefore a gross failure of incapacitation strategy. The drafters of the original Code recognized that mandatory-penalty laws were much too blunt an instrument to make individualized judgments about recidivism risk, and that other, superior means could be deployed to effect such a policy. Today, the argument is even stronger. While mandatory sentencing provisions remain a blunderbuss approach for selecting the most dangerous offenders, actuarial risk-assessment technology has significantly improved in the last 30 years. In order to approach ethical and empirical plausibility, an incapacitation program must make use of credible risk-assessment tools in support of judgments about who is dangerous and who is not. Even then many mistakes are inevitable. Considerations of humility and restraint, along with careful procedural safeguards, ought to be in play. See § 6B.09 and Comment *e* (Tentative Draft No. 2, 2011). What is never defensible is the pursuit of a selective incapacitation policy through the

crude means of offense definition alone, with no consideration of the relevant histories and propensities of individual defendants.

Finally, the case against mandatory-penalty laws includes their distorting effects upon the legal system. Studies have found that such laws often result in increased trial rates and case-processing times. Because they are often viewed as too harsh by actors within the system, there are well-documented histories of the "nullification" of mandatory penalties by prosecutors, judges, and juries. The drafters of the original Code found these concerns to be substantial—and their magnitude has only grown with time. Contemporary studies of mandatory-penalty schemes in operation show widespread patterns of spotty enforcement and circumvention by courtroom actors. Judges and other observers have noted a trend of more frequent jury nullifications, especially in drug prosecutions—and there have been proposals that juries should be informed of the sentencing consequences of mandatory penalties in order to allow them to exercise their nullification power in a more knowledgeable way. These are all signals of a vastly misinformed policy.

The revised Code's approach to the subject of mandatory-minimum sentencing provisions is more forceful and comprehensive than the original Code's in two ways. First, as discussed earlier, the Institute's blanket disapproval of mandatory penalties is now given effect in express statutory language. Second, the revised Code now includes a host of targeted provisions designed to weaken the impact of mandatory penalties where they continue to exist in American criminal codes. Concededly, these are "second-best" solutions to the problem. They are recommended to state legislatures in concession to the reality that many jurisdictions will not repeal their mandatory sentencing laws in the immediate future. It may also be admitted that the targeted provisions are inconsistent, as a matter of pristine theory, with the declaration in subsection (8) that such penalties simply should not exist. If the revised Code were adopted whole cloth by a state legislature, including subsection (8), the targeted provisions would be surplusage. The adoption history of the original Code, however, teaches that state legislatures will often pick and choose among the Code's prescriptions. Taking the world of American criminal justice as it is, and as it is likely to remain for some time, the Institute concluded that it would be irresponsible to rest upon a categorical policy of condemnation of mandatory sentences, without also offering second-order recommendations for significant incremental change.

The following is a full list of the new Code's targeted provisions that operate to mute the effects of mandatory penalties, while not requiring their outright repeal:

(1) Under § 6.02B(3) (Tentative Draft No. 3, 2014), trial courts may order a deferred adjudication in a criminal case even when the offense charged is one that carries a mandatory prison penalty. The relevant language is:

The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that

the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(2) Under a new provision for the sentencing of offenders under the age of 18 at the time of their offenses, judges are not bound by otherwise-applicable mandatory sentences. See § 6.11A(f) (Tentative Draft No. 2, 2011) ("The court shall have authority to impose a sentence that deviates from any mandatory-minimum term of imprisonment under state law.").

(3) In § 6.14(3)(b) (Council Draft No. 5, 2015), sentencing judges are given authority to approve negotiated "restorative justice" dispositions of criminal cases even when those dispositions differ from any mandatory prison sentence for the charge of conviction. The relevant language is:

The court may approve the recommended [restorative justice] disposition only if it is satisfied that the participants have consented to the recommendation and the requirements it imposes on the defendant are not disproportionate to the crime. If the court approves the recommended disposition, it may supplant any or all other authorized dispositions under this Article, and may supersede any mandatory-minimum term of imprisonment under state law.

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

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

(5) The Code authorizes judges to deviate from a mandatory-minimum sentence in § 6B.09(3) (Tentative Draft No. 2, 2011), when an offender otherwise subject to the mandatory penalty is identified through actuarial risk assessment to pose an unusually low risk of recidivism. This subsection provides:

The [sentencing] commission shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety, but who are subject to a presumptive or mandatory sentence of imprisonment under the laws or guidelines of the state. When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction

rather than a prison term, or a shorter prison term than indicated in statute or guidelines. The sentencing guidelines shall provide that such decisions are not departures from the sentencing guidelines.

(6) The Code grants sentencing judges an "extraordinary-departure power" to deviate from the terms of mandatory-penalty provisions. See § 7.XX(3)(c) (Tentative Draft No. 1, 2007; amended in Council Draft No. 5, 2015). This resembles the courts' authority to depart from sentencing guidelines, although the legal standard for departure from a mandatory penalty is more demanding than the "substantial reasons" standard for guidelines departures. The relevant language is:

Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).

(7) Under the sentence-modification power created in § 7.08(2) (Council Draft No. 5, 2015), following a motion by the government, the trial court may reduce a sentence below the requirements of any mandatory prison penalty when the defendant has provided substantial assistance in the investigation or prosecution of another person. The relevant language is:

Upon the government's motion made prior to the termination of sentence, the court may reduce a sentence if the defendant provided substantial assistance in investigating or prosecuting another person's crime or criminal case when the assistance, or its full value, was not known to the court at the time of sentencing. A sentence reduction under this subsection may reduce the sentence to a level below any otherwise-applicable mandatory-minimum term of imprisonment under state law.

(8) The revised Code's provision on appellate review of sentences creates a new statutory power in the appeals courts to reverse, remand, or modify any sentence, including sentences imposed in conformity with a mandatory prison penalty, on the ground that the sentence would be disproportionately severe. See § 7.09(4)(b) (Council Draft No. 5, 2015). The relevant language is:

The appellate courts may reverse, remand, or modify any sentence, including a sentence imposed under a mandatory-penalty provision, on the ground that it is disproportionately severe. The appellate court shall use its independent judgment when applying this provision.

(9) Good-time credits are always to be subtracted from the minimum term of a mandated prison sentence. See § 305.1(3) (Tentative Draft No. 2, 2011) ("Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.").

(10) The new sentence-modification powers under § 305.6 (Tentative Draft No. 2, 2011) (the so-called "second-look provision," which engages after a prisoner has served 15 years) and § 305.7 (Tentative Draft No. 2, 2011) (the "compassionate release" provision for aged and infirm inmates, or for extraordinary and compelling circumstances) expressly supersede any mandatory-minimum penalty that may have been imposed at the original sentencing, see § 305.6(5) ("The sentence-modification authority under this provision shall not be limited by any mandatory-minimum term of imprisonment under state law"), § 305.7(8) ("The sentence-modification authority under this provision is not limited by any mandatory-minimum term of imprisonment under state law").

(11) New § 305.8(1.3) ("Control of Correctional Populations That Exceed Operational Capacity; Principles for Legislation") (Council Draft No. 5, 2015), gives emergency powers to corrections officials (sometimes requiring court approval) to release prisoners in conditions of prison overcrowding, and these powers supersede any mandatory-minimum terms of incarceration imposed on prisoners otherwise eligible for "control release." The relevant language is:

> **The control-release authority under this provision shall not be limited by any mandatory-minimum term of incarceration or supervision under state law.**

n. Elimination of parole-release authority. The most far-reaching policy choice in this Tentative Draft, expressed in subsections (9) and (10), is the recommendation that all American sentencing systems should institute "determinate" sentencing systems—defined as systems in which no parole agency holds authority to set the actual lengths of prison stays. Subsection (5) is stated in brackets because it has application only in jurisdictions that have not already eliminated the prison-release discretion of the parole board.

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

Subsections (9) and (10) contain relatively few words, yet affect the institutional structure of the sentencing system as a whole. Their prescriptions will have profound effects on many cases,

and the policymaking process itself. At the elemental level, the choice in favor of a determinate framework reflects the underlying institutional philosophy of the Code that judges should be the decisionmakers with the greatest share of power to determine criminal sentences, see § 1.02(2)(b)(i) (Tentative Draft No. 1, 2007). The most important systemic consequence of subsections (9) and (10) is the reallocation of sentencing authority otherwise held by parole boards in prison cases, which is now vested in sentencing courts.

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

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

The considerations most important to the Institute's position in favor of a determinate-sentencing system are set forth at length in Appendix B (Tentative Draft No. 2, 2011), Reporter's Study: The Question of Parole-Release Authority.

o. States choosing an advisory-guidelines system. In states that choose to adopt advisory rather than presumptive guidelines, the statutory guidance in § 6.06 assumes heightened importance. When the guidelines themselves are unenforceable, § 6.06 supplies a coherent template for development of a common law of sentencing through decisions of trial and appellate courts. Finally, in states that have adopted no guidelines at all, § 6.06 gives important guidance

to courts when exercising broad sentencing discretion, together with a handful of enforceable legal constraints.

REPORTERS' NOTE [38]

a. Scope. For background on the Institute's decision to recommend a determinate-sentencing structure to every jurisdiction, see Model Penal Code: Sentencing, Report (2003), at 21-27; Tentative Draft No. 2 (2007), Appendix B.

c. Purposes of incarceration. The subject matter of subsection (2) is of profound importance in a nation that currently leads the world in per capita incarceration, with average incarceration rates that are seven times those in Western Europe. America's prison and jail populations have fallen into modest decline since 2009—the first period of reductions in nearly four decades, see E. Ann Carson, Prisoners in 2014 (Bureau of Justice Statistics 2015). Even so, the U.S. has maintained its position of world "leadership" in incarceration rates. See Jeremy Travis, Bruce Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press 2014); World Prison Brief, Highest to Lowest—Prison Population Rate (Institute for Criminal Policy Research 2016), available at: http://www.prisonstudies.org/world-prison-brief; Tapio Lappi-Seppälä, American Exceptionalism in Comparative Perspective: Explaining Trends and Variation in the Use of Incarceration, in Kevin R. Reitz, ed., American Exceptionalism in Crime and Punishment (Oxford University Press 2017).

On the American "crime drop" since the early 1990s, see Alfred Blumstein and Joel Wallman, The Crime Drop in America Cambridge University Press 2000); Franklin E. Zimring, The Great American Crime Decline (Oxford University Press 2007); Richard Rosenfeld, Trends in Street Crime and the Crime Drop (Wiley & Sons 2015); Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, What Caused the Crime Decline? (Brennan Center for Justice 2015).

d. Confinement of dangerous offenders. On the incapacitation of dangerous offenders as a primary utilitarian goal of incarceration, see Franklin E. Zimring and Gordon Hawkins, Incapacitation: Penal Confinement and the Restraint of Crime (Oxford University Press 1995); Martin F. Horn, Rethinking Sentencing, 5 Corrections Management Quarterly 34 (2001); Alfred Blumstein, From Incapacitation to Criminal Careers, 53 Journal of Research in Crime and Delinquency 291 (2016). Reasonable empirical estimates of the crime-reductive benefits of incapacitation policy vary significantly; see John J. Donohue III, Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin, in Steven Raphael and Michael A. Stoll, eds., Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom (Russell Sage Foundation 2009); Jeremy Travis, Bruce Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press 2014), at 140. For strong critiques of incapacitation-based prison policy, see Todd R. Clear, "A Thug in Prison Can't Shoot Your Sister," 15 Criminology & Public Policy 343 (2016); Bernard E. Harcourt, Against Prediction: Profiling, Policing and Punishing in an Actuarial Age (University of Chicago Press 2008). Most scholars agree that incarceration growth yields diminishing crime-avoidance returns as per capita

[38] The bulk of this Reporters' Note has not been revised since § 6.06's approval in 2011. The Note has been revised only to reflect the proposed amendments to the provision put forth in this draft. All Reporters' Notes will be updated for the Code's hardbound volumes.

imprisonment increases, and may reach a tipping point beyond which incarceration growth produces more crime than it prevents. See Zimring and Hawkins, supra; Bert Useem and Anne Morrison Piehl, Prison State: The Challenge of Mass Incarceration (Cambridge University Press 2008).

There are undenied elements of inefficacy and injustice in the Code's endorsement of incapacitation as a ground for incarceration, particularly when authorities misapprehend the dangerousness of individual offenders. Any sentencing policy based on predictions of future misconduct will yield a significant number of "false positives"—that is, individuals who have been classified as dangerous when, in fact, they would not reoffend if released or would commit only minor crimes. Actuarial prediction models have improved in the past several decades, and have outperformed clinical judgments of future recidivism for at least half a century, see Paul E. Meehl, Clinical vs. Statistical Prediction (1954); Michael Gottfredson and Donald Gottfredson, The Accuracy of Prediction, in Alfred Blumstein ed., Criminal Careers and Career Criminals (1986) ("in virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed predictive devices outperform human judgment"); W.M. Grove and Paul E. Meehl, Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction, 2 Psychology, Public Policy and Law 293 (1996); Grant T. Harris, Marnie E. Rice, and Catherine A. Cormier, Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 Law & Human Behavior 377 (2002) (finding that "composite clinical judgment scores were significantly correlated with violent recidivism, but significantly less than the actuarial scores"). In recent decades, the science of actuarial prediction has advanced substantially, while the success of clinical predictions has not. John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 Va. L. Rev. 391, 406 (2006).

Even with the best available risk-sensitive technology, however, errors in prediction can never be eliminated—and the greatest number of mistakes occur when trying to predict the most serious acts of reoffending. See Richard Berk and Justin Bleich, Statistical Procedures for Forecasting Criminal Behavior: A Comparative Assessment, 12 J. of Criminology and Pub. Pol'y 515 (2013). The Institute, recognizing that the question is difficult, has concluded that the interests of future crime victims (whose actuarially certain victimizations can be avoided through use of selective incapacitation policy) must be weighed against the interests of convicted offenders whose sentences are determined in part by imperfect risk assessment protocols. Indeed, either choice—to use or not use risk assessment scales—is intolerable, see § 6B.09 and Comments and Reporters' Notes *a*, *d*, and *e*; Henry Ruth and Kevin R. Reitz, The Challenge of Crime: Rethinking Our Response (2003).

Incapacitation policy can be used to rule out low-risk offenders from prison and jail sentences, as recommended in § 6B.09(3). See generally Brian J. Ostrom et al., Offender Risk Assessment in Virginia: A Three-Stage Evaluation (2002). Because actuarial prediction technologies are more successful at identifying low-risk individuals than persons who pose especially high risks, incapacitation policy can be deployed with relative confidence in support of prison-diversion initiatives. See Kathleen Auerhahn, Selective Incapacitation and the Problem of Prediction, 37 Criminology 703 (1999); Hennessey D. Hayes and Michael R. Geerken, The Idea of Selective Release, 14 Just. Quarterly 353, 368-369 (1997) ("prediction scales used in the past to predict high-rate offenders' offense behavior actually perform better at predicting the offense behavior of low-rate offenders"; proposing policy of "selective release" as opposed to selective incapacitation); Stephen D. Gottfredson and Michael Gottfredson, Selective Incapacitation?, 478 Annals of the American Academy of Political and Social Science 135

(1985) ("Predictive accuracy, while much in need of improvement, is sufficient for [the policy of selective deinstitutionalization], but insufficient for [the policy of selective incapacitation]").

Incapacitation or the prediction of dangerousness has been a fundament of American prison policy for much of the nation's history. Two-thirds of the states regularly base the lengths of prison terms on the perceived dangerousness of imprisoned offenders—a policy that has been largely uncontroversial for over a century when administered by parole-releasing agencies. See Joan Petersilia, Edward E. Rhine, and Kevin R. Reitz, The Future of Parole Release: A Ten-Point Reform Plan, in Michael Tonry ed., Crime and Justice: A Review of Research (2017); Keith A. Bottomley, Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s, in Michael Tonry and Norval Morris eds., Crime and Justice: A Review of Research, vol. 12 (University of Chicago Press 1990); Edward E. Rhine, The Present Status and Future Prospects of Parole Boards and Parole Supervision, in Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbook of Sentencing and Corrections (Oxford University Press 2012); Kevin R. Reitz, The "Traditional" Indeterminate Sentencing Model, in Joan Petersilia and Kevin R. Reitz, eds., The Oxford Handbook of Sentencing and Corrections (Oxford University Press 2012); Ebony L. Ruhland, Edward E. Rhine, Jason P. Robey, and Kelly Lyn Mitchell, The Continuing Leverage of Parole Releasing Authorities: Findings from a National Survey (Robina Institute of Criminal Law and Criminal Justice 2016). Judges regularly pass sentences based partly on their best judgment, or the best information available to them, concerning the future dangerousness of defendants, see Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry and Norval Morris eds., Crime and Justice: An Annual Review of Research, vol. 6 (1985). A binding injunction, statutory or otherwise, that these modes of decisionmaking should be outlawed is nearly impossible to imagine in this country. However, implementation of an attitude of utilitarian skepticism would work vast improvement in the nation's justice systems.

e. Incarceration based on seriousness of the offense. On retribution as a justification for prison sentences, see Michael S. Moore, Justifying Retributivism, 27 Israel L. R. 15 (1993); Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (Oxford University Press 2005); Paul H. Robinson, Intuitions of Justice and the Utility of Desert (Oxford University press 2013).

f. Omission of general deterrence as a basis for judicially imposed prison sentences; propriety of incarceration when other sanctions would depreciate the seriousness of the offense. No recommendation of the revised Code was more controversial in the drafting process than the position that general deterrence should not be included as one of the legitimate purposes of incarceration within the purview of sentencing courts. One source of concern within the Institute was that the omission is out of sync with existing law. In the majority of American jurisdictions, statutory law on the general purposes of criminal sentences or, where they exist, specialized provisions on the purposes of prison sentences, include general deterrence among the goals to be considered by courts when meting out sentences. See § 1.02(2), Reporters' Note *b*. The Code's approach is not wholly unprecedented, however. Roughly one-fifth of all states omit general deterrence from the express statutory aims to be pursued by sentencing courts. The strength of these authorities should not be overstated, however. For the most part, statutory provisions on the purposes of sentencing and imprisonment are not enforceable in individual cases. Actual judicial practice may vary significantly from statutory declarations of sentencing purposes. Indeed, one cornerstone innovation of the revised Model Penal Court is to give such statutory purposes the force of law throughout the sentencing system. See § 1.02(2), Reporter's

Note *a* ("[n]ew § 1.02(2) . . . is made a required basis for decisionmaking and explanation by identified officials throughout the sentencing system").

In the Institute's view, a reordering of past practices of prison sentencing is among the first national priorities for the 21st century. The decision not to include general deterrence among the purposes in subsection (2) should be understood as consciously intended—following extended debate and deliberation—to work an important change in the thought processes of sentencing judges across the country.

Because of the ambitious nature of the Code's recommendation on this score, it is helpful to rehearse the main subjects of discussion that preceded it. These may be arranged under several headings:

(1) The Code rejects practices of *individualized* variations in sentence severity, on a case-by-case basis, in furtherance of goals of general deterrence. General deterrence is aimed toward the public at large and has only a remote relationship to the facts or resolutions of individual cases. Judges have no case-specific information that indicates the general-deterrence efficacy of one sanction versus another. Instead, general deterrence policy is better considered at the systemic level, when penalties are assigned to particular offenses by the legislature or sentencing commission.

(2) The weight of criminological knowledge teaches that marginal increases in the severity of criminal sanctions rarely bring about marginal improvements in general deterrence in the community. Criminologists over many decades have failed to find robust empirical evidence in support of the deterrence-through-severity hypothesis. (The intellectual history of "the null hypothesis" includes groundbreaking research conducted by Thorsten Sellin, during the original Model Penal Code project, on the deterrent effect of the death penalty.) The empirical evidence does support the view that marginal general deterrence can be effected by the increased probability of apprehension for criminal conduct, and accelerated swiftness in the delivery of penalties—sometimes called the "certainty" and "celerity" principles. These mechanisms of general deterrence, however, operate independently of the quantum of punishment dispensed in particular cases.

