

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

The Institute does not recommend a specific legislative scheme for carrying out the sentence-modification authority recommended in this provision, nor is the provision drafted in the form of model legislation. Instead, the language below sets out principles that a legislature should seek to effectuate through enactment of such a provision.

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

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

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

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

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

6. Notice of the sentence-modification proceedings should be given to victims, if they can be located with reasonable efforts, and to the relevant prosecuting authorities. Any victim's impact statement from the original sentencing shall be considered by the judicial panel or other judicial decisionmaker. Victims shall be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing.

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

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

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

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

Comment:¹

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

No provision closely similar to § 305.6 exists in any American jurisdiction. The Model Code has never limited itself to a restatement of existing law, however. While it is true that much of the Code's mission is to identify, incorporate, and build upon best practices that have proven themselves in operation, the Code has always had an additional, aspirational dimension. When a careful appraisal of existing law reveals problems that are both serious and neglected, the Code has offered ambitious recommendations. In the 1962 Code, for example, many provisions in Part I (the “General Part”), especially the *mens rea* analysis pioneered in § 2.02, represented major advances over contemporary state codes and common law. The revised Code has continued in this spirit and has tendered other recommendations in the absence of prior precedent. See, for example, § 6A.07(3) (Tentative Draft No. 1, 2007) (calling for the routine preparation of “demographic” impact projections, including racial and ethnic impacts, whenever laws and guidelines affecting sentencing are proposed); § 6.11A (Tentative Draft No. 2, 2011) (recommending a consolidated and specialized statutory approach for the sentencing in adult courts of offenders who were under age 18 when their offenses were committed).

This provision is stated in terms of “principles for legislation” rather than recommended black-letter statutory language. This is because the provision envisions new *institutional* arrangements for prison-release decisions that have not been tested in practice. In this respect,

¹ The bulk of this Comment has not been revised since § 305.6's approval in 2011. New material to accompany the black-letter amendments offered in this draft is indicated by redlining in the text of the Comments. All Comments will be updated for the Code's hardbound volumes.

§ 305.6 is more ambitious than an innovative substantive provision, or a new procedural recommendation that can be executed within existing institutional frameworks. For the cases it reaches, § 305.6 would effect a change in the allocation of sentencing authority analogous to the creation of a sentencing commission in a jurisdiction that has never had one, the introduction of meaningful appellate sentence review in a state with no such history, or the abolition of parole-release discretion in a formerly indeterminate system. All of these are fundamental structural changes—but are distinguishable from § 305.6 because they have long track records. It is possible for a model code to supply recommended statutory language and fine-grained implementation advice when the subject is sentencing reforms dating back more than 30 years. In the case of § 305.6, there is no equivalent fund of experience upon which to draw.

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

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

The policy imperatives of § 305.6 coexist with the revised Code’s general preference for a “determinate” sentencing system. See § 6.06(4) and (5) (this draft); Appendix B, Reporter’s Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). Section 305.6 is crafted to be a narrow incursion upon the Code’s general preference for determinate sentences, and to avoid the shortcomings of the parole-release framework. It offers a wholly new institutional model, targeted to a small group of cases, that substitutes a judicial decisionmaker for the administrative parole board. It also represents a fundamental departure from the underlying theory of parole release, which supposed that most prisoners could be rehabilitated and that the parole board could discern when rehabilitation had been achieved in individual cases. Prisoner rehabilitation remains an eligible concern in appropriate cases under paragraph (4) (see § 1.02(2)(a)(ii) (Tentative Draft

No. 1, 2007)), but it is far from the only admissible consideration, or the basic underpinning, of the sentence-modification power.

While § 305.6 is innovative and ambitious, it will impact only a small share of all prison sentences. Given the Code's good-time allowances, which are expected to be granted to the great majority of inmates, see § 305.1 (Tentative Draft No. 2, 2011), only those serving pronounced terms of more than 20 years are likely to be affected by the second-look process. In most existing American criminal-justice systems, offenders with such sentences make up a tiny fraction of all prison admissions—probably on the order of two or three percent in most states. Their numbers are larger in standing populations, because offenders with shorter sentences move through the corrections system far more quickly. But it is the rate of admissions that will determine the case flow of eligible applicants under § 305.6, beginning 15 years post-admission for each cohort of long-term prisoners.

