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Model Penal Code: Sentencing—Workable Limits on Mass Punishment

ABSTRACT

The Model Penal Code: Sentencing (MPCS) rewrites the 1962 Model Penal Code's provisions on sentencing and corrections. Since the 1960s, use of all forms of punishment has exploded, including incarceration, community supervision, supervision revocation, economic sanctions, and collateral consequences of convictions. The MPCS provides an institutional framework for all major forms of punishment. It consists of a sentencing commission, sentencing guidelines, abolition of parole release discretion, appellate sentence review, and controls on correctional population size. It revamps sentencing procedures to inject greater fairness and transparency. It gives state legislators broad advice on how they can reform their systems as a whole, while improving decisions in each case. The MPCS recommends newly crafted limits on punishment through reasoned pursuit of utilitarian crime reduction goals, prohibition of disproportionate sentence severity, individualization of sentences that cuts through even mandatory minimum penalties, refinement of each type of punishment so it can achieve its core purposes, an attack on "criminogenic" sentences that do more harm than good, measures to prioritize and direct correctional resources to offenders who present the greatest risks and highest needs, and creation of institutional capacity to monitor, manage, and improve the entire system over time.

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The Model Penal Code is a venerable brand name in legal circles. The original code inspired legislation in 40 states and became a font of judicial precedent in every state and the federal courts (Lynch 1998, pp. 297–98; Dubber 2015, pp. 5–6). It was the most successful law reform project in the history of American criminal justice, worthy of comparison with the Uniform Commercial Code in commercial law or the American Law Institute's "Restatements" of contracts, torts, and other common-law subjects (Kadish 1988). The Model Penal Code has been a mainstay of law school curriculums for generations; it has been summarized and resummarized in hundreds of "hornbooks" for law students, and it continues to generate new scholarship to the present day.

The new *Model Penal Code: Sentencing* (MPCS) won final approval from the American Law Institute in 2017 after 15 years of study, debate, drafting, and redrafting (see American Law Institute 2017*a*, 2017*b*).[1] It is the first official amendment of any section of the original Model Penal Code and replaces about half of the old code—the half concerning sentencing and corrections.[2]

The MPCS is not legislation with force of law but recommended legislation addressed primarily to state legislatures in the United States. It is meant to collect best practices of the past and also to be "aspirational"—to propose reforms to push the law forward.

This essay does not attempt to summarize the entire MPCS project but focuses on several of its features, including foundational sections of the code that are key to understanding its more detailed pieces. Despite the many technical aspects of sentencing law addressed by the MPCS's 59 provisions, it approaches sentencing from a human, rather than a doctrinal,

[1] Citation of the new MPCS provisions can be tricky. The "Proposed Final Draft" (PFD) of the MPCS that was formally approved by the ALI membership (American Law Institute 2017*b*) is now being edited and updated, to be published in hardbound volumes in 2019. While there will be no changes in the substance of the PFD, most provisions have been renumbered to reflect their ultimate sequential order—and that final numbering does not match that in the PFD. (Over many years of drafting, the temporary section numberings were unsystematic.) Thus, in the short term, the PFD is the most complete source for the MPCS and its commentaries, but citations to the PFD will soon be past their expiration date. For the final numbering system, with back-and-forth cross-references to preapproval designations, see American Law Institute (2017*a*). Citations in this essay will follow the final MPCS nomenclature. When the PFD or other preapproval drafts are used as sources, page numbers will be cited rather than moribund section numbers.

[2] The "corrections" provisions were the least celebrated portions of the original Model Penal Code (Robinson and Dubber 2007, p. 326).

perspective. That is, it concerns itself with all the ways people convicted of crimes experience punishment. This perspective carries with it an extended time horizon. Under the MPCS, "sentencing" does not conclude with the judge's pronouncement of a sentence in court but continues forward through the lifespan of sentences as they are administered and experienced. The MPCS does not treat a sentence as having been fully determined until we can look back on it with hindsight. The full severity of a sentence, its shape and form, and the ways in which it pursues the policies of criminal law (or fails to pursue them) are continually unfolding until the sentence is over. Many official decisions taken during the life of a sentence are therefore treated by the MPCS as "sentencing decisions." Often, the process of defining a final sentence unfolds over a period of years. In some ways, the legal penalties imposed on people convicted of crimes in America are never ending.