On the weakness of empirical evidence that increasing the severity of criminal punishments has a deterrent effect on crime, see Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and P-O. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (University of Cambridge Institute of Criminology 1999); Aaron Chalfin and Justin McCrary, Criminal Deterrence: A Review of the Literature, J. Economic Literature (forthcoming) ("While there is considerable evidence that crime is responsive to police and to the existence of attractive legitimate labor market opportunities, there is far less evidence that crime responds to the severity of criminal sanctions."); Anthony N. Doob and Cheryl Marie Webster, Sentencing Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003) ("A reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society."), at 143; Daniel S. Nagin, Deterrence in the Twenty-First Century, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 42 (2013), at 199 ("certainty of apprehension, not the severity of the ensuing legal consequence, is the more effective deterrent"); Jeremy Travis, Bruce Western, and Steve Redburn, eds., The Growth of Incarceration in the United States: Exploring the Causes and Consequences (The National Academies Press 2014), at 139 ("the deterrent return to increasing already long sentences is modest at best.").

There is a consensus among researchers that an increase in the *probability* that sanctions will be imposed carries greater deterrent effect than an increase in punitive severity, see Daniel Nagin and Greg Pogarsky, Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence, 39 Criminology 865, 865 (2001) ("Deterrence studies focusing on the certainty and severity of sanctions have been a staple of criminological research for more than 30 years. . . . [A prominent finding is] that punishment certainty is far more consistently found to deter crime than is punishment severity"). This conclusion has been echoed in the domain of white-collar offending. See A. Mitchell Polinsky and Steven Shavell, On the Disutility and Discounting of Imprisonment and the Theory of Deterrence, 28 J. Legal Studies 1, 12 (1999) ("for individuals who commit white-collar crimes, the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment . . . which suggests that less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal."); Carlton Gunn & Myra Sun, Sometimes the Cure is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet, 38 Human Rights 9, 12 (2011) ("A wealth of studies suggest, perhaps especially in the case of white-collar offenders but also more generally, that it is the certainty of punishment, i.e., the certainty of being caught, that deters more than the extent of punishment once caught."). Cf. Daniel Richman, Federal White Collar Sentencing in the United States: A Work in Progress, 76 Law & Contemp. Problems 53, 63 (2013) (concluding there is "a cogent argument for a regime of frequent enforcement with relatively short prison sentences," but doubting that adequate resources will be devoted to increasing probabilities of detection).

Some believe that deterrence through severity can be an effective strategy for the prevention of corporate and other white-collar crime, on the premise that white-collar offenders are more likely than others to weigh the costs and benefits of criminal behavior before acting. The question remains an empirical one, however, not resolvable by common-sense judgments of human behavior. (Otherwise, for example, common-sense belief in the deterrent effect of the death penalty would still control.)

For research on the deterrability of corporate and other white-collar crimes through increased severity of punishment, see Elizabeth Szockyj, Imprisoning White-Collar Criminals?, 23 Southern Illinois University L.J. 485, 493 (1999) ("Empirical support regarding deterrence of conventional street crimes is inconclusive . . . . Although the subject has been researched less extensively, the results of white-collar crime deterrence studies show a similar inconsistent pattern. There is lukewarm support for the position that criminal penalties effectively deter corporate crime."); Daniel V. Dooley, Sr. and Mark Radke, Does Severe Punishment Deter Financial Crimes?, 4 Charleston L. Rev. 619, 657 (2010) ("A study of empirical evidence, relevant statistics, the nature of financial criminals, and other factors influencing punishment of white-collar criminals suggests that deterrence is not working."). Dooley and Radke advocate increased regulatory presence over harsher criminal sentences, stating that "the SEC and CFTC could achieve more meaningful deterrence by focusing on white-collar crime prevention through more effective and focused regulation," id. at 659. See also Ken Devos, The Role of Sanctions and Other Factors in Tackling International Tax Fraud, 42 Common Law World Rev. 1, 21 (2013) (studies have found that "the introduction and increase in penalties and sanctions per se had a limited impact upon tax non-compliance in the Australian, New Zealand, UK and US jurisdictions"); Peter J. Henning, Is Deterrence Relevant in Sentencing White-Collar Criminals?, 61 Wayne L. Rev. 27, 46 (2015) ("Research shows . . . that the deterrent effect of punishment is minimal for both street crimes and white-collar offenses"). The most recent and thorough meta-analysis of

corporate-crime deterrence strategies—both civil and criminal—concluded that "we do not have enough evidence to conclude that punitive sanctions have a deterrent effect on individual- or company-level offending." See Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie, and Mariel Alper, What Works? A Systematic Review of Corporate Crime Deterrence, 15 Criminology & Public Policy 387, 397 (2016). Schell-Busey et al. concluded that measurable deterrent effects can be achieved in the corporate setting through regulatory strategies (that is, strategies that increase the certainty and celerity of adverse consequences), especially when multiple regulatory mechanisms are employed, but the study authors could find no persuasive evidence that changes in the severity of criminal punishments bring about meaningful deterrent effects.

Whatever the state of the evidence on marginal general deterrence through changes in sentencing severity, and however this evidence breaks down across crime categories, the revised Code takes the view that the evidence is best weighed by lawmakers and policymakers on the systemic level, and that deterrence policy cannot sensibly be applied by sentencing courts through variation in the severity of individual penalties.

(3) The Code's approach of proportionate prison sentences, to be imposed when lesser sanctions would depreciate the seriousness of the offense, effects some of the intuitions that underlie general deterrence reasoning. As recognized long ago by Jeremy Bentham, a criminal-justice system that metes out proportionate sanctions necessarily incorporates some principles of general deterrence. Leading contemporary desert theorists assert that deterrence is a side benefit of a commitment to proportionality in sentencing. See, e.g., Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (Oxford University Press 2005), at 24-26. In Bentham's utilitarian view, deterrence dictates that a society should impose punishments that correspond with crime severity. This is in part because the most serious crimes are those the law should discourage most vigorously, even at high cost to the offender and community. In addition, Bentham reasoned that the sentencing scheme should encourage offenders to limit the gravity of their criminal activity to the lowest possible grade of offense—and he believed that a disproportionate penalty framework would disrupt this incentive structure. See Jeremy Bentham, Principles of Penal Law, Pt. II, bk. 1, ch. 3, in J. Bentham's Works (J. Bowring ed., 1843). For example, if armed robbery and homicide were both punished with life imprisonment, some robbers would be encouraged to kill their victims. The removal of a key witness may appear to be a benefit with no additional cost. Or, if shoplifting is punished equally with grand larceny, we are telling rational shoplifters to "think big."

The Code's "depreciation of seriousness" formula posits that there is a meaningful difference between prison policy driven by offense seriousness and prison policy premised on utilitarian calculations without reasonable foundation. In the Institute's view, the "depreciation of seriousness" formulation frames a question that sentencing courts are equipped to answer, and appellate courts are competent to review.

The original Code is in agreement with the revised Code on this point. The 1962 Code's commentary stated that the "depreciation of seriousness" analysis was meant to displace more traditional but "unrealistic" utilitarian attempts to calculate the general deterrent effects of individual sentences:

> As a practical matter it is impossible to measure the amount of deterrence that will be engendered by a particular sentence. The positive effect of a given disposition on the community in terms of preventing or discouraging future offenses of the type involved is, in effect, a rationale that could easily be used to justify any result at any time.

> For this reason, the wording of Subsection (I)(c) is designed to suggest a different set of inquiries. Rather than ask what positive deterrent effect a sentence will have, or whether many future offenses are likely to be deterred by a given sentence, the suggested criterion poses the question of what the negative effect of another sentence might be in terms of its impact on attitudes about the seriousness with which the offense is perceived. To take an obvious case, it would be unthinkable to impose a sentence of probation on a President's assassin. One might defend such a conclusion simply on retributive grounds, but this is not the intention here. The judgment is that such a disposition would so affect public respect for the law, and in particular for the level of seriousness with which the particular offense is taken, as to warrant a sentence of imprisonment on this ground alone. Viewed another way, the failure to impose the sanction of imprisonment would risk being taken as a license to commit certain types of offenses and should be avoided when serious risk of creating that image will arise. (Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09, § 6.06, Comment 3(c) (1985), at pp. 233-234.)

(4) Finally, some argued that it is necessary to retain general deterrence as part of the sentencing of individual offenders, because otherwise judges will be disproportionately lenient when sentencing white-collar offenders with personal characteristics of race, ethnicity, background, and social-class status similar to most judges. The Code rejects this "misdirection" line of reasoning. As a matter of principle, it would be improper for the Institute to intentionally misstate the meaning of recommended statutory language, particularly in a provision meant to be the cornerstone of a jurisdiction's prison policy. The practical effects of such a maneuver are worse. It is dangerous to loose the "weapon" of general deterrence into all sentencing proceedings as a mislabeled surrogate for another policy altogether.

h. Rehabilitation and incarceration. Norval Morris famously argued that a term of imprisonment should never be imposed solely for purposes of rehabilitation, but that the incapacitation of dangerous offenders should be permissible with proper safeguards, Norval Morris, The Future of Imprisonment (1974), at 18; Norval Morris and Marc Miller, Predictions of Dangerousness, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 6 (1985). See also H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968), at 26; Herbert L. Packer, The Limits of the Criminal Sanction (1968), at 67; United States v. Bergman, 416 F. Supp. 496 (E.D.N.Y. 1976) (Frankel, J.). For an argument that society has a moral duty to try to rehabilitate the offenders it incarcerates, see Edward L. Rubin, The Inevitability of Rehabilitation, 19 Law & Inequality 343 (2001).

i. Conditions of confinement. The Code's position on the inadequacy of rehabilitation as the sole justification for a prison sentence is qualified by its position on other utilitarian objectives. Subsection (2) endorses the use of incarceration "when necessary to incapacitate dangerous offenders." This policy applies, of course, whether or not an individual offender has any realistic prospect of rehabilitation. Indeed, the hypothetical "incorrigible" criminal has historically been considered the paradigm candidate for incapacitation. However, most people convicted of crimes, including those who present a high risk of serious reoffending when sentenced, will not remain crime-prone forever. In many cases, the aging process alone takes ex-offenders beyond the period of their active criminal careers. In other instances, the pain of incarceration, the benefits of rehabilitative programming, or the mysterious process of personal growth can be expected to change a prisoner for the better.

When deciding to imprison a defendant on grounds of incapacitation, it is a difficult but unavoidable task to pass judgment on how long an incapacitative penalty will be needed. In some cases, this translates into a calculation of the amount of time the rehabilitative (or specific deterrence) process will take. For many first-time prisoners, for example, who statistically present much lower risk of recidivism than persons who have served multiple terms, a reasonable evidence-based judgment might be that a short period of confinement will be enough to put the defendant on the right course. Or, for a seriously drug-involved offender, the length of a judge's incapacitative sentence might turn on evidence that effective in-prison drug-treatment programs often take a year or two to yield results. In some but not all cases, the classic goals of incapacitation and rehabilitation are intertwined.

j. Sentencing guidelines. Although American sentencing guidelines do not address the full menu of criminal sanctions—only a few guidelines systems contain recommendations for probation and economic sanctions, for example—all American guidelines speak to the question of whether a sentence of incarceration should be imposed and, if so, its length of term. See Richard S. Frase, Just Sentencing: Principles and Procedures for a Workable System (Oxford University Press 2013). Nearly all American sentencing guidelines are either presumptive in legal force (granting trial judges substantial discretion to deviate from guidelines provisions in individual cases) or advisory (unenforceable recommendations to trial courts); see id., Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2006).

k. Maximum authorized terms for felony offenses.

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

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

A sentence of life imprisonment without possibility of early release—usually termed "life without parole"—now exists in every American jurisdiction except Alaska. See Death Penalty Information Center, Life without Parole, at http://www.deathpenaltyinfo.org/life-without-parole (last visited Mar. 8, 2011) (49 states, the federal system, and the District of Columbia authorize sentences of life without parole; New Mexico adopted its LWOP law in 2009). On the infrequent use of such a penalty in the United States until recent decades, see Note, A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital Punishment, 119 Harv. L. Rev. 1838, 1840 and n.17 (2006) ("From the 1910s to the 1970s, life without parole, as we now know it, did not exist. . . .

While a few states, such as Pennsylvania, did not have parole for life prisoners, there was often an unofficial parole system through gubernatorial commutations"). On the effects of the death-penalty debate on the proliferation of LWOP sentences, see Franklin E. Zimring and David Johnson, The Dark at the Top of the Stairs: Four Destructive Influences of Capital Punishment on American Criminal Justice, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (forthcoming 2011).

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

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

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

Arguably, a sentence of life without possibility of release is close in severity to a death sentence. See Robert Johnson and Sandra McGunigall-Smith, Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration, 88 The Prison Journal 328, 329 (2008) (arguing that "[o]ffenders sentenced to death by incarceration suffer a 'civil death.'"). Yet few checks have developed on the appropriate use of the whole-life prison term. In the early 1970s, when the constitutionality of the death penalty had been placed in doubt by Furman v. Georgia, 408 U.S. 238 (1972), a sentence of life without parole for murder survived constitutional challenge with only cursory discussion by the Court in Schick v. Reed, 419 U.S. 256, 267 (1974)

(death sentence commuted to life without parole; Court held that "[t]he no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution.") (footnote omitted). Federal constitutional limits on the use of natural-life sentences based on the seriousness of the offense of conviction have not been robust. In 1991, the Supreme Court upheld a sentence of life without parole for a first-time drug offender in Harmelin v. Michigan, 501 U.S. 957 (state law imposed mandatory life sentence, without possibility of parole, for possession of more than 650 grams of cocaine).

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

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

(3) *Penultimate maximum penalties.* A survey of penultimate maximum prison terms in contemporary American jurisdictions reveals that many states follow the original Code's recommendation to place the ceiling at 20 years. A majority of states, however, have enacted higher maximum terms for this level of offense. See Code of Ala. § 13A-5-6(a)(2) (20-year maximum for Class B felonies); Alaska Stat. § 12.55.125(c) (20 years for most aggravated Class A felony; offenses graded above this class include homicide, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping); Ariz. Rev. Stat. § 13-604(K) (35 years for most aggravated second-degree felony); Ark. Code § 5-4-401(a)(2) (30-year maximum for Class A felonies: "Class Y" is most serious felony level); Colo. Rev. Stat. § 18-1.3-401(1)(a)(V), (6) (48 years for most aggravated second-degree felony); Conn. Gen. Stat. § 53a-35a (25 years for most serious felony other than murder); 11 Del. Code § 4205(b)(2) (maximum of 25 years for Class B felonies); Fla. Stat. § 775.082(3)(b) (30-year maximum for first-degree felonies; "life felonies" and "capital felonies" are eligible for more severe penalties); Haw. Stat. § 706-659 (20-year maximum for class A felonies; 4 classes of homicide are eligible for more severe penalties); Ill. Stat. c. 730 § 5/5-8-1 (30-year maximum for Class X felonies, one grade below first-degree murder); Ind. Code § 35-50-2-4 (50-year maximum for Class A felonies, one grade below murder); Iowa Code § 902.9(2) (25-year maximum for class B felonies); Ky. Rev. Stat. §§ 532.030 (capital felony);

532.060(2)(b) (20-year maximum for Class B felonies; Class A maximum is life term: Capital offenses eligible for death penalty or life without parole); Me. Rev. Stat. 17-A § 1252(2)(A) (30-year maximum for Class A crimes; only murder graded above this category, with a maximum life sentence); Mo. Rev. Stat. § 558.011(1)(2) (15-year maximum for Class B felonies; maximum for Class A is 30 years or life imprisonment; capital crimes are graded above Class A); Neb. Rev. Stat. § 28-105(1) (50-year maximum for Class IC felonies; Class IB has life maximum; Class IA has life-without-parole maximum; Class I has death penalty); Nev. Rev. Stat. § 193.130(2)(b) (20-year maximum for Class B felonies; maximum penalties for Class A are death or life without parole); N.J. Rev. Stat. § 2C:43-6(a)(1) (20-year maximum for crimes of first degree); N.M. Stat. §§ 31-18-15(A)(3) & 31-18-15.1(C) (24-year maximum for most aggravated first-degree felonies, except for exceptions eligible for life imprisonment or the death penalty); N.Y. Penal Law § 70.00(2)(b) (25-year maximum for Class B felonies); N.D. Code § 12.1-32-01(2) (20-year maximum for Class A felonies; maximum for Class AA felonies is life without parole); Or. Rev. Stat. § 161.605(1) (20-year maximum for Class A felonies; more severe penalties available for murder and aggravated murder); 18 Pa. C.S. § 1103 (20-year maximum for felonies of first degree; three grades of murder are graded above); S.C. Code § 16-1-20(A)(1) (30-year maximum for Class A felonies; punishments for murder separately graded); S.D. Codified Laws § 22-6-1(4) (50-year maximum for Class 1 felonies; Classes A, B, and C, graded above, include death penalty and life prison terms); Tenn. Code Ann. § 40-35-111(b)(1) (60-year maximum for Class A felonies; penalties for murder, including capital punishment and life sentences, separately provided); Tex. Penal Code § 12.33(a) (20-year maximum for felonies of the second degree; felonies of first degree have maximum of life imprisonment; death penalty separately provided); Utah Code Ann. § 76-3-203(2) (15-year maximum for felonies of the second degree; felonies of the first degree have maximum of life imprisonment; death penalty separately provided); Va. Code § 18.2-10(c) (20-year maximum for Class 3 felonies: maximum for Class 2 is life imprisonment; maximum for Class 1 is death); Wash. Rev. Code § 9A.20.021(b) (10-year maximum for Class B felonies; maximum for Class A is life imprisonment); Wis. Stat. § 939.50(3)(b) (60-year maximum for Class B felonies; maximum for Class A is life imprisonment).

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

l. Maximum authorized terms for misdemeanor offenses. Current criminal codes with general classification schemes for misdemeanors typically place the maximum available incarceration term, for the most serious of misdemeanors, at one year. See Ala. Code § 13A-5-7; Alaska Stat. § 12.55.135; Ark. Code § 5-4-401; Conn. Gen. Stat. § 53a-36; 11 Del. Code § 4206; Fla. Stat. § 775.082; Haw. Stat. § 706-663; Ill. Stat. c. 730 § 5/5-8-3; Ind. Code §§ 35-50-3-2 through 35-50-3-4; Iowa Code § 903.1; Ky. Rev. Stat. § 532.090; Me. Rev. Stat. 17 § 1252; Mo. Rev. Stat. § 558.011; Nev. Rev. Stat. §§ 193.140 & 193.150; N.H. Rev. Stat. § 651:2; N.M. Stat. § 31-19-1; N.Y. Penal Law § 70.15; N.D. Code § 12.1-32-01; Or. Rev. Stat. § 161.615; S.D. Codified Laws § 22-6-2; Tenn. Code Ann. § 40-35-111; Tex. Penal Code §§ 12.21 – 12.23; Utah Code § 76-3-204; Va. Code § 18.2-11; Wash. Rev. Code § 9A.20.021. For the exceptions, see Ariz. Rev. Stat. § 13-707 (maximum misdemeanor penalty of 6 months); Colo. Rev. Stat. § 18-1.3-501 (maximum misdemeanor penalty of 18 months); N.J. Rev. Stat. § 2C:43-6 (no misdemeanor category of offenses; "4th degree crimes" have maximum prison term of 18 months); N.C. Gen. Stat. § 15A-1340.23 (maximum misdemeanor confinement term of 60 days); Ohio Rev. Code § 2929.24 (maximum jail term of 180 days); Pa. Cons. Stat. t. 18, § 1104 (maximum incarceration term of 5 years for first-degree misdemeanors and 2 years for second-degree misdemeanors); S.C. Code § 16-1-20 (maximum incarceration term of 3 years for Class A misdemeanors and 2 years for Class B misdemeanors); Wis. Stat. § 939.51 (maximum confinement for misdemeanors of 9 months).