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

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

b. A "second look" at long-term sentences. No determinate sentencing system can be absolute, and no purely determinate system has ever existed in American law. All jurisdictions that have abrogated the releasing authority of a parole agency have retained mechanisms such as good-time and earned-time credits, compassionate-release provisions, ad hoc emergency contingencies for prison overcrowding, and the clemency power of the executive. The question is not *whether* original judicial sentences should ever be subject to change in a determinate structure, but what

exceptions should be grafted onto the generally determinate scheme. The second-look authority is one such special case, especially in a nation that makes frequent use of exceptionally severe prison sentences. Whenever a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors and injustices. On this principle, determinate prison sentences are least justifiable as they extend in length from months and years to decades. Both moral and consequentialist judgments become suspect when their effects are projected so far forward into a distant future.

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

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

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

c. Time periods. Paragraph (1) sets the timing of first eligibility for possible sentence modification under this Section, and paragraph (2) advises the legislature to provide for recurring eligibility at intervals no longer than 10 years. There was near consensus within the Institute that 15 years was the proper time period for engagement of the second-look authority—at least until

experimentation and actual experience under § 305.6 suggests a different arrangement. Where there was disagreement over the 15-year provision, it came from proponents of significantly shorter periods, such as 10 or even 5 years.

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

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

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

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

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

Paragraph (2) states that a prisoner's eligibility to apply for sentence modification must recur at least every 10 years after denial of an initial application. The 10-year period is meant as an outer limit on the time period for successive applications. So long as the date of first eligibility is set at 15 years or a similar period, the procedures for recurring applications can do little to undermine the general determinacy of the sentencing system unless they are heedlessly generous. While the numbers of prisoners who reach the 15-year mark of confinement terms is small, the numbers dwindle further after 20 or 25 years. States are free to provide for fixed eligibility intervals shorter than 10 years consistent with § 305.6, or to make other arrangements such as allowing the judicial decisionmaker to set dates of next eligibility within a 10-year ceiling.

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

There is also a persuasive *negative* case in support of a judicial decisionmaker. In large part, the project of creating a second-look provision grew out of disillusionment with traditional arrangements of back-end discretion over the lengths of prison terms, which place large reservoirs of power in parole agencies and corrections officials. These policy judgments are echoed throughout the revised Code. The Code's determinate framework removes the prison-release authority of parole boards; see § 6.06(4) and (5) (this draft); Appendix B, Reporter's Study: The Question of Parole-Release Authority (Tentative Draft No. 2, 2011). While corrections departments continue to exercise power over good-time allowances, the revised Code seeks to circumscribe and regularize the process; see § 305.1 and Comment *a* (Tentative Draft No. 2, 2011).

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

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

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

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

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

The alternative to the “back to court” approach is for the legislature to create a wholly new judicial decisionmaker for the sentence-modification process, preferably a “panel” of several judges or retired judges. If such a new authority is created for the sole purpose of ruling upon § 305.6 applications, and is separately funded, sentence-modification applications will not be in danger of being pushed to a back shelf in favor of other matters. Also, judicial panels or other decisionmakers who regularly discharge the sentence-modification function can be expected to develop specialized expertise, and a uniformity of approach, greater than if § 305.6 were administered by individual trial judges. A panel would carry the further advantage of distributing responsibility and accountability over more than one individual, thus muting the political costs attached to unpopular decisions. If the panel were composed of former judges, who need not stand for retention or election, the risks would be further reduced. There is much room for innovation in dealing with questions of competency, expertise, and independence. Some legislatures might find it desirable to charter sentence-modification panels that retain a judicial character, but include former prosecutors and defense lawyers, or other criminal-justice professionals, as well as sitting or former judges. In the spirit of § 305.6, majority representation by judges would remain an

essential ingredient, so the panel would retain its judicial character, but the heightened difficulty of second-look cases may call for broader representation.