This essay highlights a number of the MPCS's major proposals to introduce rational limits on sentences in individual cases as well as system-wide controls over aggregate sentencing severity. On matters of institutional structure, the MPCS recommends that every state should create a permanent sentencing commission with authority to develop "presumptive" sentencing guidelines—that is, guidelines with a degree of legal force but subject to judicial departures based on "substantial reasons." Trial court sentences are subject to appellate review under the MPCS. Unique to the MPCS, appellate courts are given authority to reverse any sentence—even if it is legislatively mandated—on the ground that it is disproportionately severe. The MPCS also includes a strong preference for a "determinate" sentencing system, in which parole boards have little or no authority to determine the actual time a person will serve in prison. Instead, under the MPCS, lengths of prison stay are primarily a function of the judicial sentence, with good-time allowances for prisoners who maintain a reasonably clean prison record and participate in in-prison programs. Among other advantages, the institutional structure endorsed in the MPCS has been associated with low prison-rate growth when compared with other types of American sentencing systems in the past several decades.

In addition, the MPCS addresses sentencing law and policy at the individual-case level and gives close attention to the distinctive principles at work for each sanction type. For example, it greatly restricts the utilitarian purposes that may be used to justify incarceration sentences. It would abolish all mandatory imprisonment laws but, because this is un-

likely to happen all at once, it also proposes many mechanisms to dilute the application of mandatory penalties. In community supervision, the MPCS counsels in favor of smaller probation and parole populations, with more resources devoted to clients with the greatest needs. The MPCS advocates shorter supervision terms, the parsimonious use of conditions, and defined incentives that allow clients to earn early termination. It further takes the view that many people currently on probation do not need supervision at all, and many are hindered in their efforts to reenter their communities by probation restrictions. As a law-reform priority, diversion from probation is a significant goal under the MPCS, as well as diversion from prison. On the expanding panoply of financial sanctions imposed on criminal offenders (or, sometimes, suspected offenders) across America, the MPCS recommends drastic cutbacks. Perhaps most importantly, it provides that no economic sanction of any kind may be imposed if payment would prevent the defendant from providing for his or her own reasonable financial needs and those of his or her family. In the domain of collateral consequences of conviction—although these are usually classified as "civil" measures—the MPCS gives courts the power to exempt defendants from the mandatory effects of such sanctions. It also empowers courts to grant "certificates of rehabilitation" to ex-offenders after a period of years, which would clear away nearly all collateral sanctions. Further, the MPCS instructs sentencing commissions to draw collateral consequences within their jurisdiction of responsibilities, so that someone is required to collect and update information on the hundreds of collateral sanctions that exist in each state. The commission is also given responsibility for writing guidelines for the application of those sanctions and the use of judges' powers to soften their blows.

Here is how this essay is organized. Section I briefly describes the entire MPCS project. Section II addresses the historical context into which the code has landed. Section III focuses on the MPCS's provisions to combat racial and ethnic disparities in sentencing. Section IV discusses its overall policy framework for placing limits on mass punishment. The remaining sections discuss different modes of punishment the MPCS seeks to rationalize. Section V discusses prisons and jails; Section VI, probation; Section VII, "back-end" sentencing matters including postrelease supervision and provisions for the early release of prisoners serving extended prison terms (these are the MPCS's counterparts to the original Model Penal Code's provisions on parole supervision and release); Section VIII, economic sanctions; and Section IX, collateral consequences

of conviction. We conclude with some consideration of the most important topic the MPCS failed to cover: conditions of confinement in American prisons and jails.

I. MPCS Overview

The new MPCS should not be seen as one project but as a collection of related projects spanning the sentencing landscape. Its major subject areas can be cataloged under the following headings—many of which, standing alone, could have justified multiyear law-reform initiatives in their own right:

- Purposes of Sentencing and the Sentencing System
- Institutional Framework of the Sentencing System
- Prisons and Jails
- Probation and Parole Supervision and Revocation
- Economic Penalties
- Collateral Consequences of Conviction
- Dispositions Short of Conviction
- Mechanisms to Address Racial and Other Disparities in Punishment
- Sentencing of Juvenile Offenders as Adults
- Mechanisms to Manage Correctional Resources
- Procedural Rules of Sentencing
- Mechanisms to Blunt Prosecutorial Control of Sentencing Outcomes
- Risk Assessment as a Sentencing Tool
- Victims' Rights at Sentencing
- Appellate Review of Sentences
- Sentence Modification and Prison-Release Mechanisms

Like the original Model Penal Code, the MPCS is rooted in 50-state legal research, wide consultation with practitioners, and study of the relevant legal and social science literatures. In some places, it is informed by comparative research.[3] Overall, it reflects investments of time and exper-

[3] In addition, the MPCS includes official comments and research notes for every provision. These add up to a treatise in American sentencing law and policy that will not be duplicated anytime soon.

tise that most legislatures or criminal justice agencies could not afford on their own.[4]

The MPCS's breadth of coverage is part of what makes it a valuable resource. Some of the 16 subjects listed above were receiving attention from policy makers and researchers before the MPCS project was launched, but just as many had been badly neglected. The study of all of them together, over a substantial period of years, was a unique strength of the American Law Institute process. This holistic scope permitted the MPCS to hammer out an approach to sentencing law that is internally consistent in its attempt to temper punishment with an appreciation of the cumulative weight of the many disparate sanctions—from fines to probation to collateral consequences—that criminal defendants experience as punishments for criminal conviction.