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

The Comment draws on the above sources, and also the following: Eric Luna and Paul G. Cassell, Mandatory Minimalism, 32 Cardozo L. Rev. 1 (2010); Michael Tonry, The Mostly Unintended Effects of Mandatory Penalties:

Two Centuries of Consistent Findings, in Michael Tonry ed., Crime & Justice: A Review of Research, vol. 38 (2009), at 65-114; Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer, Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences." 44 J. of Rsrch. in Crime and Delinq. 427 (2008); Anthony Kennedy, Chairman, American Bar Association Justice Kennedy Commission Report with Recommendations to the ABA House of Delegates (2004); Jack B. Weinstein, Every Day is a Good Day for a Judge to Lay Down his Professional Life for Justice, 32 Fordham Urban L.J. 131 (2004); Symposium, Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?, 18 Notre Dame J.L. Ethics & Pub. Pol'y 303 (2004); Julian V. Roberts, Public Opinion and Mandatory Sentencing: A Review of International Findings, 30 Crim. Justice and Behavior 483 (2003); Franklin E. Zimring, Gordon Hawkins, and Sam Kamin, Punishment and Democracy: Three Strikes and You're Out in California (2001); David Brown, Mandatory Sentencing: A Criminological Perspective, 7 Australian J. of Human Rights 31 (2001); Nicole Crutcher, Mandatory Minimum Penalties of Imprisonment: An Historical Analysis, 44 Crim. Law Quarterly 279 (2001); Stephen Breyer, Federal Sentencing Guidelines Revisited, 11 Fed. Sent'g Rptr. 180 (1999); David Boerner, Sentencing Guidelines and Prosecutorial Discretion, 78 Judicature 196 (1995); Barbara S. Vincent and Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings (Federal Judicial Center, 1994); U.S. General Accounting Office, Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999–2001 (2003); Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Cal. L. Rev. 61 (1993); Robert O. Dawson, Sentencing (1969).

On marginal deterrence theory, see Anthony Doob and Cheryl Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, in Michael Tonry ed., Crime and Justice: A Review of Research, vol. 30 (2003); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney, and Per-Olof H. Wikström, Criminal Deterrence and Sentence Severity: An Analysis of Recent Research (1999). On the dangers that mandatory penalties can be criminogenic of more serious crimes, see Tomislav Kovandzic, John Sloan, and Lynne Vieraitis, "Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of 'Three Strikes' in U.S. Cities (1980–1999), 1 Criminology and Public Policy 399 (2002); Thomas B. Marvell and Carlisle E. Moody, The Lethal Effects of Three Strikes Laws, 30 J. of Legal Studies 89 (2001). On the evolution of actuarial risk-assessment tools for the prediction of offender recidivism, see Tentative Draft No. 2 (2011), § 6B.09, Reporter's Note to Comment *a*.

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

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

custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections"); Del. Code Ann. tit. 11, § 4205(a) ("A sentence of incarceration for a felony shall be a definite sentence."); id. § 4354 ("No sentence imposed pursuant to the provisions of the Truth in Sentencing Act of 1989 shall be subject to parole"); 730 Ill. Comp. Stat. § 5/3-3-3(b) ("No person sentenced under this [Act] shall be eligible for parole."); id. § 5/3-3-3(c) ("Except for those sentenced to a term of natural life imprisonment, every person sentenced to imprisonment . . . shall serve the full term of a determinate sentence less time credit for good behavior and shall then be released under the mandatory supervised release provisions of paragraph (d) of Section 5-8-1 of this Code."); id. § 5/5-8-1(a) (providing that "a sentence of imprisonment for a felony shall be a determinate sentence set by the court"); Ind. Code § 35-50-6-1(a)(1) (providing for release "when a person imprisoned for a felony completes the person's fixed term of imprisonment, less the credit time the person has earned with respect to that term"); Kan. Stat. § 21-4704(e)(2) ("In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing"); id. § 21-4705(c)(2) (same); Me. Rev. Stat. § 1254 ("An imprisoned person shall be unconditionally released and discharged upon the expiration of his sentence, minus the deductions authorized under section 1253 [providing for good-time credits and credits for time served]"); Minn. Stat. § 609.11, subd. 6 ("Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law"); Miss. Code § 47-7-3(1)(g) ("No person shall be eligible for parole who is convicted or whose suspended sentence is revoked after June 30, 1995"; providing an exception to general parole ineligibility for "first offender[s] convicted of a nonviolent crime after January 1, 2000," who are sentenced for a year or more, have "observed the rules of the department," and have served at least one-quarter of their sentences); N.C. Gen. Stat. § 15A-1368.2(a) ("A prisoner . . . shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded"); id. § 143B-266(a) (providing that persons sentenced under the structured sentencing system . . . are not eligible for parole"); Ohio Rev. Code § 2967.021(B) (establishing that Ohio's parole, pardon, and probation provisions, revised as of July 1, 1996, "appl[y] to a person upon whom a court imposed a stated prison term for an offense committed on or after July 1, 1996"); Or. Rev. Stat. § 137.635(1) ("The convicted defendant shall serve the entire sentence imposed by the court and shall not, during the service of such a sentence, be eligible for parole or any temporary leave from custody . . . or for any reduction in sentence . . . or for any reduction in term of incarceration"); Va. Code § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."); id. § 19.2-311 (allowing for the indeterminate sentencing for a 4-year term of persons under 21 "convicted of a felony offense other than" murder or sexual assault, "considered by the judge to be capable of returning to society as a productive citizen following a reasonable amount of rehabilitation"); Wash. Rev. Code § 9.94A.728 (providing that "[n]o person serving a sentence imposed pursuant to this chapter [the Sentencing Reform Act of 1981] and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows" [allowing for sentence reductions for "earned release time"]).

———————

ABA HOUSE OF DELEGATES,
RESOLUTION 10B ON MANDATORY MINIMUMS (2017)

ADOPTED AS REVISED

AMERICAN BAR ASSOCIATION

MASSACHUSETTS BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association opposes the imposition of a mandatory minimum sentence ~~in any criminal case~~; and

FURTHER RESOLVED, That the American Bar Association urges Congress, state and territorial legislatures to repeal ~~existing criminal~~ laws requiring minimum sentences, and to refrain from enacting ~~criminal~~ laws punishable by mandatory minimum sentences ~~in the future.~~

REPORT

Summary

This resolution provides a clear statement that the American Bar Association opposes mandatory minimum sentences in all cases and for all offenses.

Existing ABA Resolutions and/or Standards

Current ABA policy (as discussed in I., below) recognizes the problems that arise from mandatory minimum sentences and the deleterious impact mandatory sentences schemes have on society. This resolution is consistent with existing ABA policy and the Criminal Justice Standards; however, it seeks to provide a clear, concise statement that the ABA opposes all mandatory sentencing schemes, with updated and current research and support.

I. The ABA's Efforts to End Mandatory Minimums

The ABA has opposed mandatory minimum sentencing—which it believes raises grave issues of public policy—for almost fifty years.[1] [2] All senses of "fairness, due process and the rule of law" require that criminal sentencing be uniform amongst similarly situated offenders and proportional to the criminal conduct.[3] Mandatory minimum sentences are inconsistent with both of these principles. For almost twenty-five years, the ABA has adopted resolutions and issued recommendations challenging mandatory minimum sentences as unjust and as a driving force in over incarceration:

- (1995) The ABA adopts a resolution calling for the equalization of the federal penalties for crack and powder cocaine.[4]

- (2003-2004) The ABA establishes the Justice Kennedy Commission to further investigate the state of sentencing and corrections in the United States and to make recommendations to address the problem of over-incarceration. The Kennedy Commission issues a series of recommendations urging broad reforms to address

---

[1] *See* 1968 ABA Standards Relating to Sentencing Alternatives and Procedures § 2.1(c); Proceedings of the 1974 Midyear meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44; 1980 ABA Standards Relating to Sentencing Alternatives and Procedures (2d Ed.) § 18-4.3(a).

[2] Letter from ABA President Karen Mathis to Committee Leadership regarding the House of Representatives Hearing on Mandatory Minimum Sentencing Laws (July 3, 2007), https://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenthl.authcheckdam.pdf ("Mathis Letter") Mandatory minimum sentences are also against the ABA's Standards for Criminal Justice on Sentencing. The Standards state clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21(b). In addition, Standard 18-6.1(a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account."

[3] Mathis Letter.

[4] Recommendation 129, Annual 1995 (Special Committee on the Drug Crisis).

sentencing policy, racial and ethnic disparities in the justice system, use of clemency and sentence reduction, and prison conditions and prisoner reentry.[5] The Kennedy Commission issues a recommendation urging all jurisdictions, including the federal government, to "[r]epeal mandatory minimum sentence statutes."[6]

- (2005) The ABA expresses its concerns regarding over-reliance on imprisonment in a policy adopted in response to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), urging Congress to permit increased judicial discretion in departing from the ranges of imprisonment advised by the federal Sentencing Guidelines.[7]

- (2010) The ABA advocates against mandatory minimum sentencing before the Sentencing Commission, offering testimony that "[s]entencing by mandatory minimums is the antithesis of rational sentencing policy."[8]

- (2011) The ABA recognizes the unwarranted severity of the federal guidelines for the sentencing of high loss economic crimes and issues a recommendation urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for these offenses to ensure that they are proportional to offense severity and adequately take into consideration individual culpability and circumstances.[9]

- (2011) The ABA advocates for further reform of drug quantity laws through the retroactive application of the amendments to the federal guidelines enacted pursuant to the Fair Sentencing Act of 2010.[10]

- (2011) The ABA issues a resolution urging the Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense and factors pertaining to the current nature of these offenses, offenders, victims, and the role of technology in these offenses.[11]

- (2015) The ABA advocates for further reform of economic crime guidelines and publishes a report drafted by the ABA Criminal Justice Section Task Force on The Reform of Federal Sentencing for Economic Crimes. The report provides an entirely new model for sentencing economic crimes.[12]

---

[5] Recommendation 121A, Annual 2004 (Criminal Justice Section).
[6] *Id*.
[7] Recommendation 301, Midyear 2005 (Criminal Justice Section).
[8] *See* Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission, June 2, 2010.
[9] Recommendation 104C, Midyear 2011 (Criminal Justice Section).
[10] *See, e.g.*, Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (June 1, 2011).
[11] Resolution 105A, available at https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_105a.authcheckdam.pdf.
[12] *See* Testimony of James E. Felman on behalf of the American Bar Association before the United States Sentencing Commission (March 12, 2015).

The ABA's Criminal Justice Standards on Sentencing 18-3.21 (b) provides that "[a] legislature should not prescribe a minimum term of total confinement for any offense." This means no mandatory minimum sentences. Such sentences would be inconsistent with the notion of individualizing sentences within a guided discretion regime.[13] There should be no need for mandatory minimum sentences in a jurisdiction that insists upon four elements in sentencing: guidance to judges as to sentencing norms for offenses and repeat offenders, judicial discretion to vary from the norms, on-the-record explanations for any variance upward or downward, and judicial review of any variance from a sentencing norm. All of these elements are found in the Sentencing Standards and are reflected in our recommendations.

II. History and Rationale Behind Mandatory Minimum Sentences

Mandatory minimum sentences have sharply different origins than Guidelines sentences. Through the Sentencing Reform Act of 1984, Congress tasked the Sentencing Commission with establishing sentencing guidelines that would both reconcile the purposes of punishment (i.e., just punishment, deterrence, incapacitation, and rehabilitation) and promote uniformity and proportionality. *See* 28 U.S.C. § 991(b)(1)(A). The Commission set out to base these sentencing guidelines on empirical data by analyzing "10,500 actual past cases in detail . . . along with almost 100,000 other less detailed case histories."

Although the Commission initially decided upon an empirical approach to crafting the guidelines, political forces were also at play. While the Commission worked toward its congressionally directed deadline of November 1, 1987, "rates of violent crime in America, particularly in cities, were high, and the public saw increasing drug use and the drug trade as major contributors to the violence." There was sentiment that violence was "veering out of control, and new approaches were needed" because "efforts toward rehabilitation of offenders had failed and that harsh punishments were needed."

In the midst of this period of violence and fear, on June 19, 1986, college basketball star Len Bias died of a cocaine overdose. Congress responded quickly—it passed the Anti-Drug Abuse Act of 1986 that included tough mandatory minimum sentences for drug crimes. The 1980's "War on Drugs" fueled drug sentencing, not empirical data.

III. Mandatory Minimums are Detrimental to Society

The United States imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe and 12 times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are behind bars here in the United States. The federal sentencing scheme contributed to these statistics. In the 25 years since the advent

[13] On their face, the Standards are not entirely consistent. Standard 18-3.11 states that "[t]he legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction." This could be read supporting mandatory minimum sentences.

of the mandatory minimum sentences for drug offenses and the adoption of the Sentencing Guidelines, the average federal sentence has tripled in length.

Sentencing by mandatory minimums is the antithesis of rational sentencing policy. There are few, if any, who would dispute the proposition that criminal sentencing should take into account a wide array of considerations, including the nature and circumstances of the offense, the history and characteristics of the defendant, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her criminal conduct, and the likelihood that a given sentence will further the various purposes of sentencing, such as "just desserts," deterrence, protection of the public and rehabilitation. Mandatory minimum sentencing reflects a deliberate election to jettison this entire array of undisputedly relevant considerations in favor of a solitary fact—usually a quantity of drugs that may bear no relationship to the defendant's particular culpability. Mandatory minimum sentencing declares that we do not care even a little about the defendant's personal circumstances. Mandatory minimum sentencing announces as a policy that we are utterly uninterested in the full nature or circumstances of the defendant's crime. Mandatory minimum sentencing blinds the court to the defendant's role in the offense and his or her acceptance of responsibility. Mandatory minimum sentencing is uniformly indifferent to the evaluation of whether the result furthers all or even any of the purposes of punishment.

As a matter of policy, mandatory minimum sentences raise a myriad of troubling concerns. To satisfy the basic dictates of fairness, due process and the rule of law, sentences should be both uniform among similarly situated offenders and proportional to the crime that is the basis of the conviction. Mandatory minimum sentences are inconsistent with these twin commands of justice.

A. Mandatory Minimums Lead to Excessively Severe Sentences

First, mandatory minimum sentencing laws have resulted in excessively severe sentences. Mandatory minimum sentences set a floor for sentencing. As a result, all sentences for that crime, regardless of the circumstances of the crime or the offender, are arrayed above the mandatory floor. The Justice Kennedy Commission found that mandatory minimum sentencing was one of an "array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation's prisons and jails," despite a decrease in the number of serious crimes committed in the past several years.[14] The mandatory minimum sentences for drug offenses enacted in 1986 not only resulted in excessively severe sentences for those offenses, but also had an overall impact of increasing federal sentences virtually across the board. By imposing penalties higher than those imposed by federal courts over many years, Congress impelled the Sentencing Commission to increase many sentences to maintain some consistency in the

[14] Justice Kennedy Commission Report at 16-17; see also USSC Special Report, supra note 1, at 63 ("Overwhelmingly, the most frequent response given by judges, defense attorneys, and probation officers to the question about the effects of the mandatory minimums was that they are too harsh").

Guidelines.[15] Had Congress not enacted mandatory minimum penalties in1986, the sentencing guidelines overall would have likely been less harsh and offenders would have received lower sentences in many cases. Thus, the effect of the mandatory minimums is not simply to incarcerate individuals who receive these sentences longer than a judge would have regarded as necessary. It is also to incarcerate many individuals who do not receive mandatory minimum sentences for longer than necessary as a result of the impact that mandatory minimum sentences have had on the federal sentencing guidelines as a whole.

Second, mandatory minimum statutes lead to arbitrary sentences. When the considerations in sentencing shifted from the traditional wide focus on both the crime itself and "offender characteristics" to an exclusive focus on a single fact—typically drug quantity or the presence of a firearm—a host of mitigating circumstances could no longer be considered in determining the sentence. As a result, persons with sympathetic mitigating factors based on degree of culpability, role in the offense, personal circumstances and background frequently face severe sentences.

B. Sentencing Disparities

Mandatory minimums are intended to more uniform sentences for similar crimes but practical experience has taught that they tend to create sentencing disparities—just what determinate sentencing was intended to eliminate. Drug offenses, which contribute to a large proportion of mandatory minimum sentences, can give rise to arbitrary, severe punishments. Even minor differences in drug quantities can lead to similar offenses where only some trigger mandatory minimums, leading to a resulting "cliff effect" between similarly situated offenders. For instance, someone arrested with 0.9 gram of LSD will not likely spend much time incarcerated, while an arrest for one gram will trigger a mandatory minimum sentence of five years behind bars.

Application of mandatory minimum sentencing is also more harsh for one specific racial community—African Americans. The Commission's 2011 Report to Congress explains that "Blacks account for 30.3 percent of drug offenders convicted of an offense carrying a mandatory minimum penalty" but they account for a higher percentage of drug offenders who receive a mandatory minimum at sentencing—40.4 percent. The Commission states that this disparate application is "largely attributable to the cumulative effects of criminal history and weapon involvement."

C. Undermining the Judiciary

Mandatory minimums undermine judicial discretion and disturb a just allocation of authority among the parties. In the United States adversarial criminal justice system, the

[15] See Statement of Stephen A. Saltzburg (DOJ Ex Officio Sentencing Commissioner, 1989-90) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 22, 2009; see also USSC Special Report, supra note 1, at ii ("The SentencingCommission drafted the new guidelines to accommodate ... mandatory minimum provisions by anchoring the guidelines to them").

judge serves as an impartial arbiter of the case, neither on the side of the prosecution nor the defense. Because of this, judges are entrusted to determine appropriate sentences. Mandatory minimum sentencing regimes, however, deprive judges of the discretion they need to fashion sentences tailored to the circumstances of the offense and the offender. And while judges are stripped of the discretion they need to do justice, at the same time, mandatory minimums often shift that discretion to prosecutors, who do not have the incentive, training or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case. To give prosecutors such unchecked authority dangerously disturbs the balance of power between the parties in an adversarial system, and deprives defendants of access to an impartial decision-maker in the all-important area of sentencing.

D. Opposition to Mandatory Minimums is Widespread and Bipartisan

In addition to the ABA's objections to mandatory minimum sentencing regimes, mandatory minimum sentencing is opposed by an unusually wide ideological array of thoughtful groups and individuals. The Judicial Conference of the United States has consistently opposed mandatory minimum sentences for almost 60 years.[16] In 1990, the Judicial Conference approved a recommendation of the congressionally directed Federal Courts Study Committee urging Congress to "reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act."[17]

In 1993, Chief Justice William Rehnquist criticized mandatory minimums as "perhaps a good example of the law of unintended consequences" and observed the politically unfortunate circumstances under which they are often enacted:

> Mandatory minimums ... are frequently the result of floor amendments to demonstrate emphatically that legislators want to "get tough on crime." Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines, as a whole. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.[18]

---

[16] See Statement of Honorable Julie E. Carnes (on behalf of the Judicial Conference) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 14, 2009, http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf (reviewing Judicial Conference opposition to mandatory minimums in 1953, 1962, 1965, 1967, 1971, 1976, 1981, 1990, 1991, 1993, 1994, 1995, 2006, and 2009).

[17] Report of the Proceedings of the Judicial Conference of the United States, March 13, 1990, published in USSC Special Report, supra note 1, at App. G.

[18] William H. Rehnquist, Luncheon Address (June 18, 1993), published in United States Sentencing Commission, Proceedings of the Inaugural Symposium on Crime and Punishment in the United States 286 (1993).

Justice Stephen Breyer has spoken out against mandatory minimums, noting their fundamental inconsistency with the guidelines system:

> [S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. ... Every system, after all, needs some kind of escape valve for unusual cases. ... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.[19]

In 2013, Attorney General Eric Holder issued a second memorandum on mandatory minimum sentences ("2013 Holder Memo").[20]. This memo "refine[d]" the DOJ's charging policy for crimes carrying a mandatory minimum sentence. He instructed that the most severe mandatory minimum sentences for drug offenses be reserved for "serious, high-level, or violent drug traffickers," as long sentences for low level offenders have led to unduly harsh sentences that do not advance public safety, rehabilitation, or deterrence. The 2013 Holder Memo directed that such charges should not be brought for low-level drug offenders without significant ties to gangs; whose conduct did not involve violence, death or injury, the use of weapons, or involvement of minors; and where the defendant did not have a significant criminal history.