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

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

The Institute weighed and rejected a split decisionmaking model for this section. Long consideration was given to the possible inclusion of a “gatekeeper” to ensure that only colorable applications are presented to the judicial decisionmaker for consideration. Instead, the provision envisions that the judicial authority itself will create appropriate processes of its own to review and screen out applications that are unmeritorious on their face. Paragraph (4) explicitly authorizes such a process, both to manage the workload of applications in general, and preserve resources for those applications that deserve closest attention. A centralized sorting approach would be consistent with this section, or the use of an outside agency to offer nonbinding recommendations. For example, a probation department might be enlisted to give preliminary input, perhaps as part of a larger responsibility to prepare presentence reports in designated cases. The main concern is

that there be no external gatekeeper with the power to select or veto cases. It is difficult to imagine an existing agency that could safely be entrusted with so much power. In the related context of compassionate release, gatekeepers such as the department of corrections have been seen to unduly choke off the flow of meritorious petitions. See § 305.7 and Comment *c* (Tentative Draft No. 2, 2011).

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

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

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

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

Thus, for example, the unserved balance of an applicant's prison sentence might be justified on the reasonable belief that the offender presents a continuing danger to the community, see *id.* § 1.02(2)(a)(ii), and so the judicial decisionmaker could rule under paragraph (4) that the original sentence should remain undisturbed on incapacitation grounds. On the other hand, there may be cases in which there are no reasonable grounds to believe the prisoner presents a danger to public safety. For example, a prisoner's progress in correctional treatment programs and behavior while institutionalized may now support a low assessment of recidivism risk. Or, over a period of 15 years or more, prediction technology may have improved so that an offender previously placed in a "high risk" category may be differently classified using contemporary tools. See § 6B.09 (Tentative Draft No. 2, 2011). Depending on what other considerations exist in the case, the judicial decisionmaker may well decide that there is no sound rationale for the applicant's continued incarceration.

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

Section 305.6 rejects a number of alternative models that might be posited for a sentence-modification provision, which are different or more limited than the resentencing model. Many of these are already effected in other parts of the Code. The second-look provision is not meant to displace rules concerning sentence reconsideration authorized during the early stages of a prison sentence. The sentencing judge's front-end reconsideration powers should perhaps be expanded beyond existing rules, but this is a separate subject to be taken up in an as-yet-undrafted provision of the revised Code. Section 305.6 is not intended as a new form of appellate review or other reappraisal of the correctness of the original sentence (appellate sentence review will also be addressed elsewhere. See § 7.ZZ (Tentative Draft No. 1, 2007) (draft provision submitted for informational purposes only). Nor is § 305.6 meant to be a reinstatement of the traditional parole inquiry focused primarily on the timing of offender rehabilitation, a reward or incentive for good

behavior while incarcerated (addressed in § 305.1, Tentative Draft No. 2, 2011), a new form of judicial clemency or mercy (the clemency power has never been a part of the Model Code), or a vehicle that responds only to demonstrably “new” circumstances that have arisen since the original sentencing. (See § 305.7, Tentative Draft No. 2, 2011.)

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

g. What modifications are permitted. Paragraph (5) states that the judicial decisionmaker must be given the power to “modify any aspect of the original sentence, so long as the portion of the modified sentence to be served is no more severe than the remainder of the original sentence.” Subject to the ceiling on prospective severity, this is intended to be as broad an authority as possible to craft a modified sentence. An amended sentence could take the form of a shortened prison term, but might also include new or altered sanctions such as a longer or shorter term of postrelease supervision than originally imposed, a term of intermittent confinement (as in a halfway house or day-reporting center), and newly imposed economic sanctions including fines, forfeitures, and victim restitution. Any lawful sanction or combination of sanctions that would have been available to the original sentencing judge should be among the options permissible at sentence modification.

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

Paragraph (5) further clarifies that the sentence-modification authority “shall not be limited by any mandatory-minimum term of imprisonment under state law.” A similar exemption from

the force of mandatory penalties exists under the compassionate-release provisions of some states, see § 305.7(8) and Comment *i* (Tentative Draft No. 2, 2011). Paragraph (5) is also consistent with the revised Code’s general policy of softening the harshness of mandatory sentence provisions, spurred by the Institute’s longstanding disapproval of such laws; see § 6.06, Comment *d* (this draft) (“The revised Code continues the ‘firm position of the Institute that legislatively mandated minimum sentences are unsound.’”). For a discussion of other provisions in the revised Code that seek to mute the effects of mandatory penalties, see § 6.06, Comment *d*.