II. Context: Criminal Punishment in Twenty-First-Century America

The MPCS has arrived at a moment in American criminal justice history that is both tragic and, perhaps, a time of cautious optimism. Over several decades, from the early 1970s through the late 2000s, all American states expanded the per capita use and severity of every major form of criminal punishment—by stunning amounts.[5] We refer to this as America's "punishment buildup period." The across-the-board punitive eruption included imprisonment, jail confinement, probation supervision, victim restitution, fines, court and corrections fees (of many varieties), asset forfeitures, parole supervision, revocations from probation and parole supervision, and collateral consequences of conviction. All of these sanction types grew dramatically and over substantially overlapping periods.[6] Their social importance grew as well.

The basic facts of incarceration growth are well known. From 1970 to 2008, the 1-day counts of people in US prisons and jails multiplied from 357,292 to 2,325,633. Corrected for population growth, this was

[4] The MPCS also benefited from close alliance with the Robina Institute of Criminal Law and Criminal Justice. This added significantly to the project's resources over its last 5 years, especially in the areas of community corrections and economic sanctions.

[5] By "major forms of criminal punishment," we mean penalties imposed on large numbers of people.

[6] A similar pattern holds for the American death penalty, which saw a resurgence in the 1970s, 1980s, and 1990s, after nearly disappearing across the 1960s and early 1970s. Even at its recent peak, however, it affected a vanishingly small number of people compared with the many millions in prison and jail, or on probation and parole (Reitz 2018, p. 6).

a quintupling of the nation's incarceration rate (Cahalan 1986, tables 3–4, 4–1; Sabol, West, and Cooper 2009, table 5; Minton et al. 2015, table 2). No other country experienced a parallel incarceration explosion during the same period, and no country—including the United States—had ever seen such a historic phenomenon. By the 1990s, America had drawn neck and neck with Russia for the "leadership" position in the world's incarceration rates (The Sentencing Project 2001). The United States became the undisputed "winner" around the turn of the century and remains number one today.

We became an international leader in other ways, too. By the 1990s and 2000s, using available data, the United States had become an outlier among Western democracies in its uses of all mainstream forms of criminal punishment (Reitz 2018). To describe where the country ended up, we have no quarrel with the terms "mass imprisonment" or "mass incarceration," which have come into popular usage. Sadly, however, these terms underdescribe the current American predicament. We prefer to say that the nation has reached a condition of "mass punishment" that goes beyond incarceration and touches a far greater share of the US population than the 2 million in prison and jail.

For instance, across America there were 3.7 million adults under sentences of probation supervision on any given day in 2016 (Kaeble 2018, p. 1). In 1976, the average daily count of probationers was about 923,000 (Cahalan 1986, table 7–8A). Over the same 40-year period, the parole supervision population multiplied from 156,000 to 875,000. In other words, probationer counts quadrupled and parolees quintupled—during a time span in which the total US population grew by less than 50 percent. Trend lines this steep are worrisome in themselves, but it is equally illuminating to compare the United States with other countries in the wake of the community-supervision buildup. We do not know if America is the world leader in supervision rates (it could be), because we lack data for most countries. However, MPCS-allied research found that US probation supervision rates in 2014 were five to 10 times those of Western and Eastern European countries—roughly the same outsized ratio as comparative incarceration rates (Alper, Corda, and Reitz 2016; Rhine and Taxman 2018; van Zyl Smit and Corda 2018).[7]

[7] The research grew out of activities of the Robina Institute of Criminal Law and Criminal Justice, conceived to run in parallel with MPCS drafting. Reporters Reitz and Klingele were heavily involved in the planning and execution of Robina Institute projects from 2011–18, in symbiosis with their American Law Institute duties.