Prosecutors were also instructed to limit using severe mandatory minimum sentencing enhancements under 21 U.S.C. § 851 to only those defendants whose history or conduct made such increases appropriate.

In 2014, the Attorney General forbade prosecutors from threatening or imposing a so-called "trial penalty," by manipulating severe mandatory minimum enhancements under 21 U.S.C. § 851 in plea negotiations. The need to secure a plea agreement was not, he said, an appropriate factor to be considered when determining whether to seek the recidivist enhancement which could double a five or ten year sentence and result in a life sentence in certain cases.

The Department of Justice recently released a report entitled "Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the *Smart on Crime* Initiative."[21] The report found that between 2010 and 2015,

---

[19] Speech of Justice Stephen Breyer, Federal Sentencing Guidelines Revisited (Nov. 18, 1998), reprinted at 11 FED. SENT. REP. 180, 184-85 (1999); see also Harris v. United States, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring in part and concurring in the judgment).

[20] Memorandum from the Attorney General Eric H. Holder, Jr. to The United States Attorney and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013) ("2013 Holder Memo").

[21] United States. Department of Justice. Office of the Inspector General. June 2017. https://oig.justice.gov/reports/2017/e1704.pdf.

sentencing outcomes in drug cases had shifted in a manner that was consistent with the first two principles of *Smart on Crime* ["prioritize prosecutions to focus on most serious cases" and "reform sentencing to eliminate unfair disparities and reduce overburdened prisons"]. This was reflected by significantly fewer mandatory minimum sentences being imposed in drug cases nationwide, as well as a decrease in mandatory minimum sentences for those defendants who might otherwise have received such a sentence…"[22]

Many others have noted the defects of mandatory minimums, including the Federal Judicial Center[23], Families Against Mandatory Minimums[24], Senator Rand Paul (R-KY) [25], Senator Cory Booker (D-NJ) [26], Senator Mike Lee (R-UT) [27], Dick Senator Durbin (D-IL) [28], the Constitution Project's Sentencing Initiative[29], and numerous judges, and academics.

E. Mandatory Minimum Sentencing Policy Punishes Ethnic Minorities Disproportionately

Mandatory minimum sentences have an adverse effect on minority defendants, who are more likely to be charged with a mandatory minimum offense than other defendants.[30] In California, for example, where the well-known "three strikes" rule (which also applies to offenders with two strikes) has had greatest application, the African-American incarceration rate for third strikes is twelve times higher than the third strike incarceration rate for whites, and the Latino incarceration rate is forty-five percent higher than the third strike incarceration rate for whites.[31] When second and third strike sentences are combined, the African-American incarceration rate is more than 10 times higher and the

---

[22] Id.

[23] Barbara S. Vincent & Paul J. Hofer, The Consequences of Mandatory Prison Terms, Federal Judicial Center (1994)("evidence has accumulated indicating that the federal mandatory minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system").

[24] Families Against Mandatory Minimums, FAMMGRAM, The Case Against Mandatory Minimums (Winter 2005), available at http://famm.org/Repository/Primer/Final.pdf.

[25] (June 7, 2017), https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED

[26] (June 7, 2017), https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED http://www.politico.com/blogs/under-the-radar/2017/03/jeff-sessions-drug-policy-cory-booker-dick-durbin-patrick-leahy-236309

[27] (June 7, 2017), https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED

[28] (June 7, 2017), https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED http://www.politico.com/blogs/under-the-radar/2017/03/jeff-sessions-drug-policy-cory-booker-dick-durbin-patrick-leahy-236309

[29] The Constitution Project Sentencing Initiative, Principles for the Design and Reform of 16 Sentencing Systems (June 7, 2005).

[30] Sonja B. Starr & M. Marit Rehavi, "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker," Yale Law Journal, Vol. 123 (Oct 2013) (finding that "prosecutors file mandatory minimums twice as often against black men as against comparable white men. Moreover, for those concerned about mass incarceration of black men, expanding mandatory minimums would be counterproductive.").

[31] Scott Ehlers, Vincent Schiraldi & Jason Ziedenberg, STILL STRIKING OUT: TEN YEARS OF CALIFORNIA'S THREE STRIKES (March 2004).

Latino incarceration rate more than 78% higher than the white incarceration rate. In Massachusetts, where the racial minority composition of the state population in 2009 was determined to be 20%, a Massachusetts Bar Association concluded that 74.6% of defendants convicted of mandatory drug distribution offenses were racial/ethnic minorities and only 25.4% of defendant's convicted of such mandatory minimum offenses were white.[32] Studies like these have tended to bear out the findings of the U.S. Sentencing Commission's 1991 Special Report to Congress on mandatory minimum sentences, that "whites are more likely than non-whites to be sentenced below the applicable mandatory minimum" and the ominous, deeply troubling conclusion that "available data strongly suggest that [whether] a mandatory minimum is applicable appears to be related to the race of the defendant …."[33]

Conclusion

While incarceration has a role in the criminal justice system, mandatory minimum sentences exploit that role by imposing unduly long sentences on only certain classes of offenders. Because mandatory minimum sentences are not in line with the purposes of sentencing and, rather, lead to indeterminate sentencing, racial disparity, and mass incarceration, we urge the adoption of this resolution.

Respectfully submitted,

_____

Jeffrey N. Catalano
President, Massachusetts Bar Association

August 2017

[32] *"The Failure of the War on Drugs: Charting a New Course for the Commonwealth"*, Report of the Massachusetts Bar Association Drug Policy Task Force, 2009, p. 18-19 & n.55, available at http://www.massbar.org/media/520275/drug%20policy%20task%20force%20final%20report.pdf .

[33] U.S. Sentencing Commission, *"Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System"*, August 1991, Summary, pp. ii, available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

10B

GENERAL INFORMATION FORM

Submitting Entity: Massachusetts Bar Association, ABA Criminal Justice Section

Submitted By: Jeffrey N. Catalano (MA Bar), Matthew Redle, Chair (ABA Criminal Justice Section)

1. Summary of Resolution(s).

   This Resolution urges the House of Delegates to review the ABA's multiple resolutions and recommendations that challenge mandatory minimum sentences as unjust and a driving force in over incarceration. With many prominent individuals, such as Chief Justice William Rehnquist and former Attorney General Eric Holder, speaking out against mandatory minimum sentencing, the movement against mandatory minimum sentencing retains bipartisan support. As such, this resolution calls for the end of mandatory minimum sentencing, as it significantly disadvantages people of color in terms of sentencing, is a significant factor in incarcerating more individuals in the United States than any other country, and ultimately leads to an unfair application of the law.

2. Approval by Submitting Entity. This resolution was passed by Massachusetts Bar Association in July 2017 and by the American Bar Association Criminal Justice Council in July 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?

   As noted in the Report, previous ABA policy (some of it fifteen to twenty years old) is consistent with this resolution; however, this resolution provides a clear statement against mandatory minimums in all cases, supported by up to date research and analysis.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   As noted in #3, and in the report, existing policies address sentencing schemes, mandatory minimums in drug cases, and criminal justice reform. This resolution draws upon all of them, but provides a clear, concise, and up to date statement on mandatory minimum sentencing schemes.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   Given the recent announcements from the Department of Justice and others calling for an increased use of mandatory minimum sentences, along with pending

legislation in the House and Senate, it is necessary for the ABA to speak out and reinforce its commitment to opposing mandatory sentencing schemes.

6. Status of Legislation. (If applicable)

Legislation is pending before a number of federal House and Senate committees. States are also looking at their mandatory sentencing laws.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This policy, if adopted, will be used by the ABA Government Affairs Office in its efforts to work with members of Congress to repeal mandatory minimum sentences. ABA Members can also utilize this resolution in their own constituent contact efforts at the state and federal levels to push for a reform of sentencing laws. Practitioners can point to this resolution in sentencing hearings and plea negotiations as further support for relief from mandatory minimum sentences.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Commission on Veteran's Legal Services
Legal Aid & Indigent Defense
Commission on Disability Rights
Special Committee on Hispanic Legal Rights & Responsibilities
Commission on Homelessness and Poverty
Center for Human Rights
Commission on Immigration
Racial & Ethnic Diversity
Racial & Ethnic Justice
Youth at Risk
Young Lawyer's Division
Civil Rights and Social Justice
Government and Public Sector Lawyers
International Law
Federal Trial Judges

10B

State Trial Judges
Law Practice Division
Science & Technology
Health Law
Litigation

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Rebecca Brodey
Cozen O'Connor
1200 19th Street NW
Washington, D.C. 20036
T: (202) 912-4892
Email: rbrodey@cozen.com

James E. Felman
Kynes, Markman & Felman
100 S. Ashley Drive, Suite 1300
Tampa, FL 33602
T: (813) 229-1118
Email: jfelman@kmf-law.com

Kevin J. Curtin
200 Trade Center, 3rd floor
Woburn, MA. 01801
T: (508) 423-0140
Email: kevinjcurtin@icloud.com

Sara Elizabeth Dill
American Bar Association – Criminal Justice Section
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036
T: (202) 662-1511
Email: sara.dill@americanbar.org

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Stephen Saltzburg
2000 H Street, NW
Washington, D. C. 20052
T: 202-994-7089
E: ssaltz@law.gwu.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the House of Delegates to review the ABA's multiple resolutions and recommendations that challenge mandatory minimum sentences as unjust and a driving force in over incarceration. With many prominent individuals, such as Chief Justice William Rehnquist and former Attorney General Eric Holder, speaking out against mandatory minimum sentencing, the movement against mandatory minimum sentencing retains bipartisan support. As such, this resolution calls for the end of mandatory minimum sentencing, as it significantly disadvantages people of color in terms of sentencing, is a significant factor in incarcerating more individuals in the United States than any other country, and ultimately leads to an unfair application of the law.

2. Summary of the Issue that the Resolution Addresses

This resolution addresses the current trend towards increasing use of mandatory minimum sentences in a broader list of crimes and offenses.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This policy sets a clear statement that mandatory sentencing schemes should be eliminated and provides research and analysis to support that conclusion. This policy can be used in lobbying efforts, amicus briefs, and by ABA members in their litigation of criminal cases and sentences.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

None.

ERIK LUNA, *MANDATORY MINIMUMS*, REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE, VOLUME 4, ARIZONA STATE UNIVERSITY (2017)

Mandatory Minimums

Erik Luna[*]

Mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum. These laws, known as "mandatory minimums," can produce punishment that is unjust in its disproportionality. Studies have also shown that mandatory minimums are unlikely to reduce future crime. As a practical matter, mandatory minimums transfer sentencing power from judges to prosecutors, who may place unfair pressures on defendants to plead guilty while also distorting the legal framework of separated powers. The laws tend to create sentencing disparities by treating similar offenders differently and different offenders the same. Because of their inflexible nature, mandatory minimums encourage manipulations of the system and even outright deceit. The laws have helped make the United States the most punitive nation in the Western world. For these and other reasons, mandatory minimums should be reformed.

INTRODUCTION

A mandatory minimum sentence requires that an individual convicted of a given offense be incarcerated for at least the minimum term set by statute. These so-called "mandatory minimums" have been the focus of recent calls for change in American criminal justice.[1] Reform efforts have been supported by practitioners, researchers, public interest groups, and prominent legal organizations such as the American Bar Association and the American Law Institute. Likewise, numerous judges have voiced dismay at the excessive punishment that courts are required to impose pursuant to mandatory minimums, including Justice Stephen Breyer, Justice Anthony Kennedy, and the late Chief Justice William Rehnquist.

* Amelia D. Lewis Professor of Constitutional & Criminal Law, Arizona State University Sandra Day O'Connor College of Law. This chapter draws upon a number of previous writings, including: Erik Luna, *Sentencing*, *in* Oxford Handbook on Criminal Law (Markus Dubber & Tatjana Hoernle eds., 2014); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1 (2010); and Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. Crim. L. & Criminology 25 (2005). Professor Luna wishes to thank Douglas Berman for his thoughtful comments, and Casey Ball and Madeline Mayer for excellent research assistance. The opinions expressed and any mistakes made in this chapter are the author's alone.

1. For citations to those calling for reform, see Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 Cardozo L. Rev. 1, 1–4 (2010); and Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 65–66 (2009).

The most interesting and potentially influential opposition to mandatory minimums has come from government officials and political conservatives. At various times in their careers, the previous four presidents have all doubted the wisdom of long mandatory sentences. Current and former members of Congress, several attorneys general and other high-level law enforcement officials, and even a former "drug czar" have disputed the justice of mandatory minimums. In addition, conservative commentators and organizations (e.g., the American Conservative Union and Americans for Tax Reform) have called for the review of mandatory minimums. Some opinion polls even suggest that opposition is growing within the general public.[2]

Nonetheless, the reform or elimination of mandatory minimums may face long-standing political hurdles. Even during periods of low crime rates, the public has expressed fear of victimization and a belief that criminals were not receiving harsh enough punishment. Lawmakers have responded in kind with new crimes and stiffer penalties, including mandatory sentencing statutes. Conversely, reform proposals have carried a career-ending risk for politicians, who could be labeled "soft on crime" by allegedly providing the means for dangerous criminals to escape with lenient sentences. This political dynamic has stymied previous efforts to reform mandatory minimums. In fact, the laws remained politically popular well into the new millennium. As one U.S. Attorney noted in 2007, "[E]very Administration and each Congress on a bipartisan basis has … supported mandatory minimum sentencing statutes for the most serious of offenses."[3] Moreover, recent rumblings by the U.S. Department of Justice suggest a counter-movement is afoot in favor of federal mandatory minimums.[4]

So although there is reason for hope in some reforms to mandatory minimums, further change will require concerted, broad-based, and well-informed support. This chapter provides the basic background on mandatory minimum sentences and some of the principal arguments for their reform. The

2. For instance, one survey found that a majority of those polled opposed mandatory minimums for nonviolent offenses and stated that they would vote for a congressional candidate who supports ending such sentences. *See* Fams. Against Mandatory Minimums, Omnibus Survey (2008), http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf; *see also* Luna & Cassell, *supra* note 1, at 3 n.8.

3. Richard B. Roper, *Mandatory Sentencing*, 19 Fed. Sent'g Rep. 351, 352 (2007).

4. *See, e.g.*, Rebecca R. Ruiz, *Sessions to Toughen Rules on Prosecuting Drug Crimes*, N.Y. Times (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html?_r=0; Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, Wash. Post (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.5be32846d997.

criticisms of mandatory minimums are long-standing and well-documented; they should be known to any policymaker with the ability to shape these laws.

I. BACKGROUND

Enacted by statute, mandatory minimums set the lower limits for sentencing particular offenses and particular offenders. If a defendant is convicted of a given crime, his offense meets some criterion, or he has a certain criminal history—typically measured by objective factors, such as the quantity of drugs possessed, the presence of a firearm, or the number of prior felony convictions—then he must be sentenced to at least the legislatively prescribed prison term. The sentencing judge has no discretion to impose a lesser term (though she may have the authority to dole out a longer sentence).

To be clear, this chapter is not concerned with every conceivable law that, in theory, might be classified as a mandatory minimum. After all, every sentencing statute that requires incarceration is, in some sense, a "mandatory minimum"—even if the underlying crime is a misdemeanor carrying a compulsory punishment of, say, one day in jail. This chapter focuses instead on felonies with mandatory terms usually measured in years of imprisonment. Admittedly, there is a certain pedigree to such sentencing schemes. Congress enacted the first batch of mandatory minimums in the late 18th century,[5] and new mandatory minimums have been added over the ensuing two centuries, both in the federal and state systems. Until recent times, however, such laws were enacted only occasionally and did not target entire classes of crimes.[6]

The modern rise of mandatory sentencing can be traced to an increasing punitiveness in the American approach to criminal justice. For instance, scholars have argued that U.S. crime-control policy has been shaped by a series of "moral panics," where intense outbursts of emotion impede rational deliberation, lead individuals to overestimate a perceived threat and to demonize a particular group, and thereby generate a public demand for swift and stern government action.[7] Politicians have exploited citizen anxiety over crime and security, best exemplified by the declaration of a "war" on crime (or drugs or, most recently, terrorism), such that the United States now governs through crime.[8] Moreover,

5. *See* U.S. Sent'g Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 7–9 (2011) [hereinafter 2011 Special Report].

6. *See* U.S. Sent'g Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 6 (1991) [hereinafter 1991 Special Report].

7. *See* Michael Tonry, Thinking About Crime: Sense and Sensibility in American Penal Culture ch. 4 (2004).

8. *See* Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (2007).

scholars agree that the media portrayal of crime increases the public's demand for punitive policies—which, in turn, provides an incentive for lawmakers to create new crimes and increase punishments in order to be seen as "tough on crime," a time-tested way to win an election.

This understanding helps explain the rise and persistence of mandatory minimums. Their enactment often does not involve "any careful consideration" of the ultimate effects, Chief Justice Rehnquist once noted. Instead, mandatory minimums "are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'"[9] Consider, for instance, the enactment of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968. The legislation was a response to public fear over street crime, civil unrest, and the murder of Martin Luther King, Jr. The day after the assassination of Robert F. Kennedy, § 924(c) was proposed as a floor amendment and passed that same day with no congressional hearings or committee reports, only a speech by the amendment's sponsor about its catchphrase goal "to persuade the man who is tempted to commit a federal felony to leave his gun at home."[10] Since then, Congress has amended the law several times and converted it into one of the nation's most draconian punishment statutes. Under § 924(c), possessing a firearm during a predicate crime, including any drug offense, carries a 5-year mandatory minimum sentence. Any additional violation results in a 25-year mandatory minimum sentence, where each violation must be served consecutively (i.e., one after the other).

Another example comes from the passage of the Anti-Drug Abuse Act of 1986, which created a regime of mandatory minimum sentences of 5 or 10 years' imprisonment based on the type and amount of drug involved.[11] Among other things, the legislation produced a 100:1 ratio of crack to powder cocaine penalties. For instance, trafficking 50 grams of crack cocaine (less than 2 ounces) and trafficking 5,000 grams of powder cocaine (approximately 11 pounds) resulted in the same 10-year mandatory minimum sentence. A driving force behind the law was the media frenzy and moral panic over crack cocaine following the overdose death of basketball star Len Bias.[12] The bill was pushed forward in a headlong, result-oriented surge, and enacted without hearings or input from experts. Some lawmakers conceded that the legislation attempted to appease an electorate that had become hysterical over an alleged epidemic of

9. William H. Rehnquist, *Luncheon Address (June 18, 1993), in* U.S. Sent'g Comm'n, Drugs and Violence in America 283, 287 (1993).

10. 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff).

11. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

12. *See* Luna & Cassell, *supra* note 1, at 25–26.

crack cocaine, which was fed in part by inflammatory claims about the drug. At the height of the Bias incident, a *Washington Post* editorial gibed that in the prevailing *can-you-top-this* environment, "an amendment to execute pushers only after flogging and hacking them" might have been enacted by Congress.[13] Ironically, it was later revealed that Bias died from ingesting powder cocaine, not crack.[14] But by then, it didn't matter. Indeed, Congress would create a 5-year mandatory minimum sentence for simple possession of 5 grams of crack cocaine, meaning that about a teaspoon of crack possessed for personal use would result in a half-decade term in federal prison.[15] Congress was not alone, however, as many states would adopt laws codifying dramatic sentencing disparities between crack and powder cocaine.[16]

Still another example is provided by get-tough recidivist statutes, epitomized by the so-called "three strikes and you're out" laws. Although the basic concept—increasing the punishment for repeat offenders—has existed for centuries in law, the ferocity of modern recidivist statutes is a relatively recent development. Under these laws, an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies or "strikes." Pursuant to California's law, for instance, an offender with one prior serious or violent felony conviction must receive twice the sentence otherwise prescribed for his current felony conviction. As originally enacted, the law required a minimum sentence of 25 years to life for a felony conviction where the offender had at least two prior serious or violent felony convictions, even if the current felony was neither serious nor violent.[17]

In 1993, the underlying bill was stalled in committee and appeared unlikely to receive even a general legislative vote, until a single harrowing event captured the media's attention and the public's imagination: the kidnapping and murder of 12-year-old Polly Klaas.[18] The story horrified not only the victim's hometown of Petaluma, California, but also the entire country, receiving national news coverage and stimulating a surge in public fear of crime and violence, all in spite of declining crime rates. When the story broke that the killer had an extensive

13. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 Fed. B. News & J. 158, 159 n.30 (1993) (quoting editorial).