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

The Section does, however, lay down several core principles of fair process that should be effectuated by each legislature in one way or another. Basic to fair process are paragraph (7)’s injunctions that adequate records of proceedings must be maintained, and that the judicial decisionmaker must be required to provide a statement of reasons for its decisions on the record. Sound recordings of hearings, if any, should be maintained, and any dossier or other information considered by the judicial decisionmaker should be preserved. While there is no requirement that the decisionmaker’s statement of reasons be in writing, it must be sufficient to explain why the standard for decision in Paragraph (4) was met or unmet in a given case. Boilerplate explanations, too oft

Paragraph (6) speaks to victims’ rights in the sentence modification process under § 305.6. Earlier in this draft, § 7.07C gives close attention to the role of victims in original sentencing proceedings and, in general, limits victims’ rights of participation to those that will advance the general purposes of the sentencing system. See also Appendix B, Reporters’ Memorandum, Victims’ Roles in the Sentencing Process (this draft). Under that analysis, victims have important information to provide to the sentencing authority and, in some cases, may directly participate in the delivery and effectiveness of criminal sanctions.

Consistent with the spirit of § 7.07C, § 305.6(6) counsels state legislators to afford certain procedural rights to crime victims during sentence-modification proceedings. These are not

coterminous with victims' rights at an original sentencing, nor do offenders enjoy comparable rights in both settings.²

Paragraph (6) requires that reasonable efforts must be taken to notify victims of sentence-modification proceedings in their cases. It also requires that any victim impact statement offered at the original sentencing be made part of the record, and must be considered by the § 305.6 decisionmaking authority. Difficult questions arise as to whether input by crime victims should be permitted in addition to their earlier impact statements. One might argue that the severity of the offense was legally determined at the time of first sentencing, and should not be relitigated in the § 305.6 context. In the normal course of criminal law, offenders' sentences do not vary over time depending on the experiences and preferences of victims. Given the innovation of a de novo resentencing that § 305.6 sets up, however, 15 years after the original sentencing hearing, it would be extraordinary to ban the victim from submitting information about changed circumstances in the intervening years. As explained in Tentative Draft No. 2 (2011), § 305.6, Comment *f*, "The ultimate inquiry is whether, in light of current information, the purposes of sentencing in . . . § 1.02(2), would best be served by completion of the original sentence or a modified sentence." Paragraph (6) therefore recommends that victims "be afforded an opportunity to submit a supplemental impact statement, limited to changed circumstances since the original sentencing."

The Code does not speak to how the supplemental impact statement is to be transmitted to the judicial decisionmaker. This is in accord with the general spirit of § 305.6, that each jurisdiction should be allowed latitude to develop its own processes. It would be consistent with Paragraph (6) for a state legislature to provide that supplemental victim impact statements must be submitted in writing.

i. Appeals. The revised Code disapproves of the existence of great powers of sentencing discretion without the check of appellate review. At the same time, it is the Code's policy that the "intensity" of review should not be constructed in such a way that judicial discretion to individualize penalties is unduly restricted. See § 7.ZZ (Tentative Draft No. 1, 2007). The intensity of an appellate process increases with the likelihood that any given decision will be reviewed, nondeferential legal standards of review, and high reversal rates. Paragraph (8) does not attempt

² In important ways, a sentence-modification proceeding under § 305.6 is not identical to an original sentencing. For example, § 305.6(4) contemplates that "[t]he judicial panel or other judicial decisionmaker may adopt procedures for the screening and dismissal of applications that are unmeritorious on their face . . ." No such screening process exists at a first sentence; every offender is entitled to a judicial hearing. Even if a hearing is ordered under § 305.6, the Code's scheme does not mandate that it follow the same procedural rules as first sentencings; the provision is intended to be flexible and allow room for experimentation across the states. Also in contrast with an original sentencing, offenders have no absolute right to be represented by counsel; instead, under § 305.6(3), provision of appointed counsel to indigent prisoners is a matter within the court's discretion.