14. *See, e.g.*, Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, Bos. Globe, July 5, 2006, at 7.

15. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

16. Nicole D. Porter & Valerie Wright, The Sentencing Project, Cracked Justice 2 (2011).

17. *See* Cal. Penal Code § 667 (West 1994) (codified legislation); Cal. Penal Code § 1170.12 (West 1994) (codified ballot initiative).

18. *See* Erik Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. Jefferson L. Rev. 1, 3–7 (1998) (describing background of three strikes law).

rap sheet, California lawmakers raced to revive the anti-recidivist proposal and expressed their adamant support for it. Many used the incident and the ensuing public fear to their political advantage, making "three strikes" the catchphrase of choice during the 1994 campaign. No politician dared oppose the law. One state senator confessed, "I don't think we have any choice [but to pass it]," while another candidly admitted, "I'm going to vote for these turkeys because constituents want me to."[19] Other states have passed harsh criminal laws in similar contexts, where politicians see a vote against such laws as an act of political suicide. Some of these laws have created or toughened mandatory minimums in the wake of horrifying crimes against sympathetic victims. These statutes can be both well-intentioned and shortsighted, as lawmakers respond to shocking fact-patterns by enacting overly broad sentencing provisions without considering the ultimate consequences.

The last years of the 20th century did witness at least a few acts of moderation. In 1994, for instance, Congress created a so-called "safety valve" in recognition that, for some offenders "who most warrant proportionally lower sentences" and "are the least culpable" by definition, "mandatory minimums generally operate to block the sentence from reflecting mitigating factors."[20] The safety valve allows federal judges to go below an otherwise applicable mandatory minimum sentence in low-level drug cases involving essentially nonviolent, first-time offenders who have disclosed all relevant information to the government.[21] Although applicable only to certain drug crimes and criminals,[22] the safety valve is commonly seen as a successful (albeit limited) means of preventing unjust punishments without hampering the general objectives of sentencing.

In the new millennium, there have been even more promising signs for those who oppose mandatory minimums. In August 2010, President Obama signed into law the Fair Sentencing Act, which reduced the sentencing disparity between crack and powder cocaine offenses.[23] In particular, the law eliminated the mandatory minimum for simple possession of crack cocaine—the first

19. *Id.* at 5 n.37.

20. H.R. Rep. No. 103-460 (1994). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (creating safety valve); U.S. Sentencing Comm'n, Guidelines Manual § 5C1.2 (2016) (incorporating safety valve into federal sentencing guidelines).

21. *See* 18 U.S.C. § 3553(f).

22. *See, e.g.*, U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics tbl.44 (2016) (safety valve employed in 13.7% of all drug cases where a mandatory minimum would have applied).

23. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

time a federal mandatory minimum had been repealed since the Nixon administration—and it reduced the crack/powder disparity, from 100:1 to 18:1, by upping the required amount of crack cocaine to trigger a mandatory sentence.[24] The law received broad bipartisan support, including the backing of conservative lawmakers and commentators, as well as prominent law enforcement organizations. At a policy level, the Justice Department issued memoranda instructing federal prosecutors that they need not always seek the harshest possible sentences;[25] that they should avoid excessive mandatory penalties for low-level, nonviolent drug offenses;[26] and that prosecutors should not use a recidivist enhancement to extract plea bargains.[27] In addition, President Obama commuted over 1,700 federal sentences—more than any president in U.S. history—with the vast majority of the commutations involving drug offenders, many of whom were imprisoned pursuant to mandatory minimums.[28]

Changes to mandatory sentencing laws and policies have also occurred at the state level. Since the turn of the millennium, some two dozen American jurisdictions have enacted some kind of reform to their mandatory minimum laws.[29] In November 2012, for instance, California voters overwhelmingly adopted Proposition 36—the Three Strikes Reform Act—a ballot initiative that modified the most severe aspect of the state's recidivist law. With a few exceptions, California's three-strikes statute now requires a sentence of 25 years to life only when a defendant's current conviction is for a serious or violent

24. In other words, it now takes 28 grams of crack cocaine to trigger a 5-year mandatory sentence and 280 grams of crack cocaine to generate a 10-year mandatory sentence.

25. *See* Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010).

26. *See* Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to the United States Attorneys & Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

27. *See* Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to Department of Justice Attorneys, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014).

28. For a discussion of clemency and its reform, see Mark Osler, "Clemency," in the present Volume.

29. *See* Fams. Against Mandatory Minimums, Recent State-Level Reforms to Mandatory Minimum Laws (2016), http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf; *Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States*, Pew Charitable Trusts (Jan. 22, 2016), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment; Ram Subramanian & Ruth Delaney, Vera Inst. of Just., Playbook for Change? States Reconsider Mandatory Sentences (2014).

felony. The Three Strikes Reform Act also allows a court to reduce the term of imprisonment for an inmate sentenced under the prior regime but whose third strike was not a serious or violent felony.

These recent changes provide reason for hope among reformers. The political norm that favors more crimes and harsher punishments, including mandatory minimums, may turn out to be a mile wide but only an inch deep. In fact, we may be reaching a tipping point in criminal justice as evidenced by the growing ranks of reform advocates. As mentioned at the outset, however, it may still be possible to paint a legislator who votes to repeal mandatory minimums as being "soft on crime." There may even be a counter-reform movement brewing among some law enforcement officials, epitomized by the Justice Department's recent policy reversal that now requires federal prosecutors to pursue the most severe possible punishment, "including mandatory minimum sentences."[30] Reform advocates need to be well-informed on the arguments for and against mandatory sentencing statutes, beginning with claims grounded in the philosophy of punishment.

II. PUNISHMENT THEORY

Generally speaking, theories of punishment can be separated into two philosophical camps: consequentialist (or teleological) theories and non-consequentialist (or deontological) theories. The approaches are distinguished by their focus and goals. Consequentialist theories are forward-looking, concerned with the future consequences of punishment. Nonconsequentialist theories are backward-looking, interested solely in past acts and mental states.

When it comes to mandatory minimums, discussion of these theories is not merely an academic exercise. Punishment philosophy informs the practice of sentencing, as codified in the penal law or administered by criminal justice actors, and the transition from theory to practice can produce troublesome consequences in the real world. Scholars have suggested that mandatory minimum sentences are part of "ominous trends in our penal practices,"[31] stemming, at least in part, from politicians co-opting punishment theories to rationalize seemingly irrational punishment systems.

30. Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017).

31. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801, 1839 (1999); *see also* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. Rev. 1751 (1999); Markus D. Dubber, *Recidivist Statutes as Arational Punishment*, 43 Buff. L. Rev. 689 (1995).

A. RETRIBUTION

The best-known nonconsequentialist rationale for the criminal sanction, (deontological) retributivism, often conceives of punishment as "just deserts"—an offender deserves to be punished because of his moral blameworthiness. Under this theory, moral blameworthiness may be seen as a function of an offender's subjective state of mind, the wrongful nature of his acts, and the harm he has caused. Retributivism thereby incorporates limiting principles on systems of criminal justice. Among other things, penalties must be based on the depravity of the offense and not merely the danger posed by the offender. Retributivism does not advocate disproportionate punishment based on a heightened risk of recidivism alone. More generally, all theories of retribution require that punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.[32] Indeed, the notion of proportionality between crime and punishment expresses a common principle of justice, a limitation on government power that has been recognized throughout history and across cultures,[33] and a precept "deeply rooted and frequently repeated in common-law jurisprudence."[34]

Admittedly, the principle of proportionality raises difficult issues in sentencing. In measuring the gravity of an offense for proportionality analysis, one might look to, among other things, "the harm caused or threatened to the victim or society."[35] Although harm is a notoriously thorny idea,[36] most agree that the basic criminal harms involve acts or threats of physical violence and non-consensual or fraudulent deprivations of others' property.[37] The issue of proportionality might also be informed by comparative analysis, such as whether the sentence in a given case exceeds that for far more serious crimes and criminals.

According to proponents of mandatory minimums, those who are sentenced under these laws—purportedly, high-level offenders who perpetrate violent and serious crimes—can only be assured of receiving their just deserts through

32. *See generally* Andrew von Hirsch & Andrew Ashworth, Proportionate Sentencing: Exploring the Principles (2005).

33. *See Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent'g Comm'n* 1 n.3 (2010) (statement of Erik Luna), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Luna.pdf.

34. Solem v. Helm, 463 U.S. 277, 284–85 (1983).

35. *Id.* at 288–93; *see also* Rummel v. Estelle, 445 U.S. 263, 275 (1980).

36. *See generally* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology 109 (1999).

37. *See, e.g.*, Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy 1 (2007).

long, compulsory sentences. Few retributivists would balk at a life sentence for a serial murderer, for instance, and most mandatory minimums imposed for serious crimes of violence (e.g., forcible rape) will fall within the rough boundaries of deserved punishment.[38] The problem is that mandatory minimum statutes can be grossly overinclusive. In enacting such statutes, lawmakers tend to imagine an exceptionally serious offense and set the mandatory minimum they consider fitting for a particularly egregious offender. But they do not take into consideration a far less serious crime or less culpable criminal who nonetheless might be sentenced under the law.[39] Mandatory minimums eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call for a below-minimum sentence. For this reason, mandatory minimums are unaffected by proportionality concerns and can pierce retributive boundaries with excessive punishment.

Consider, for instance, the problems that have arisen under certain recidivist laws, where an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies. Such a lengthy sentence for sometimes trivial offenses—life imprisonment for a three-time nonviolent larcenist,[40] for instance, or a 25-year to life sentence for petty theft by a recidivist[41]—proves almost impossible to reconcile with traditional conceptions of retribution. The same is true of mandatory minimum sentences under 18 U.S.C. § 924(c). In very discrete situations, the crime's low predicates of any drug and a firearm, and the high penalties that ensue—a 5-year mandatory sentence for the first count and 25-year sentences for each subsequent count—might be justifiably employed against, say, a brutal drug lord or the occasional dictator who turns his country into a narco-state. But when applied to the vast majority of offenders, low-level drug dealers who neither threaten violence nor cause injury, the results can be grotesque. In one § 924(c) case, for instance, a defendant received a 55-year term of imprisonment for low-level marijuana distribution while possessing (but not brandishing or using) a firearm.[42] This punishment exceeded the sentence for, among others, an aircraft hijacker, a second-degree murderer, a kidnapper, and a child rapist.

38. *See, e.g.*, The Constitution Project, Principles for Design and Reform of Sentencing Systems: A Background Report 26 (2010), http://www.constitutionproject.org/pdf/34.pdf.

39. *See, e.g.*, 2011 Special Report, *supra* note 5, at 92.

40. *See* Rummel v. Estelle, 445 U.S. 263 (1980).

41. *See* Ewing v. California, 538 U.S. 11 (2003) (25-year-to-life sentence for defendant convicted of stealing three golf clubs, worth $399 apiece); Lockyer v. Andrade, 538 U.S. 63 (2003) (same for theft of $150 worth of videotapes).

42. *See* United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004).

In fact, the sentence was more than twice the federal sentence for a kingpin of a major drug-trafficking ring in which a death results, and more than four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction.[43]

Given such cases, it is unsurprising that many judges, and even some prosecutors, believe that mandatory minimums are too severe and can result in disproportionate punishment.[44]

B. CRIME PREVENTION

As mentioned above, consequentialist theories are forward-looking in their focus on the future consequences of punishment. The primary consequentialist theory—utilitarianism—imposes criminal penalties only to the extent that social benefits outweigh the costs of punishment. In particular, the imposition of criminal sanctions might: discourage the offender from committing future crimes (specific deterrence); dissuade others from committing future crimes (general deterrence); or disable the particular offender from committing future crimes (incapacitation).[45]

According to their advocates, mandatory minimums both deter and incapacitate offenders. With respect to deterrence, mandatory minimum sentences are sometimes justified as sending an unmistakable message to criminals. Some offenses require certain minimum punishments, advocates claim. They argue that because of the wide diversity of views on the appropriate level of punishment for offenders, legislators—not judges—are in the best position to make sentencing determinations.[46] The certain, predictable, and harsh sentences forewarn offenders of the consequences of their behavior

43. *See id.* at 1244–46, 1258–59. In the interest of full disclosure, I served as appellate counsel in the *Angelos* case and assisted in efforts to achieve Mr. Angelos's eventual release. *See, e.g.*, Erik Luna & Mark Osler, *Mercy in the Age of Mandatory Minimums*, U.S. News & World Rep. (Aug. 5, 2016), https://www.usnews.com/opinion/articles/2016-08-05/president-obamas-clemency-initiative-doesnt-go-far-enough.

44. *See, e.g.*, 2011 Special Report, *supra* note 5, at 93–94.

45. Another utilitarian goal is rehabilitation, that punishment can reform a particular offender against committing future crimes. *See* Francis T. Cullen, "Correctional Rehabilitation," in the present Volume. As far as I know, no plausible argument has been made that mandatory sentencing serves rehabilitation.

46. For a discussion on some of the arguments in defense of mandatory minimums, see Evan Bernick & Paul J. Larkin, Jr., The Heritage Foundation, Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms 4 (2014).

upon apprehension and conviction.[47] Proponents contend that mandatory minimums also incapacitate the most incorrigible criminals and thereby prevent them from committing crime.[48]

None of these claims receives robust empirical support, however, as most researchers have rejected crime-control arguments for mandatory sentencing laws. There is little evidence that lengthy prison terms serve specific deterrence. Rather, imprisonment either has no effect on an inmate's future offending or perhaps even increases recidivism.[49] This is hardly surprising given the absence of meaningful rehabilitative programs for inmates and, worse yet, the deplorable conditions of incarceration facilities.[50] It has often been argued that prisons serve as "colleges for criminals," where offenders are psychologically damaged by incarceration, for instance, or learn new anti-social skills from their criminally involved peers, and thus come out more likely to recidivate. They may also be at risk of reoffending because of imprisonment's social and economic consequences, such as the difficulties of obtaining gainful, lawful employment after release.[51]

As for general deterrence, research has largely failed to show that mandatory minimums decrease the commission of crime, and some studies suggest that such punishment schemes may even generate more serious crime.[52] Regardless, any deterrence-based reduction in crime is far outweighed by the increased

47. *See, e.g.*, Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. Legal Stud. 159 (2002) (finding that California's three-strikes law prevented 8 murders, almost 4,000 aggravated assaults, over 10,000 robberies, and more than 384,000 burglaries in its first two years of operation). For a refutation of these findings, see, for example, Tonry, *Mostly Unintended Effects*, *supra* note 1, at 99–100.

48. *Cf.* Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & Econ. 551 (2009) (finding that, on average, "the social benefit of the crimes averted by incapacitation is slightly higher than the marginal cost to the state of imposing a 1-year sentence enhancement"). As discussed below, any incapacitative benefit from mandatory minimums is likely to be modest and outweighed by other considerations.

49. *See* Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 Crime & Just. 115 (2009); Michael Mueller-Smith, The Criminal and Labor Market Impacts of Incarceration (Aug. 18, 2015) (working paper), http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf.

50. *See* Sharon Dolovich, "Prison Conditions," in the present Volume.

51. *See* Gabriel J. Chin, "Collateral Consequences," in the present Volume; Susan Turner, "Reentry," in the present Volume.

52. *See, e.g.*, Tomislav V. Kovandzic, John J. Sloan & Lynne M. Vieraitis, *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980-1999)*, 1 Criminology & Pub. Pol'y 399 (2002); Thomas B. Marvell & Carlisle Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. Legal. Stud. 89 (2001).

costs of incarceration from long mandatory sentences.[53] Again, this is not a surprising conclusion. If we assume that criminals act rationally—pursuant to an assessment of the advantages and disadvantages of criminality—the potential cost of committing a particular offense is not, as some politicians maintain, the allowable punishment under law. Instead, it is a mere fraction of the prescribed sanction, given that potential punishment must be discounted by the probability of apprehension and conviction for the given offense.[54] And given that most felony convictions already lead to incarceration, the enactment of mandatory minimums will have only a marginal impact on the certainty of imprisonment.[55]

Besides, criminals are not likely to be well-informed, rational actors in the classic economic model. To begin with, people know very little about criminal justice, including sentencing schemes and severity, and thus are unlikely to be deterred by mandatory minimums.[56] Even assuming someone knows the relevant sentence for a prospective crime, a long mandatory term may be heavily discounted in the mind of a risk-taking offender, who places greater emphasis on immediate gains (e.g., stolen goods in hand) over deferred losses (e.g., punishment extending into the distant future).[57] This may be particularly true of those from deprived socioeconomic or familial backgrounds.[58] In addition, some offenders may commit crime in pursuit of intangible, nonquantifiable ends, such as respect, glory, or attention,[59] while other offenders are driven by

53. *See* Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 134–40, 154–55 (Jeremy Travis et al. eds., 2014); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 231 (2013); 2011 Special Report, *supra* note 5, at 98; Jonathan P. Caulkins et al., Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money? 143–44 (1997); Barbara S. Vincent & Paul J. Hofer, The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings 11–16 (1994); Tonry, *Mostly Unintended Effects*, *supra* note 1, at 90–100. As discussed elsewhere, the most effective deterrent of crime is the certainty of punishment—the likelihood that an individual will be punished if they commit a crime—not the severity of the punishment itself. *See* Daniel S. Nagin, "Deterrence," in the present Volume.

54. *See* Nat'l Research Council, *supra* note 53, at 140; Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. Rev. 1909, 1915–16 (1999).

55. *See* Nat'l Research Council, *supra* note 53, at 133; *see also id.* at 140.

56. *See* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime & Just. 143, 181–84 (2003); Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 Crim. Just. & Behav. 483 (2003).

57. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Legal Stud. 1 (1999).

58. *See* Alfred Blumstein, *Prisons, in* Crime 415 (James Q. Wilson & Joan Petersilia eds., 1994).

59. *See, e.g.*, Jack Katz, Seductions of Crime: Moral and Sensual Attractions in Doing Evil 80–110 (1988); Elijah Anderson, *The Code of the Streets*, Atl. Monthly, May 1994, at 81, 81–94.

"impulsive, irrational, or abnormal" desires.[60] These individuals are undeterred by the existence of mandatory minimums.

Mandatory minimum sentences are also unlikely to reduce crime by incapacitation,[61] at least given the overbreadth of such laws and their failure to focus on those most likely to recidivate. Among other things, offenders typically age out of the criminal lifestyle, usually in their 30s,[62] meaning that long mandatory sentences may require the continued incarceration of individuals who would not be engaged in crime. In such cases, the extra years of imprisonment will not incapacitate otherwise active criminals and thus will not result in reduced crime. Instead, prisons become geriatric facilities.[63] Although selective incapacitation—choosing offenders based on certain predictors of future criminality[64]—may work in discrete circumstances, mandatory minimums sentences work as meat cleavers, not scalpels, and thus generate high levels of false positives (i.e., incapacitated offenders who would not otherwise be committing crimes). Moreover, certain offenses subject to mandatory minimums can draw upon a large supply of potential participants. With drug organizations, for instance, an arrested dealer or courier may be quickly replaced by another, eliminating any crime-reduction benefit.[65] More generally, any incapacitation-based effect from mandatory minimums was likely achieved years ago, due to the diminishing marginal returns of locking more people up in an age of mass incarceration.[66]

Based on the foregoing arguments and others, most scholars have rejected crime-control arguments for mandatory sentencing laws.[67] By virtually all measures, there is no reason to believe that mandatory minimums have any meaningful impact on crime rates.[68]

60. James Q. Wilson, Thinking About Crime 118 (rev. ed. 1983); *see also* Nat'l Research Council, *supra* note 53, at 133–34; Kleiman, *supra* note 54, at 1917 ("Repeat offenders tend to be reckless and impulsive.").

61. *See generally* Shawn D. Bushway, "Incapacitation," in the present Volume.

62. *See, e.g.*, David P. Farrington, *Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues*, 41 Criminology 221 (2003).

63. For an interesting case study, see Michael Millemann et al., "Releasing Older Offenders," in the present Volume.

64. *See* John Monahan, "Risk Assessment in Sentencing," in the present Volume.

65. *See, e.g.*, Tonry, *Mostly Unintended Effects*, *supra* note 1, at 102.

66. *See* Nat'l Research Council, *supra* note 53, at 143; Bushway, *supra* note 61.

67. *See* Nat'l Research Council, *supra* note 53, at 156.

68. *See* Tonry, *Mostly Unintended Effects*, *supra* note 1, at 100.

III. SENTENCING POWER

A. AGENCY COSTS AND PLEA BARGAINING

Despite the foregoing problems with mandatory minimums, the executive branch may have an interest in retaining or even expanding these laws. Perhaps the most perverse example comes from prison-guard unions, which have sponsored and lobbied for harsher sentencing laws.[69] By incarcerating more criminals for longer periods of time, mandatory minimums certainly serve the guards' professional interests in guaranteed employment. California's "three-strikes law sponsor is the correctional officers' union," Justice Kennedy emphasized, "and that is sick!"[70] Police and prosecutors also have an interest in get-tough policies, namely, the expansion of their power. The more crimes on the books and the harsher the punishments, the more power that police and prosecutors can exercise throughout the criminal process.[71] For instance, harsh sentences bound by mandatory minimums provide the government enormous leverage to extract plea bargains and information from defendants, leading to more convictions and closed cases.

This is, indeed, the best argument in favor of mandatory minimums. The threat of long, obligatory sentences tends to encourage plea bargaining, which, if successful, averts the substantial costs associated with trial. In fact, over 90% of all prosecutions end by guilty plea,[72] with mandatory minimum sentences helping to keep that figure extremely high. Moreover, the possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders. Low-level participants can avoid mandatory minimums by informing on bigger players, or so the argument goes, thereby allowing prosecutors to move up the chain of command. Certainly, many prosecutors believe that the threat of a long prison term is essential to securing cooperation, and this belief likely plays a very strong role in the tendency of prosecutors to advocate for new mandatory sentencing provisions and against the repeal or reform of existing mandatory minimums.

---

69. *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. Crim. L. & Criminology 395, 436 n.242 (1997).

70. Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. Times, Feb. 4, 2010.

71. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

72. *See, e.g.*, Lindsey Devers, Bureau of Just. Assistance, Plea and Charge Bargaining: Research Summary 1 (2011).

Some organized criminal enterprises may be impossible to unravel and eventually put out of business, supporters argue, unless the government has the leverage provided by severe punishment. Mob prosecutions provide a standard example, where much information and trial evidence might be unattainable without the stick of long sentences (and the carrot of immunity grants). The same obstacles may apply in other forms of concerted criminality, from violent street gangs to sophisticated white-collar offenders. Aside from the pragmatic benefits, a defendant might earn a form of moral credit through his willingness to cooperate with law enforcement. The providing of information and the acceptance of responsibility may demonstrate genuine remorsefulness on the part of the offender and a willingness to help redress the harm that he may have caused.

To be clear, plea bargaining is not some unmitigated good. Several years ago, a federal judge declared that the U.S. Justice Department was "so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen."[73] When individuals demand their day in court or plea negotiations fail, "the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury."[74] More recently, a report by Human Rights Watch documented how prosecutors threaten charges involving heavy mandatory minimums unless a defendant pleads guilty to charges that do not carry a mandatory sentence.[75]

There is a genuine question as to the propriety of extracting information and guilty pleas through the threat of mandatory minimums.[76] Such practices impose a sort of "trial tax" on defendants who exercise their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees—the tax being the mandatory minimum sentence that otherwise would not have been imposed. Moreover, the statistics seem to challenge any categorical assertions of government necessity.[77] In the federal system, in fact, the rate of

73. United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

74. *Id.* at 264.

75. *See* Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty (2013); *see also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U.L. Rev. 63, 67–85 (2012).

76. *See* 2011 Special Report, *supra* note 5, at 99.

77. *See id.*; Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 826 (2017) ("The proportion of drug offenders convicted of an offense carrying a mandatory minimum penalty is now the lowest it has been since 1993. Yet despite the fears of some, defendants are pleading guilty at the same rates as they were before … and cooperation rates have at least been stable, and may have even slightly increased.").

cooperation in mandatory minimum cases is comparable to the average in all federal cases.[78] As it turns out, most recipients of federal drug minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels.[79] "Were there no mandatories, defendants now affected by them would remain subject to all the pressures that face every criminal defendant," Professor Michael Tonry has noted. "They would simply no longer face out-of-the-ordinary—and therefore unfair—pressures resulting from the rigidity and excessive severity of mandatory minimum sentencing laws."[80]

B. SEPARATION OF POWERS

Mandatory sentencing laws are not only unfair—they distort the legal framework. In particular, mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors, who may pre-set punishment through creative investigative and charging practices.[81] Undoubtedly, law enforcement is well-intentioned in many cases. But it would be a mistake to assume that good faith will prevent the misuse of mandatory minimums. Serious and violent offenders may have served as the inspiration for mandatory minimums, but, as mentioned earlier, the statutes themselves are not tailored to these criminals alone and instead act as grants of power to prosecutors to apply the laws as they see fit, even to minor participants in nonviolent offenses.

Expressing a view held by many jurists, Justice Kennedy described as "misguided" the "transfer of sentencing discretion" from judges to prosecutors, "often not much older than the defendant."

> Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.[82]

78. *See* Luna & Cassell, *supra* note 1, at 19 n.73.

79. *See, e.g.*, U.S. Sent'g Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 20–21, 85 (2007), http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter Cocaine and Federal Sentencing].

80. Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67 n.1.

81. *See infra* notes 102–03 and accompanying text.

82. Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

Prosecutors and judges occupy distinct but overlapping roles in the criminal justice system. The prosecutor is empowered with the discretion to instigate charges against a defendant, amass evidence of crime, and seek convictions as an adversary in the trial process. It has long been held that the prosecutor is more than an ordinary party, however, given the power he wields and the principal he represents (i.e., the citizenry). Still, prosecutors are influenced by the ordinary human motivations that may at times cause a loss of perspective—path dependence, career advancement, immodesty, and occasional vindictiveness[83]—leading to the misapplication of mandatory minimums. In most cases, however, no external check prevents the imposition of an unjust mandatory term.

By contrast, the judge functions as a neutral arbiter and dispassionate decision-maker in individual cases. The sentencing judge is the one neutral party in the courtroom who benefits from neither harsh punishment nor lenient treatment; he has no vested interest in the outcome of a case other than that justice be done. Indeed, trial court judges are in the best position to make the highly contextual, fact-laden decision about the proper punishment in particular cases. They are familiar with the environment in which offenses occur; they have been involved in every part of the court process; they have seen the evidence firsthand; and they have been in a position to evaluate the credibility of each witness and each argument. And as Justice Kennedy mentioned, trial judges have the benefit of experience in reasoned, transparent discretion, making them the precise individuals who should decide the complicated, fact-specific issues of sentencing. But with mandatory minimums, judges are denied this authority as sentences inevitably follow from prosecutorial choices in charging.

But the shift in power is more than misguided—it implicates the separation-of-powers doctrine. Liberal society has long been concerned with arbitrary, oppressive authority stemming from the accumulation of too much power in too few hands. The Framers' solution was to create a system of checks and balances, distributing power across government institutions in a manner that prevents any entity from exercising excessive authority and sets each body as a restraint on the others. Along these lines, the U.S. Constitution (and, indeed, every state government) employs a separation of powers among co-equal branches—the legislative, executive, and judicial—each having "mutual relations" in a series of checks and balances.[84]

83. *See, e.g.*, Luna & Cassell, *supra* note 1, at 26 n.115.
84. The Federalist No. 51 (James Madison).

As a matter of history and experience, an autonomous court system under the guidance of impartial jurists is considered the most indispensable aspect of American constitutional democracy. An independent judiciary was meant to protect individuals from the prejudices and heedlessness of political actors and the public.[85] To check such abuses, the courts were historically entrusted with certain fundamental legal decisions, including dispositive criminal justice issues that demand evenhanded judgment. Among these quintessential judicial functions is the imposition of punishment on another human being. "Traditionally," noted the U.S. Supreme Court in 1993, "sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant."[86] This eclectic approach attempted to accommodate the diverse rationales for punishment—from retributive principles of just deserts to consequential considerations of deterrence, rehabilitation, and incapacitation—thus allowing trial judges to craft a proper sentence based on an array of factors and legitimate conceptions of justice.

Indeed, the Supreme Court has described this judicial tradition as "uniform and constant," where sentencing judges "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[87] As such, there is "wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,"[88] drawing upon the judge's familiarity with the case and face-to-face interaction with the defendant, the victim, and their families. By taking away this authority and giving it to the executive branch, mandatory minimums have undermined not only a fundamental check on law enforcement, but an important tradition in the American criminal justice system. On this point, there appears to be significant support across a broad spectrum of groups that mandatory minimums should be reformed to allow for individualized sentencing by judges.[89]

85. *See, e.g.*, The Federalist No. 78 (Alexander Hamilton).
86. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).
87. Koon v. United States, 518 U.S. 81, 113 (1996).
88. *Id.* at 92.
89. *See, e.g.*, 2011 Special Report, *supra* note 5, at 95.

IV. DISPARITY AND ITS DISCONTENTS

A. DISPARITY AND PUNITIVENESS

Proponents of mandatory minimums often raise the problems with earlier sentencing systems, which were described as "lawless"[90] and a major source of public cynicism. As just mentioned, trial judges traditionally exercised discretion in determining sentences within broad statutory ranges. This discretion purportedly generated intolerable (even unconstitutional) disparities among defendants, with sentences turning on the temperament of a given judge or irrelevant factors such as race and class. Proponents argue that mandatory minimums help eliminate these inequalities by providing uniformity and fairness for defendants, certainty and predictability of outcomes, and a higher level of truth and integrity in sentencing.

Opponents of mandatory minimums sometimes challenge the image of vast disparity in punishment prior to the enactment of determinate sentencing.[91] But even accepting the historical accuracy of the conventional narrative, mandatory minimums may have done little to eliminate punishment discrepancies among similarly situated defendants. Inconsistent application of mandatory minimums has only exacerbated disparities, opponents argue, expanding the sentencing differentials in analogous cases. Indeed, mandatory minimums tend to magnify disparity through their punitiveness. After all, differences in sentencing matter far more in systems where idiosyncratic judgments produce terms of imprisonment differing by years or even decades, as compared to systems where the eccentricities of decision-makers can only generate differentials of days or months.

In the United States, mandatory minimums are part of a punishment spree of unprecedented proportions. From the mid-1920s to the mid-1970s, the prison population ratio hovered around 100 inmates in state and federal prisons per 100,000 residents, with a low of 79 in 1925 to a high of 137 in 1939. With the U.S. declaring "wars" on crime, drugs, etc., over the past four decades, the rate quintupled to around 500 prison inmates per 100,000 people.[92] A recent report found that "1% of adult males living in the United States were

90. *See* Marvin E. Frankel, Criminal Sentences: Law Without Order (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1 (1972). For a discussion of the prior approach and subsequent reforms, see Douglas A. Berman, "Sentencing Guidelines," in the present Volume.

91. *See, e.g.*, Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 106–12 (1998).

92. *See* Bureau of Just. Stat., U.S. Dep't of Just., Sourcebook of Criminal Justice Statistics Online tbl.6.28.2012, http://www.albany.edu/sourcebook/pdf/t6282012.pdf.

serving prison sentences of greater than 1 year."[93] Since 1980, in fact, the federal prison population has increased tenfold, for instance, while the average federal sentence more than doubled, due in no small part to mandatory minimums.[94] Moreover, empirical work suggests that the U.S. punishment binge is the result of prosecutorial decision-making, particularly the willingness of prosecutors to file felony charges.[95] The United States has become the global incarceration leader with nearly 700 jail and prison inmates for every 100,000 inhabitants and a total custodial population of more than 2.2 million people, constituting almost a quarter of the world's inmates.[96]

All told, America is the single most punitive nation in the Western world. A statistical review of eight Western nations found that "the high U.S. imprisonment rate results primarily from much greater lengths of prison sentence by every punitiveness measure we were able to use—years of imprisonment per recorded crime or conviction, or average sentence length given a commitment—than are imposed in other countries."[97] The U.S. imprisonment rate was also a function of the relatively high probability of imprisonment upon conviction. Comparisons of probable case outcomes further support the exceptional nature of U.S. sentencing. European nations certainly differ as to the likely punishment in standard cases, but those differences can pale in comparison to their collective divergence from U.S. sentences. The social consequences of America's punitiveness are substantial, with some jurisdictions spending more on prison than higher education, and certain areas (especially poor, mostly minority communities) suffering utter devastation from the loss of people, resources, and respect for law.[98]

93. E. Ann Carson & Elizabeth Anderson, Bureau of Just. Stat., U.S. Dep't of Just., Prisoners in 2015, at 8 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf. The report did have some good news, including a decrease in both the U.S. imprisonment rate and the total number of prisoners. *See id.* at 1, 8.

94. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Just., Sourcebook of Criminal Justice Statistics Online tbl.6.57, http://www.albany.edu/sourcebook/pdf/t657.pdf; Pew Charitable Trusts, Prison Time Surges for Federal Inmates (2015), http://www.pewtrusts.org/~/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent'g Rep. 12 (1999).

95. *See* John F. Pfaff, The Causes of Growth in Prison Admissions and Populations (Jan. 23, 2012) (working paper), http://perma.cc/K5QG-LHCQPfaff.

96. *See* Roy Walmsley, International Centre for Prison Studies, World Prison Population List (11th ed., 2016); *see also* Roy Walmsley, *Trends in World Prison Population*, *in* International Statistics on Crime and Justice 153 (Stefan Harrendorf et al. eds., 2010).

97. Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 Crime & Just. 347, 348 (2006).

98. *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 Ohio St. J. Crim. L. 173 (2008).

Through their punitiveness, mandatory minimums have helped America achieve this ignominious status. For instance, criminal law experts in six European nations were queried as to the expected sentence for a first-time offender convicted of selling relatively small amounts of marijuana (8 ounces) and possessing (but not brandishing or using) firearms. The likely punishment in each country was as follows: a sentence of two to four years' imprisonment in England; a one-year sentence or probation in France; a five-year sentence or less in Germany; a fine of € 300-350 in the Netherlands; a three-and-a-half-year sentence or less in Poland; and a one-year sentence or less in Sweden.[99] By comparison, this fact-pattern generated a mandatory minimum sentence of 55 years' imprisonment in an actual federal case prosecuted under 18 U.S.C. § 924(c).[100] Moreover, such a harsh sentence would be at least a theoretical possibility in a few other American jurisdictions. At one point, the U.S. Department of Justice even suggested "some reforms of existing mandatory minimum sentencing statutes are needed … to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population."[101]

B. DISPARITY AND UNIFORMITY

As discussed in the previous section, the source of disparity is manifest: Mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors,[102] which has resulted in troubling punishment differentials among offenders with similar culpability. In truth, mandatory minimums are not mandatory at all, but instead discretionary sentencing laws susceptible to the haphazard and even perverse charging and plea bargaining decisions of prosecutors.[103] These often dispositive decisions are made in a largely opaque process with almost no external oversight.

99. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 Wash. & Lee L. Rev. 1413, 1496–1501 (2010).

100. *See* United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004). *See also supra* notes 42–43 and accompanying text (discussing case).

101. 2011 Special Report, *supra* note 5, at 94 (quoting testimony of U.S. Justice Department representative).

102. *See supra* notes 81–89 and accompanying text.

103. *See* Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67–68; *Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent'g Comm'n* 1 n.3 (2010) (statement of Stephen J. Schulhofer, Professor of Law, N.Y.U. Sch. of Law), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Schulhofer.pdf.

A number of studies have confirmed that mandatory minimums tend to generate disparate sentences among similarly situated offenders.[104] For many commentators, however, the most troubling issue is the appearance, if not reality, of disparities along racial, ethnic, or class-based lines.[105] To be sure, there is an ongoing debate about correlation versus causation; in other words, whether the disproportionate impact of mandatory minimums on minorities might be based on any number of factors other than race or ethnicity. Nonetheless, a relationship has emerged between mandatory punishments and people of color, which can have a profoundly harmful meaning and effect regardless of causation.[106]

Inconsistent application of mandatory minimums has not only exacerbated disparities by expanding the sentencing differentials between analogous cases, it has generated inequality by requiring the same base sentences in patently dissimilar cases. In other words, mandatory minimums have not only fostered *undue disparity* in sentencing, they have created *undue uniformity* by demanding the same punishment for disparate crimes and criminals.[107] Equality in the classical sense requires decision-makers not only to treat like cases alike, but also to treat dissimilar cases differently. It would thus be a violation of equality for relevantly dissimilar offenders to receive analogous sentences, just as it would be for relevantly similar offenders to receive disparate sentences.

Mandatory minimums often violate the idea that different cases should be treated differently by accentuating certain quantifiable variables in fixing punishment. This offers the illusion of equality through the semblance of mathematical objectivity, while disregarding all other information about the defendant and his life. So although mandatory minimums provide equal punishment when certain objects are equal—the existence of a firearm, the quantity of drugs, the number of prior convictions, what have you—this grouping of defendants cannot ensure moral equality: the equal treatment of individuals whose crimes, backgrounds, and prospects are so analogous as to justify identical sentences and, conversely, the unequal (but judicious) treatment of individuals whose crimes, personal histories, and prospects are materially different. Mandatory minimums operate with a sort of *numerical* equality—not unlike the "majestic equality" of the criminal justice system

104. *See, e.g.*, Luna & Cassell, *supra* note 1, at 18 n.70.

105. *See, e.g.*, 2011 Special Report, *supra* note 5, at 101–02; Brennan Ctr. for Just., Racial Disparities in Federal Prosecutions 11 (2010).

106. *See, e.g.*, 2011 Special Report, *supra* note 5, at 101–02; Letter from Pat Nolan et al., to Hon. John A. Boehner, House Minority Leader (May 25, 2010), http://www.famm.org/Repository/Files/BOEHNER%20LETTER.pdf; Erik Luna, *Race, Crime, and Institutional Design*, 66 Law & Contemp. Probs. 183, 183–87 (2003).

107. 2011 Special Report, *supra* note 5, at 90.

described by Anatole France[108]—offering equal punishment for those who are not equal.

Consider, for instance, the so-called "cliff" effect of mandatory minimums that draw seemingly trivial lines with huge consequences.[109] The most striking examples often involve illegal drugs, where offenders face steep cliffs at quantity cutoffs. Someone caught with, say, 0.9 grams of LSD might receive a relatively short sentence—but add on a fraction of a gram and a half-decade in federal prison necessarily follows, with the defendant falling off the metaphorical cliff.[110] Likewise, mandatory minimums can have a "tariff" effect, where some basic fact triggers the same minimum sentence regardless of whether the defendant was, for instance, a low-level drug courier or instead a narcotics kingpin.[111] Perversely, the tariff may be levied on the least culpable members in a criminal episode. Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.[112]

C. MANIPULATION AND ACCURACY

To obtain maximum leverage to extract pleas, law enforcement may engage in a process known as "count stacking" or "charge stacking." For purposes of charging, the government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that then can be stacked, one on top of the other, to produce heavier punishment.[113] This may be particularly troubling when the government procures further crimes through its own actions, as when law enforcement arranges a number of controlled drug buys in order to achieve a lengthy sentence. In multi-defendant cases, there is also an issue of fairness when disparate punishment is the result of a "race to the prosecutor's office," with the defendant who pleads first—sometimes the one who has the savviest or most experienced defense counsel—avoiding a long mandatory sentence.