to strike an exact balance between intensity of review and the scope of discretion ceded to the sentence-modification authority. It insists merely that an effective review mechanism of some kind must be in place. No appeal as of right need be created under paragraph (8), but each state must give an appellate tribunal discretion to hear prisoners' appeals from adverse rulings. Without at least this much potential for review, any guidelines or other substantive decision criteria developed under paragraphs (4) and (9) would be demoted to advisory status. Indeed, a central criticism of the traditional parole-release process is that the parole board's discretion is not subject to enforceable regulations or meaningful substantive review. The probability of reversal need not be great under § 305.6(8) in order for a competent appellate body to reinforce the legal status of decision rules. In addition, a growing body of appellate precedent, from selected cases that present important issues, can promote principled analysis through the development of a common law of sentence modification.

j. Sentencing guidelines. Because the theoretical model for § 305.6 most closely resembles the resentencing of long-term prisoners, it follows that the sentencing commission should have responsibility to promulgate guidelines for the process. Sentence-modification guidelines, and their amendments over time, would be informed by the judgment of the diverse membership of the commission, the commission's investigations into the views of stakeholders throughout the justice system, and its ongoing monitoring of sentence-modification decisions once the second-look process has begun to operate. Sentence-modification guidelines could aid the judicial decisionmaker in the difficult tasks of selecting cases under paragraph (4) to be brought forward for full consideration, and in reaching ultimate dispositions in those cases. A guidelines framework would also help distribute the political costs of sentence modification so that they do not fall entirely upon the judicial decisionmaker, but are shared by a broadly representative and bipartisan commission. The danger of popular backlash might be diffused, for example, when a controversial modification ruling is seen to be consistent with the guidelines' presumptions or recommendations.

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

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

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

From a policy perspective, there is no doubt that a new second-look process should be given retroactive force in some form. The considerations that support enactment of § 305.6 apply just as forcefully to long prison terms imposed in the past as to those not yet imposed. Indeed, because many jurisdictions have been operating without the constraints of proportionality, utilitarian purposes, and correctional resource management that are fundamental to the revised Code, extremely long sentences handed down under prior law might especially be in need of reconsideration. Simply put, given the scale of incarceration in the United States, unprecedented historically or in any other nation, and the prison overcrowding crisis in many jurisdictions, delayed implementation of § 305.6 would ignore the systemic imperatives that impelled its creation.

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

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

REPORTERS' NOTE³

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

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

For worldwide incarceration rates, see Roy Walmsley, *World Prison Population List*, 8th ed. (International Centre for Prison Studies, 2009), available at <http://www.kcl.ac.uk/depsta/law/research/icps/publications.php?id=8> (last visited Mar. 9, 2011). For further analysis of historically high U.S. incarceration rates, see The Pew Center on the States, *One in 31: The Long Reach of American Corrections* (2009), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=49398 (last visited Mar. 9, 2011); David Garland ed., *Mass Imprisonment: Social Causes and Consequences* (2001).

In order to weigh the burden § 305.6 will impose on the criminal-justice system, it is helpful to estimate the percentage of prison-bound offenders who receive sentences that will result in time served of greater than 15 years. No comprehensive national data on this question are available. However, the U.S. Dept. of Justice reports on felony sentences in the nation's 75 largest counties on a periodic basis. The most recent report, from 2004, collects statistics on 57,497 defendants charged with felonies, 10,156 of whom were convicted and sentenced to prison. See U.S. Dept. of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2004* (2008), at 1; *Felony Defendants in Large Urban Counties, 2004—Statistical Tables* (2008), table 26. Among the group sentenced to prison, 7 percent received *maximum* prison terms of 10 years or more, including 1 percent of the prison-bound group who received life sentences. There is no separate reporting of sentences in excess of 15 years—or any other term of years greater than 10. We can estimate, however, that the percentage of newly sentenced prisoners who might someday file petitions under § 305.6 is substantially less than the seven percent of the total who receive sentences of 10 years or more. First, among any cohort of sentenced offenders, the more serious punishments are outnumbered by the less serious, so this seven percent almost certainly includes far more 10-year terms than 20- or 30-year terms. It is unlikely that more than two to three percent of all prison-bound defendants receive imposed maximum terms in excess of 15 years. It should also be noted that these data go only to maximum sentences as pronounced by the sentencing court rather than the actual term served by inmates—and we know that few prisoners remain confined