108. Anatole France, The Red Lily 91 (1894), *quoted in* John Bartlett, Familiar Quotations 550 (Justin Kaplan ed., 1992) ("The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.").

109. *See* 2011 Special Report, *supra* note 5, at 91.

110. *See* 21 U.S.C. § 841(b)(1)(B)(v).

111. *See, e.g.*, United States v. Brigham, 977 F.2d 317 (7th Cir. 1992).

112. *See, e.g.*, 2011 Special Report, *supra* note 5, 99; Cocaine and Federal Sentencing, *supra* note 79, at 20–21, 85.

113. *See, e.g.*, Luna & Cassell, *supra* note 1, at 14.

Moreover, the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are bargainable, from the amount of drugs to the existence of a gun. The participants will figuratively "swallow the gun" to avoid a factual record that would require mandatory sentence.[114] To be sure, these manipulations may appear reasonable in difficult cases by evading excessive sentences demanded under a mandatory minimum. Regardless of benign intent, however, the distortive effect of mandatory minimums on transparency and truth can only undercut the legitimacy of the criminal justice system and its actors. The moral authority of criminal law depends on the perception of both substantive and procedural justice, and a system that allows, if not requires, duplicity tends to breed contempt for the law.[115] A legitimate, properly functioning criminal justice system would not tolerate such deception and instead would demand that the case facts be true, not from some kind of omniscient perspective, but as best as humans can discern.

Due to its opaque nature, prosecutorial decision-making has proven almost impossible to fully understand and reform. Scholars and institutions like the U.S. Sentencing Commission have tried for decades to crack open this "black box" with limited success. Needless to say, mandatory sentencing schemes only aggravate the difficulties in evaluating and improving the prosecutorial function. Worse yet, mandatory minimums may undermine the principal benefit of transparency and truth in the criminal justice system: accurate outcomes. The accumulation of power by prosecutors through severe sentencing laws has resulted in a dramatic shift from trials to plea bargains and the near extinction of acquittals. As a result, some defendants who might have been acquitted at trial are now convicted by plea bargaining, which diminishes the chances of discovering the truth through the trial process and, in exceptional cases, may

114. *See, e.g.*, United States v. Mercer, 472 F. Supp. 2d 1319, 1323 (D. Utah. 2007); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 Roger Williams U. L. Rev. 645, 674–75 (2004).

115. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also* Erik Luna, *Transparent Policing*, 85 Iowa L. Rev. 1107, 1154–65 (2000).

increase the possibility of wrongful convictions.[116] In fact, recent cases have demonstrated how mandatory minimums can generate fabricated testimony and wrongful convictions.[117]

Mandatory minimums may even have a backlash effect, making community members less likely to report suspicious behavior and cooperate with law enforcement out of concern that their neighbors may receive draconian punishment.[118] Likewise, when victims of actual violence notice that their assailants receive shorter terms than imposed on nonviolent offenders via mandatory minimums, the message received is that their pain and suffering is less important than abstract governmental objectives, like winning the "war on drugs."[119] Over the long haul, lay citizens may refuse to cooperate with prosecutors, and conscientious jurors may engage in nullification, not because they believe the defendant to be innocent or the allegations unproven, but out of fear that an unjust sentence will necessarily ensue.[120]

RECOMMENDATIONS

Given the foregoing flaws and others in mandatory sentencing statutes, former U.S. District Court Judge John Martin offered this terse but accurate assessment of mandatory minimums: "They are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea."[121] Here are a few potential reforms to mandatory minimums, roughly ranked from minimalist to maximalist in approach:

1. **Do no (new) harm.** Politicians should not create new mandatory minimum sentencing statutes or expand those currently on the books. Whatever one thinks of the current slate of mandatory minimums, no

116. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 150–54 (2005). Although Professor Wright's study focused on the pre-*Booker* mandatory guidelines, his critique applies with equal force to statutory minimums. *See also* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 164-65, 180 (2014). *Cf.* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013).

117. *See, e.g.*, 2011 Special Report, *supra* note 5, at 97; *see also* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.

118. *See* 2011 Special Report, *supra* note 5, at 99; Schulhofer, *supra* note 103, at 16–18.

119. *See* United States v. Angelos, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004).

120. *See id.* at 1252.

121. Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 Notre Dame J.L. Ethics & Pub. Pol'y 311, 317 (2004).

plausible case can be made that existing statutes are somehow insufficient for law enforcement purposes.

2. **Create court mechanisms to prevent a patently unjust application of mandatory minimums.** One much-discussed reform is the adoption of "safety valve" provisions that permit a judge to sentence a defendant below a mandatory minimum when certain criteria are met. A few states have such provisions to prevent injustices under their mandatory sentencing laws.[122] As mentioned earlier,[123] the federal system also contains a safety valve, although the current version is rather limited and applicable only to certain drug crimes. It should be expanded to be more generally available to defendants who might otherwise receive an excessive prison sentence.[124] Among other things, a safety-valve provision could require that the sentencing court provide specific reasons for employing the provision in a given case, thereby creating a written record that can be examined by an appellate court. A more elaborate vehicle would have juries participate in the determination of whether a mandatory minimum sentence is excessive.[125] For instance, a trial judge could provide the defendant's criminal history and other relevant information to the jury, which would then deliberate and recommend a sentence to the court. If that recommendation were less than the mandatory minimum, the judge could then be authorized (but not required) to impose a sentence below the mandatory term.

3. **Empower correctional or parole authorities to reconsider sentencing length.** Another possible reform would involve a post-incarceration mechanism to reconsider the length of prisoners serving long mandatory minimum sentences.[126] This could be done by empowering (or reviving) a parole commission to evaluate current prison sentences under mandatory minimums and consider whether it makes sense to continue to incarcerate long-serving inmates. A somewhat similar approach would be to enact or expand so-called "compassionate release" provisions that exist in several jurisdictions. The existing federal provision authorizes the U.S. Bureau of Prisons to make a motion to the district court for the release of a prisoner

122. *See* Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, The State Factor, Mar. 2016, at 6-7, https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf.

123. *See supra* notes 20–22 and accompanying text.

124. *See* Luna & Cassell, *supra* note 1, at 61–63.

125. *See id.* at 78–80.

126. *See id.* at 81–82; Tonry, *Mostly Unintended Effects*, *supra* note 1, at 105–06.

who is at least 70 years old and has served at least 30 years in prison, or for other "extraordinary and compelling reasons."[127] The Bureau of Prisons has interpreted this authority very narrowly, however, effectively limiting release to those with terminal illnesses or severely debilitating and irreversible conditions. Congress could expand this authority to include additional circumstances where the bureau could use parole or other forms of discretionary release to discharge prisoners who have already served significant sentences pursuant to mandatory minimums.[128]

4. **Limit the scope and impact of mandatory minimums.** The problematic cases involving mandatory minimums can be mitigated by narrowing their reach and effect. Obviously, the length of mandatory minimums could be reduced, with, for instance, a troubling 5-year minimum sentence scaled back to a 1-year mandatory term. Such reductions could be done discretely to particular statutes or across the board to all mandatory minimums. Alternatively, mandatory minimums could be converted into presumptive sentences, where judges have the authority to issue a lower sentence so long as they provide good reasons as to why the presumption should not apply in a given case.[129] Mandatory sentencing statutes could also be limited in scope to avoid their application in cases of less serious crimes or criminals. Multi-year mandatory minimums might be eliminated for nonviolent drug crimes, for instance, and offenses by juveniles and nonviolent property crimes might be removed as predicate offenses for recidivist statutes such as three-strikes laws. Another ready-made fix would be to preclude the "stacking" of mandatory minimum sentences, such as those pursuant to 18 U.S.C. § 924(c),[130] which can result in a lifetime's worth of punishment for just a few days of criminal activity. Still other reforms could check the use of mandatory minimums against bit players in criminal schemes by, for example, constraining the application of conspiracy doctrine and accomplice liability as the basis for long mandatory sentences.[131] Finally, mandatory minimums might be subject to temporal limits through so-called "sunset clauses," where the statutes would automatically lapse after a certain time period unless lawmakers voted to extend the laws.[132]

127. 18 U.S.C. § 3582(c)(1).
128. *See* Luna & Cassell, *supra* note 1, at 82.
129. *See* Tonry, *Mostly Unintended Effects*, *supra* note 1, at 103–04.
130. *See* Luna & Cassell, *supra* note 1, at 80–81.
131. *See* Schulhofer, *supra* note 103, at 26–27.
132. *See* Tonry, *Mostly Unintended Effects*, *supra* note 1, 104.

5. **Eliminate mandatory minimum sentences.** For many crimes, particularly those that do not involve violence, mandatory minimums could be eliminated. "In a sensible world of rational policy making, no mandatory penalty laws would be enacted. Those that exist would be repealed. That would be the simplest way to address the problems revealed by the literature," Professor Tonry argued.[133] "That is not the world we live in," he noted, but perhaps someday it will be. Until then, lesser reforms should be pursued.

133. *Id.* at 103.

U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE,
***FIVE THINGS ABOUT DETERRENCE*, NCJ 247350 (MAY 2016)**

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

NATIONAL INSTITUTE OF JUSTICE
FIVE THINGS
ABOUT DETERRENCE

Deter would-be criminals by using scientific evidence about human behavior and perceptions about the costs, risks and rewards of crime.

1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment.

Research shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment.

2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime.

Prisons are good for punishing criminals and keeping them off the street, but prison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment.

See "Understanding the Relationship Between Sentencing and Deterrence" for additional discussion on prison as an ineffective deterrent.

3. Police deter crime by increasing the perception that criminals will be caught and punished.

The police deter crime when they do things that strengthen a criminal's perception of the certainty of being caught. Strategies that use the police as "sentinels," such as hot spots policing, are particularly effective. A criminal's behavior is more likely to be influenced by seeing a police officer with handcuffs and a radio than by a new law increasing penalties.

4. Increasing the severity of punishment does little to deter crime.

Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes.

More severe punishments do not "chasten" individuals convicted of crimes, and prisons may exacerbate recidivism.

See "Understanding the Relationship Between Sentencing and Deterrence" for additional discussion on the severity of punishment.

5. There is no proof that the death penalty deters criminals.

According to the National Academy of Sciences, "Research on the deterrent effect of capital punishment is uninformative about whether capital punishment increases, decreases, or has no effect on homicide rates."

Source: Daniel S. Nagin, "Deterrence in the Twenty-First Century," in *Crime and Justice: A Review of Research*, vol. 42: Crime and Justice in America: 1975-2025, ed. Michael Tonry, Chicago: University of Chicago Press, 2013.[1]

Understanding the Relationship Between Sentencing and Deterrence

In his 2013 essay, "Deterrence in the Twenty-First Century," Daniel S. Nagin succinctly summarized the current state of theory and empirical knowledge about deterrence. The information in this publication is drawn from Nagin's essay with additional context provided by NIJ and is presented here to help those who make policies and laws that are based on science.

NIJ's "Five Things About Deterrence" summarizes a large body of research related to deterrence of crime into five points. Two of the five things relate to the impact of sentencing on deterrence — "Sending an individual convicted of a crime to prison isn't a very effective way to deter crime" and "Increasing the severity of punishment does little to deter crime." Those are simple assertions, but the issues of punishment and deterrence are far more complex. This addendum to the original "Five Things" provides additional context and evidence regarding those two statements.

It is important to note that while the assertion in the original "Five Things" focused only on the impact of sentencing on deterring the commission of future crimes, a prison sentence serves two primary purposes: punishment and incapacitation. Those two purposes combined are a linchpin of United States sentencing policy, and those who oversee sentencing or are involved in the development of sentencing policy should always keep that in mind.

Deterrence and Incapacitation

There is an important distinction between deterrence and incapacitation. Individuals behind bars cannot commit additional crime this is incarceration as incapacitation. Before someone commits a crime, he or she may fear *incarceration* and thus refrain from committing future crimes — this is incarceration as *deterrence*.

"Sending an individual convicted of a crime to prison isn't a very effective way to deter crime."

Prison is an important option for incapacitating and punishing those who commit crimes, but the data show long prison sentences do little to deter people from committing future crimes.

Viewing the findings of research on severity effects in their totality, there is evidence suggesting that short sentences may be a deterrent. However, a consistent finding is that increases in already lengthy sentences produce at best a very modest deterrent effect.

A very small fraction of individuals who commit crimes — about 2 to 5 percent — are responsible for 50 percent or more of crimes.[2] Locking up these individuals when they are young and early in their criminal careers could be an effective strategy to preventing crime *if* we could identify who they are. The problem is: we can't. We have tried to identify the young people most likely to commit crimes in the future, but the science shows we can't do it effectively.

It is important to recognize that many of these individuals who offend at higher rates may already be incarcerated because they put themselves at risk of apprehension so much more frequently than individuals who offend at lower rates.

"Increasing the severity of punishment does little to deter crime."

To clarify the relationship between the severity of punishment and the deterrence of future crimes, you need to understand:

- The lack of any "chastening" effect from prison sentences,
- That prisons may exacerbate recidivism,
- The different impacts of the *certainty* versus the severity of punishment on deterrence, and
- That individuals grow out of criminal activity as they age.

More severe punishments do not "chasten" individuals convicted of crimes.

Some policymakers and practitioners believe that increasing the severity of the prison experience enhances the "chastening" effect, thereby making individuals convicted of an offense less likely to commit crimes in the future. In fact, scientists have found no evidence for the chastening effect.

Prisons may exacerbate recidivism.

Research has found evidence that prison can exacerbate, not reduce, recidivism. Prisons themselves may be schools for learning to commit crimes. In 2009, Nagin, Cullen and Jonson published a review of evidence on the effect of imprisonment on reoffending.[3] The review included a sizable number of studies, including data from outside the U.S. The researchers concluded:

> "… compared to non-custodial sanctions, incarceration has a null or mildly criminogenic impact on future criminal involvement. We caution that this assessment is not sufficiently firm to guide policy, with the exception that it calls into question wild claims that imprisonment has strong specific deterrent effects."

Certainty has a greater impact on deterrence than severity of punishment.

Severity refers to the length of a sentence. Studies show that for most individuals convicted of a crime, short to moderate prison sentences may be a deterrent but longer prison terms produce only a limited deterrent effect. In addition, the crime prevention benefit falls far short of the social and economic costs.

Certainty refers to the likelihood of being caught and punished for the commission of a crime. Research underscores the more significant role that *certainty* plays in deterrence than severity — it is the certainty of being caught that deters a person from committing crime, not the fear of being punished or the severity of the punishment. Effective policing that leads to swift and certain (but not necessarily severe) sanctions is a better deterrent than the threat of incarceration. In addition, there is no evidence that the deterrent effect increases when the likelihood of conviction increases. Nor is there any evidence that the deterrent effect increases when the likelihood of imprisonment increases.

A person's age is a powerful factor in deterring crime.

Even those individuals who commit crimes at the highest rates begin to change their criminal behavior as they age. The data show a steep decline at about age 35.[4] A more severe (i.e., lengthy) prison sentence for convicted individuals who are naturally aging out of crime does achieve the goal of punishment and incapacitation. But that incapacitation is a costly way to deter future crimes by aging individuals who already are less likely to commit those crimes by virtue of age.

1. "Five Things About Deterrence" is available at https://ncjrs.gov/pdffiles1/nij/247350.pdf.
2. Mulvey, Edward P., *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders,* Juvenile Justice Fact Sheet, Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, March 2011, NCJ 230971. Available at https://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf.
3. Nagin, Daniel S., Francis T. Cullen and Cheryl Lero Johnson, "Imprisonment and Reoffending," *Crime and Justice: A Review of Research*, vol. 38, ed. Michael Tonry, Chicago: University of Chicago Press, 2009: 115-200.
4. Sampson, Robert. J., John H. Laub and E.P. Eggleston, "On the Robustness and Validity of Groups," *Journal of Quantitative Criminology* 20 (1) (2004): 37-42.

U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS,
***TIME SERVED IN STATE PRISON*, NCJ 252205 (NOVEMBER 2018).**

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

November 2018, NCJ 252205

Bulletin

Time Served in State Prison, 2016

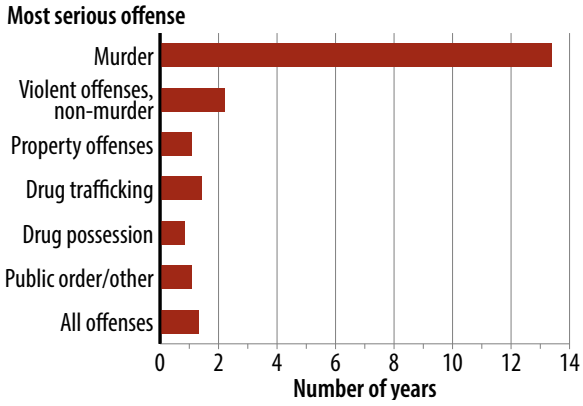
Danielle Kaeble, *BJS Statistician*

Most violent offenders (57%) released from state prison in 2016 served less than three years in prison before their initial release. About 1 in 25 violent offenders (3.6%) served 20 years or more before their initial release. These findings are based on prisoner records from the Bureau of Justice Statistics' National Corrections Reporting Program (NCRP), which collects records on prison admissions and releases.

All statistics in this report are based on state prisoners' first release after serving time for a given offense. They exclude persons who had been released after serving time for an offense, returned to prison for violating community supervision, and then were released again.

The average time served by state prisoners released in 2016, from their date of initial admission to their date of initial release, was 2.6 years. The median amount of time served (the middle value in the range of time served, with 50% of offenders serving more and 50% serving less) was 1.3 years (figure 1).

FIGURE 1
Median time served in state prison before initial release, by most serious offense, 2016



Note: Initial release does not refer to first-time offenders but to offenders' first release from a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation. Statistics are based on 44 states, and data exclude state prisoners with sentences of one year or less; those with missing values for most serious offense or calculated time served; those released by transfer, appeal, or detainer; and those who escaped. Data include 2,755 deaths in 2016. See table 1 for detail and description of offenses.
Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

HIGHLIGHTS

- The average time served by state prisoners released in 2016, from initial admission to initial release, was 2.6 years, and the median time served was 1.3 years.
- Persons released from state prison in 2016 served an average of 46% of their maximum sentence length before their initial release.
- State prisoners initially released in 2016 served an average of 62% of their sentence if they were serving time for rape or sexual assault, and 38% if serving time for drug possession.
- Persons serving less than one year in state prison represented 40% of first releases in 2016.
- Persons sentenced for murder or non-negligent manslaughter served an average of 15 years in state prison before their initial release.
- Ninety-six percent of violent offenders released in 2016, including 70% of those sentenced for murder or non-negligent manslaughter, served less than 20 years before initial release from state prison.
- About three-quarters of violent offenders released from state prison in 2016 served at least one year before initial release.
- Roughly 1 in 5 state prisoners released in 2016 after being sentenced for rape or sexual assault served 10 or more years before initial release.
- On average, state prisoners serving time for property, drug, or public-order offenses served less than two years before initial release.
- Most offenders (59%) released from state prison in 2016 after serving time for drug possession served less than one year before their initial release.