³ The bulk of this Reporters' Note has not been revised since § 305.6's approval in 2011. The Note has been revised only to reflect the amendments to the provision contained in this draft. All Reporters' Notes will be updated for the Code's hardbound volumes.

for the full maximum period. Nationally, the Justice Department estimates that offenders serve, on average, 55 percent of their pronounced prison sentences. See U.S. Dept. of Justice, Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004—Statistical Tables* (2008), table 1.5. Thus, based on these aggregated statistics from large urban counties, the percentage of prison admittees who will actually serve terms of 15 years or more is in the low single digits.

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

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

On the shifting norms and priorities of criminal law, see Lawrence M. Friedman, *Crime and Punishment in American History* (1993); Samuel Walker, *Popular Justice: A History of American Criminal Justice* (2d ed. 1997); David F. Musto, *The American Disease: Origins of Narcotic Control* (1999); Michael Tonry, *Crime and Public Policy*, in Tonry ed., *The Oxford Handbook of Public Policy* (2009). For human accounts of the effects of long-term imprisonment, and changes in inmates over long periods of time, see Ron Wikberg, *The Long-Termers*, in Wilbert Rideau and Ron Wikberg, *Life Sentences: Rage and Survival Behind Bars* (1992). For a more academic discussion, see Robert Johnson, *Hard Time: Understanding and Reforming the Prison* (2d ed.

1996), ch. 4. On the change in criminal propensity over the life course, see Alfred Blumstein and Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327 (2009). On the reemergence of rehabilitative theory under an evidence-based model, and the prospects for deincarceration that would follow, see Lawrence W. Sherman, *Reducing Incarceration Rates: The Promise of Experimental Criminology*, 46 *Crime & Delinq.* 299 (2000).

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

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

d. Identity of the official decisionmaker. While no close precedent exists for a judicial “second look” procedure, a few states currently provide for the judicial modification or reduction of some prison sentences long after they were originally imposed. The closest analogues are 11 Del. Code § 4217 (judicial sentence-modification discretion exists upon recommendation of Department of Corrections and Board of Parole); Ind. Code § 35-38-1-17(b) (after passage of one year, court may resentence any prisoner to a community punishment if this had been an option at the original sentencing; otherwise resentencing of prisoner requires approval of prosecutor); N.H. Rev. Stat. § 651:20 (prisoners may petition court to suspend their sentences after serving a specified portion of their terms; earlier petitions require the recommendation of the department of corrections); and

N.J. Rules of Court, R. 3:21-10(b) (court may entertain motion at any time to modify a custodial sentence in order to place offender into a substance-abuse treatment program; transfer of prisoner to intensive supervision program also authorized upon review of a three-judge panel). A judicial release provision exists in Ohio, but it does not apply to sentences longer than 10 years. See Ohio Rev. Code § 2929.20(3). In at least one state, judges until recently had power to modify prison sentences after many years—a practice sometimes called “bench parole,” but this authority existed from the date of original sentencing. See Cecilia Klingele, *Changing the Sentence Without Hiding the Truth: Sentence Modification as a Promising Method of Early Release*, 52 *Wm. & Mary L. Rev.* 465, 503-506 (2010) (discussing Maryland Rule of Court 4-345, which was amended in 2005 to put a five-year limit on the sentencing court’s “revisory power”).

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

Some jurisdictions in roughly similar contexts have used the Department of Corrections as a gatekeeper for prisoner petitions. Under the federal compassionate-release provision, for example, the Director of the Bureau of Prisons must make a recommendation in favor of sentence modification before the matter may be heard by the courts. This arrangement has resulted in only a small trickle of recommendations each year. See Stephen R. Sady and Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies that Result in Over-Incarceration*, 21 *Fed. Sent. Rptr.* 167 (2009) (“with almost 200,000 federal prisoners, the BOP approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24% of the motions that were approved by the BOP, the prisoner died before the motion was ruled on”); Mary Price, *A Case for Compassion*, 21 *Fed. Sent. Rptr.* 170 (2009) (recommending that, “[i]f the Bureau of Prisons is unwilling or unable to exercise this power as Congress intended it may be time for Congress to allow prisoners to petition the court directly, taking the Bureau of Prisons out of the business of controlling compassion.”). In light of this experience, the American Bar Association Commission on Effective Criminal Sanctions expressed hesitation about the formulation of a gatekeeping authority in § 305.6, and encouraged the consideration of gatekeeping entities other than Departments of Correction. See ABA Commission

on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28.