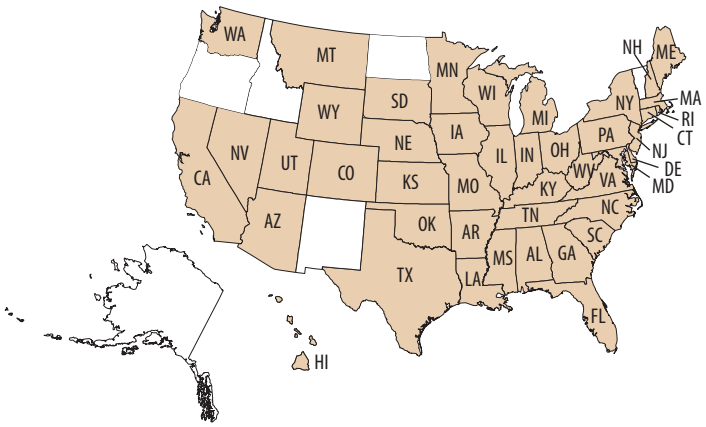
By offense type, the median time served was 13.4 years for murder, 2.2 years for violent crimes excluding murder, 17 months for drug trafficking, and 10 months for drug possession.

This report is based on NCRP data from 44 states. In 2016, these states were responsible for 97% of all persons released from state prisons nationwide (map 1). Annually administered by the Bureau of Justice Statistics, the NCRP obtains individual-level records from state departments of corrections on prisoners entering and leaving prison custody or community supervision.

Violent offenders served 4.7 years in state prison on average, compared to less than 2 years for other offenders

State prisoners released in 2016 after serving time for a violent offense spent an average of 4.7 years in prison before their initial release. Violent offenders made up 29% of all initial releases that year (table 1). Among non-violent offenses, persons released from state prison in 2016 after serving time for weapons offenses (24 months) served five months longer on average than those released for other public-order offenses (19 months). Persons sentenced for drug trafficking spent an average of 26 months in state prison before initial release, which was five months longer than the average time served for property offenses (21 months).

MAP 1
States included in analysis of time served, 2016



Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

Eight percent of initial releases from state prison in 2016 were persons sentenced to more than one year for possession of drugs. On average, these offenders spent 15 months in state prison, and their median time served was 10 months.

TABLE 1
Time served in state prison before first release, by most serious offense, 2016

Most serious offense	Percent of total releases	Time served in prison[a]	
		Median[b]	Mean
All offenses	100%	1.3 yrs.	2.6 yrs.
Violent	28.7%	2.4 yrs.	4.7 yrs.
Murder[c]	1.9	13.4	15.0
Negligent manslaughter	0.7	4.0	5.2
Rape/sexual assault	5.0	4.2	6.2
Robbery	7.4	3.2	4.7
Assault[d]	11.0	1.4	2.5
Other violent[e]	2.6	1.6	3.1
Property	27.4%	13 mos.	21 mos.
Burglary	11.4	17	26
Larceny-theft	7.2	11	17
Motor vehicle theft	1.3	12	17
Fraud[f]	4.0	11	17
Other property[g]	3.5	12	19
Drug	24.4%	14 mos.	22 mos.
Possession	7.6	10	15
Trafficking	9.3	17	26
Other drug[h]	7.4	14	23
Public order	18.7%	13 mos.	20 mos.
Weapons	5.5	16	24
Other public order[i]	13.3	12	19
Other/unspecified	0.8%	13 mos.	27 mos.
Number of releases	377,839	~	~

Note: Details may not sum to totals due to rounding. First release does not refer to first-time offenders but to offenders' first release from a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation. Statistics are based on 44 states, and data exclude state prisoners with sentences of one year or less; those with missing values for most serious offense or calculated time served; those released by transfer, appeal, or detainer; and those who escaped. Data include 2,755 deaths in 2016. Excluding deaths, the average time served for murder or non-negligent manslaughter would be 11.2 years.

~Not applicable.

[a]Excludes time served in jail.

[b]The statistical median represents the value at which 50% of the values are larger and 50% are smaller in a sequence of numbers.

[c]Includes non-negligent manslaughter.

[d]Includes 72.2% aggravated assault, 21.4% simple assault, and 6.4% assault on a public safety officer.

[e]Includes kidnapping, blackmail, extortion, hit and run with injury, and other unknown violent offenses.

[f]Includes forgery and embezzlement.

[g]Includes arson, receiving and trafficking of stolen property, destruction of property, trespassing, and other unknown property offenses.

[h]Includes forging prescriptions, possession of drug paraphernalia, and other unspecified offenses.

[i]Includes DUIs/DWIs; court offenses; commercialized vice, morals, and decency offenses; liquor law violations; and other public-order offenses.

Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

More than 7 in 10 violent offenders released in 2016 served less than five years in state prison

Persons serving less than one year in state prison represented 40% of first releases in 2016 (table 2). Almost a fifth (18%) of persons served less than six months. More than 7 in 10 of violent offenders (72%) served less than five years in state prison before their initial release, and nearly 9 in 10 violent offenders (88%) served less than 10 years. About a quarter (24%) of offenders released after being sentenced for rape or sexual assault served between 5 and 10 years before initial release; most (57%) served shorter terms than that.

Less than 7% of persons released in 2016 after serving time for property, drug, or public-order offenses served five years or longer in state prison before their initial release. Three percent of those sentenced for drug possession served five years or more. About four-fifths (81%) of persons released in 2016 who served 10 years or longer before their initial release were in prison for a violent offense (not shown in table). Ninety-nine percent of offenders served less than 20 years before initial release, including 70% of those sentenced for murder or non-negligent manslaughter.

TABLE 2

Percent of prisoners who served a given length of time before first release, by most serious offense, 2016

Most serious offense	<6 months[a]	<1 year[b]	<2 years	<3 years	<5 years	<10 years	<20 years	20 years or longer
All offenses	18.1%	39.5%	64.5%	76.8%	87.4%	95.5%	98.8%	1.2%
Violent	10.8%	24.3%	44.3%	56.7%	71.8%	87.7%	96.4%	3.6%
Murder[c]	2.4	3.8	7.7	11.8	20.0	39.6	69.6	30.4
Negligent manslaughter	6.6	13.2	26.9	39.0	60.2	87.1	99.1	0.9
Rape/sexual assault	5.8	12.8	27.0	39.1	57.2	81.3	96.0	4.0
Robbery	6.9	15.7	33.7	48.0	68.0	89.4	98.2	1.8
Assault	16.0	37.1	63.4	75.8	88.0	96.5	99.4	0.6
Other violent[d]	16.9	34.9	59.1	71.8	83.3	94.0	98.2	1.8
Property	20.7%	45.6%	72.9%	84.9%	94.3%	98.8%	99.8%	0.2%
Burglary	15.8	35.9	63.4	78.3	91.5	98.1	99.7	0.3
Larceny-theft	24.7	54.1	80.8	90.3	96.6	99.4	99.8	0.2
Motor vehicle theft	21.6	51.4	80.7	91.2	97.3	99.4	99.8	0.2
Fraud[e]	23.6	51.8	79.8	90.1	96.7	99.5	99.9	0.1
Other property[f]	25.4	50.8	76.8	87.2	94.9	99.0	99.8	0.2
Drug	21.1%	45.0%	72.0%	84.4%	93.4%	98.8%	99.9%	0.1%
Possession	28.5	58.6	84.2	92.6	97.4	99.5	99.9	0.1
Trafficking	15.3	35.3	63.5	79.0	91.1	98.4	99.8	0.2
Other drug[g]	20.7	43.3	70.1	82.6	92.3	98.6	99.9	0.1
Public order	21.6%	46.7%	74.0%	85.7%	94.3%	99.0%	99.9%	0.1%
Weapons	17.1	38.5	66.6	81.6	93.1	98.6	99.9	0.1
Other public order[h]	23.6	49.9	76.6	86.9	94.5	99.0	99.9	0.1
Other/unspecified	25.1%	45.9%	68.2%	78.6%	88.2%	96.7%	99.6%	0.4%

Note: Categories overlap (e.g., <1 year includes <6 months). First release does not refer to first-time offenders but to offenders' first release from a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation. Statistics are based on 44 states, and data exclude state prisoners with sentences of one year or less; those with missing values for most serious offense or calculated time served; those released by transfer, appeal, or detainer; and those who escaped. Data include 2,755 deaths in 2016.

[a]Deaths accounted for 6.9% of murder "releases," 1.8% of manslaughter "releases," and 2.1% of rape/sexual assault "releases" in under 6 months in 2016. Deaths made up under 0.5% of all other offense categories.

[b]Deaths accounted for 7.9% of murder "releases," 0.9% of manslaughter "releases," and 2.0% of rape/sexual assault "releases" in under 1 year in 2016. Deaths made up under 0.4% of all other offense categories.

[c]Includes non-negligent manslaughter.

[d]Includes kidnapping, blackmail, extortion, hit and run with injury, and other unknown violent offenses.

[e]Includes forgery and embezzlement.

[f]Includes arson, receiving and trafficking of stolen property, destruction of property, trespassing, and other unknown property offenses.

[g]Includes forging prescriptions, possession of drug paraphernalia, and other unspecified offenses.

[h]Includes DUIs/DWIs; court offenses; commercialized vice, morals, and decency offenses; liquor law violations; and other public-order offenses.

Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

Persons released after serving time for rape or sexual assault (62%) served the highest percentage of their sentence

Persons released from state prisons in 2016 served an average of 46% of their maximum sentence length before their first release (table 3). The average sentence length for persons released for murder or non-negligent manslaughter in 2016 was more than three times the average sentence length of other violent offenses and more than five times the average sentence length of any non-violent offenses. Among broader categories, the percentage of maximum sentence that prisoners served was highest for violent offenses (54%) and lowest for drug (41%) and other unspecified (36%) offenses. For offenders first released from state prison in 2016, the average sentence length for drug offenses was 4.0 years for possession and 6.7 years for trafficking, and the average time served was 15 months for possession and 26 months for trafficking.

Persons released for the first time after being imprisoned for rape or sexual assault served the highest percentage of their maximum sentence length (62%), while those released after serving time for drug possession served an average of 38% of their sentence—lowest aside from other/unspecified offenses. Offenders sentenced for murder or non-negligent manslaughter served an average of 57% of their maximum sentence length before being released, and those imprisoned for negligent manslaughter or robbery served an average of 58% of their sentences.

TABLE 3

Average sentence length and percent of sentence served before first release, by most serious offense, 2016

Most serious offense	Average sentence length[a]	Percent of sentence served
All offenses	6.4 yrs.	45.5%
Violent	10.2 yrs.	53.7%
Murder[b]	40.6	57.2
Negligent manslaughter	10.1	58.4
Rape/sexual assault	12.2	61.9
Robbery	9.0	57.7
Assault	5.6	47.9
Other violent[c]	7.2	47.0
Property	4.8 yrs.	42.4%
Burglary	5.8	43.1
Larceny-theft	3.7	43.7
Motor vehicle theft	4.0	41.5
Fraud[d]	4.4	39.9
Other property[e]	4.5	40.5
Drug	5.3 yrs.	40.6%
Possession	4.0	37.5
Trafficking	6.7	40.9
Other drug[f]	4.9	43.2
Public order	4.2 yrs.	44.5%
Weapons	4.6	46.6
Other public order[g]	4.0	43.6
Other/unspecified	7.7 yrs.	35.5%
Number of releases	375,739	~

Note: First release does not refer to first-time offenders but to offenders' first release from a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation. Statistics are based on 44 states, and data exclude state prisoners with sentences of one year or less; those with missing values for most serious offense or calculated time served; those released by transfer, appeal, or detainer; and those who escaped. Data include 2,755 deaths in 2016.

~Not applicable.

[a]Average sentence length excludes time in jail and reflects the total maximum sentence that prisoners received. Sentences of more than 100 years, and life or death sentences, are set to 100 years. Average percentage of sentence served is the percentage of the maximum sentence served before first release. In cases of death, percentage of sentence served equals 100%. Including life sentences, death sentences, and deaths has little effect on offenses apart from murder. If these were excluded, the average sentence for murder would be 20.2 years and the percentage of time served for murder would be 64.6%.

[b]Includes non-negligent manslaughter.

[c]Includes kidnapping, blackmail, extortion, hit and run with injury, and other unknown violent offenses.

[d]Includes forgery and embezzlement.

[e]Includes arson, receiving and trafficking of stolen property, destruction of property, trespassing, and other unknown property offenses.

[f]Includes forging prescriptions, possession of drug paraphernalia, and other unspecified offenses.

[g]Includes DUIs/DWIs; court offenses; commercialized vice, morals, and decency offenses; liquor law violations; and other public-order offenses.

Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

Persons sentenced for murder or rape/sexual assault made up about half (49%) of all deaths in state prisons in 2016

In 2016, 2,755 prisoners died while awaiting their initial release, and they were counted among "first releases" in 2016 (table 4). This statistic is based on data from 38 states where type of release was available for 2016 (map 2). Causes of death included natural causes, suicide, homicide, legally imposed execution, and injury resulting in death. Violent offenders serving time in state prison made up 68% of the total deaths in 2016 among prisoners awaiting their first release. Persons sentenced for murder or rape/sexual assault offenses made up about half (49%) of all deaths in state prisons in 2016 among those awaiting their first release. Almost a tenth (9.4%) of persons sentenced for murder whose time-served ended in 2016 died while serving their sentence (not shown in table).

TABLE 4
Deaths among state prisoners awaiting their first release, by most serious offense, 2016

Most serious offense	Percent	Number
All offenses	100%	2,755
Violent	68.3%	1,883
Murder[a]	25.0	689
Negligent manslaughter	1.4	39
Rape/sexual assault	24.0	660
Robbery	7.4	205
Assault	7.4	205
Other violent[b]	3.1	85
Property	12.0%	330
Burglary	5.7	157
Larceny-theft	2.7	74
Motor vehicle theft	0.2	6
Fraud[c]	1.6	44
Other property[d]	1.8	49
Drug	9.0%	247
Possession	1.3	35
Trafficking	4.3	119
Other drug[e]	3.4	93
Public order	9.8%	271
Weapons	2.2	60
Other public order[f]	7.7	211
Other/unspecified	0.9%	24

Note: Details may not sum to totals due to rounding. Counts may differ from those published elsewhere due to non-reporting states. First release does not refer to first-time offenders but to offenders' first release after a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation. Statistics are based on state prisoners who were released for the first time from their sentence in 38 states, and data exclude state prisoners with sentences of one year or less.

[a]Includes non-negligent manslaughter.

[b]Includes kidnapping, blackmail, extortion, hit and run with injury, and other unknown violent offenses.

[c]Includes forgery and embezzlement.

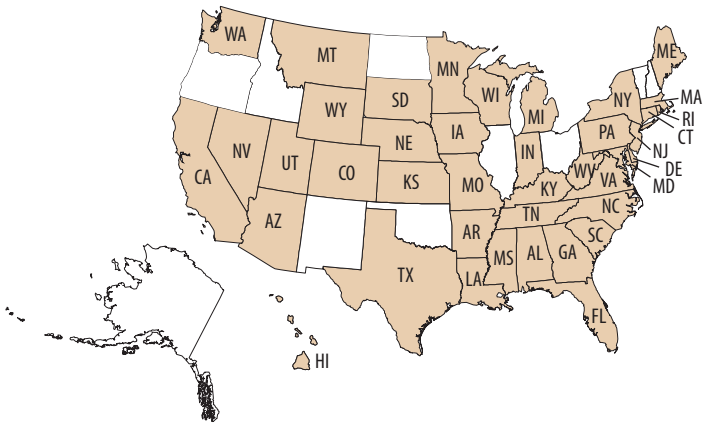
[d]Includes arson, receiving and trafficking of stolen property, destruction of property, trespassing, and other unknown property offenses.

[e]Includes forging prescriptions, possession of drug paraphernalia, and other unspecified offenses.

[f]Includes DUIs/DWIs; court offenses; commercialized vice, morals, and decency offenses; liquor law violations; and other public-order offenses.

Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

MAP 2
States with prisoner deaths included in current analysis, 2016



Note: Excludes the District of Columbia. Number of states included differs from other tables in the report due to availability of type of prison release in release records.

Source: Bureau of Justice Statistics, National Corrections Reporting Program, 2016.

Methodology

The National Corrections Reporting Program (NCRP), administered by the Bureau of Justice Statistics (BJS), is an annual voluntary data collection of administrative records on individual prisoners submitted by state departments of corrections. Since its inception in 1983, the NCRP has collected records for each prison admission, prison release, and exit from post-custody community supervision programs. Starting in 1999, BJS requested that states submit an additional file that included the administrative records of all prisoners under the custody of state prisons on December 31 of each year. In 2013, BJS began requesting that states provide entries to post-custody community supervision in addition to exits. The U.S. Census Bureau served as the data collection agent for the NCRP from 1983 to 2009, at which point BJS opened a competitive solicitation and awarded data collection responsibilities to Abt Associates, Inc. For calendar year 2016, a total of 47 states had submitted at least one type of record: prison admissions (44 states), prison releases (46), year-end population (46), entries to post-custody community supervision (31), and exits from post-custody community supervision (28).

The current analysis includes data from the NCRP prison-release records, which include one record for each release of a sentenced offender from a state's prison system. Data elements collected include offender demographic, offense, and sentencing characteristics, and the dates and types of admission to, and release from, state prison. Data include prisoners under the immediate control of state authorities, regardless of the jurisdiction in which they were originally sentenced.

Reporting on time served and percentage of sentenced served

First release of an offender is defined by the type of admission to prison for that period of imprisonment. If the admission was coded by the state as a court commitment—either through a new sentence, imposition of a suspended sentence, or revocation of probation—the release of that offender was considered to be the first release. Admissions to prison due to community supervision violations were considered to be subsequent releases.

Data in this report included NCRP release records for 2016 from 44 states. New Mexico, North Dakota, and Oregon did not submit any NCRP data for 2016. Vermont did not submit prison release records. Alaska and Idaho could not distinguish between admission types. In addition, admission types were not reported in Virginia's 2016 NCRP release file. Based on data reported to the 2016 National Prisoners Statistics (NPS) program; however, BJS estimated that all of Virginia's offenders entered on new court commitments.

All analyses were limited to prisoners sentenced to more than one year who were admitted to state prison on new court commitments. New court commitments made up 416,735 of the releases reported to the NCRP from the 44 states included in the analysis. All analyses excluded (1) records that indicated the offender had previously been released from the current sentence and (2) release records where the type of admission was a transfer within the state prison system or was the return of a prisoner who escaped or was absent without leave. There are 377,839 releases included in tables 1 and 2. This number excludes reported releases with missing values for most serious offense or calculated time served. There are 375,739 releases included in table 3. In addition to excluding releases with missing values for most serious offense or calculated time served, this number also excludes releases with a missing value for maximum sentence.

Maximum sentence length refers to the greatest amount of time a person can spend in prison based on the sentence imposed by a court. It includes consecutive sentences imposed by a court for multiple offenses but does not measure the time actually served in prison. The analyses in this report include prisoners who were released in 2016 after being sentenced to life, life without parole, life plus additional years, or death. For purposes of calculating percentage of time served, BJS assigned a 100-year maximum value to sentences of more than 100 years, life, or death. Average percentage of sentence served is the percentage of the maximum sentence served before first release. In cases of deaths in prison, percentage of sentence served equals 100%. In statistical tables previously published by BJS, offenders with life or death sentences, and "releases" due to death, were excluded from calculations. Including life sentences, death sentences, and deaths—as in this report—has little effect on offenses apart from murder. If these were excluded, the average sentence for murder would be 20.2 years and the percentage of time served for murder would be 64.6%.

The Bureau of Justice Statistics of the U.S. Department of Justice is the principal federal agency responsible for measuring crime, criminal victimization, criminal offenders, victims of crime, correlates of crime, and the operation of criminal and civil justice systems at the federal, state, tribal, and local levels. BJS collects, analyzes, and disseminates reliable statistics on crime and justice systems in the United States, supports improvements to state and local criminal justice information systems, and participates with national and international organizations to develop and recommend national standards for justice statistics. Jeffrey H. Anderson is the director.

This report was written by Danielle Kaeble. Mary Cowhig and Stephanie Mueller verified the report.

Caitlin Scoville and Jill Thomas edited the report. Tina Dorsey produced the report.

November 2018, NCJ 252205

Office of Justice Programs
Building Solutions • Supporting Communities • Advancing Justice
www.ojp.gov