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

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

In the setting of compassionate release for age or infirmity, American law generally makes prisoners eligible for consideration even though they are otherwise subject to mandatory-minimum terms of incarceration, although many states make narrow exceptions, e.g., for capital cases or sentences of life without parole. See Alaska Stat. § 33.16.085(a) (“Notwithstanding a presumptive, mandatory, or mandatory minimum term or sentence a prisoner may be serving or any restriction on parole eligibility under AS 12.55, a prisoner who is serving a term of at least 181 days, may, upon application by the prisoner or the commissioner, be released by the board on special medical parole [if statutory criteria satisfied]”); Cal. Penal Code § 1170(e)(2) (effective January 1, 2009) (“This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.”); Conn. Gen. Stat. § 54-131k (“The Board of Pardons and Paroles may grant a compassionate parole release to any inmate serving any sentence of imprisonment, except an inmate convicted of a capital felony”); Fla. Stat. § 947.149 (parole commission’s power to grant medical release exists “[n]otwithstanding any provision to the contrary” except for inmates under sentence of death); Idaho Code § 20-223(f) (“Subject to the limitations of this subsection and notwithstanding any fixed term of confinement or minimum period of confinement . . . the commission may parole an inmate for medical reasons.”); La. Rev. Stat. § 15:574.20(A)(1) (“Notwithstanding the provisions of this Part or any other law to the contrary, any person sentenced to the custody of the Department of Public Safety and Corrections may, upon referral by the department, be considered for medical parole by the Board of Parole. Medical parole consideration shall be in addition to any other parole for which an inmate may be eligible, but shall not be available to any inmate who is awaiting execution or who has a contagious disease.”); N.H. Rev. Stat. § 651-A:10-a(VI) (“An inmate who has been sentenced to life in prison without parole or sentenced to death shall not be eligible for medical parole under this section”); N.M. Stat. § 31-21-25.1(B) (“Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible.”); N.C. Gen. Stat. § 15A-1369.2(b) (“Persons convicted of a capital felony or a Class A, B1, or B2 felony and persons convicted of an offense that requires registration under Article 27A of Chapter 14 of the General Statutes shall not be eligible for release under this Article”); Or. Rev. Stat. § 144.122(4) (“The provisions of this section do not apply to prisoners sentenced to life imprisonment without the possibility of release or parole”); R.I. Stat. § 13-8.1-1 (“Notwithstanding other statutory or administrative provisions to the contrary, all prisoners except those serving life without parole shall at any time after they begin serving their sentences be eligible for medical parole consideration, regardless of the crime committed or the sentence imposed.”); 28 Vt. Stat. § 502a(d) (“Notwithstanding subsection (a) of this section, or any other provision of law to the contrary, any inmate who is serving a sentence, including an inmate who has not yet served the minimum term of the sentence” may be eligible for medical parole); Wyo. Stat. § 7-13-424(a) (“Notwithstanding any other provision of law restricting the grant of parole, except for inmates sentenced to death or life imprisonment without parole, the board may grant a medical parole to any inmate meeting the

conditions specified in this section.”). In other states, the sentence-modification power cannot alter a mandatory-minimum prison term. See 11 Del. Code § 4217(f) (“no offender who is serving a statutory mandatory term of incarceration at Level V imposed pursuant to a conviction for any offense set forth in Title 11 shall be eligible for sentence modification pursuant to this section during the mandatory portion of said sentence”; although this preclusion does not apply in cases of “serious medical illness or infirmity”); *State v. Peterson*, 2007 WL 2609244 (N.J. Super. A.D. 2007) (holding Rule 3:21-10(b) does not permit court to reduce sentence below a statutory mandatory-minimum period of incarceration).