The same growth trends, and the same drive toward international preeminence, are apparent in America's use of economic sanctions and its ever-increasing slate of collateral consequences of conviction (Bannon, Nagrecha, and Diller 2010; Beckett and Harris 2011; American Law Institute 2017*b*, § 6.04 and comment *a*). Here are just a few of those developments. The victims' rights movement, first building momentum in the 1980s, brought about a revolution in victim restitution orders in criminal cases, which are now mandatory in many states regardless of the defendant's ability to pay. As local courts, governments, and criminal justice agencies have become poorer, they have increasingly looked to people accused of crime as new sources of revenue through the multiplication of fines, fees, costs, and other assessments—a trend that seems not to have abated. Police and county sheriffs' departments, allowed to retain assets seized from citizens via civil forfeiture laws (usually without criminal charges), have become ever more active in the forfeiture line of work. The "economic sanctions buildup" overlapped with a period of worsening wealth and income inequalities in the United States, which could only have amplified the felt intensity of these new punishment practices. We think it fair to include economic sanctions as a substantial component of the mass punishment buildup more generally. In much the same way, beginning in the 1980s, laws authorizing collateral consequences have been enacted at federal, state, and local levels, increasingly cutting off the ability of people who have served their criminal sentences to obtain employment, secure housing, obtain student loans, and vote (Pinard 2010; Meek 2014). Although data about the prevalence of collateral consequences in other nations are difficult to obtain, the available evidence suggests that, as in all other areas of sanctioning, the United States is an outlier, imposing more consequences, more automatically, on a larger segment of convicted individuals, for longer periods of time (Pinard 2010; Corda 2018; Demleitner 2018).

In addition to their sheer scale, criminal punishments in the United States are shot through with racial and ethnic disproportionalities. Generally speaking, across American prisons, jails, and parole and probation systems, the amplitudes of racial and ethnic disparities tend to increase in relation to the severity of the punishment type examined.[8] In other words, more severity often comes with greater disparity. Some mental adjust-

[8] Black-white disparities in imposition of the death penalty are similar to those in prison and jail populations. If we correct for representation in the general population, the black

ments need to be made when interpreting statewide or national statistics in this area. Within minority groups, the poor experience heightened risks of criminal punishment compared with the better off. Among the most disadvantaged Americans, especially African Americans, the felt intensity of criminal sentencing policy is far greater than is suggested by aggregated official statistics (Wilson 1987; Western 2006; Tonry 2011; Goffman 2015). And the official statistics are bleak enough.

The US Bureau of Justice Statistics reported that the nationwide African American imprisonment rate in 2016 was 5.2 times that for whites, the Latino rate was 2.6 times higher, and the Native American rate was twice as high (Beck and Blumstein 2018; Carson 2018, table 5, p. 7; table 6, p. 8). Disparities in jail confinement rates were also reported, albeit at lower levels than in the prisons (disparity ratios of 3.4, 1.1, and 1.2, respectively; Zeng 2018, table 1, p. 2). With more than 2 million people incarcerated overall, this adds up to a high level of "carceral intensity" experienced by discrete population groups as a constant feature of community life. The Pew Charitable Trusts reported that roughly "one in 9" (not a misprint) black men age 20–34 were in prison or jail on any given day in 2007 (Pew Center on the States 2008, p. 6). The ratio was even more shocking in the poorest black neighborhoods (Western 2006).

Racial and ethnic disparities also run through most of America's vast community supervision populations—totaling 4.5 million in 2016 on any given day. In that year, according to national statistics, the African American parole supervision rate was four times greater than for whites. The black-white ratio of probation supervision rates was more than 2:1. Hispanics and Native Americans were more than 10 percent overrepresented among parolee populations but were 9 percent underrepresented among probationers (Kaeble 2018, app. table 4, p. 17; app. table 8, p. 24).[9]

We have no official "counts" or "rates" to compare the intensity of application of economic sanctions and collateral consequences of conviction across demographic subgroups. We do have quite a bit of localized

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rate of presence on death row in 2016 was 4.1 times the white rate. The Hispanic-white disparity ratio was 1.2:1, with no Native American statistics reported (Davis and Snell 2018, table 2, p. 4; estimates of Hispanic representation among blacks and whites based on Beck and Blumstein [2018, p. 862]).

[9] We do not know how to interpret these last underrepresentations on probation, except to say that prison disparities can be fueled in part by a tendency of particular groups to be refused probation more often than one would expect and receive prison sentences instead. This dynamic may also help explain the relatively "low" 2:1 black-white disparities among probationers, when disparities in incarceration and on parole are at least twice as large.

and anecdotal evidence, however. For example, the US Justice Department's investigation of the police department in Ferguson, Missouri, found that the collection of municipal fines and fees—largely used to support the local government—was concentrated in poor minority neighborhoods. The same thing has been happening in other parts of the country (US Department of Justice 2015; Lawyers' Committee for Civil Rights 2017). There have been many journalistic accounts of law enforcement agencies use of asset forfeiture laws around the country and many demonstrations at the local level that poor and black people suffer most (Lexington 2010; Stillman 2013; Balko 2017). In the domain of collateral consequences and their lifelong effects on the formerly convicted, we have strong circumstantial evidence of racial and ethnic disparities simply because the people who are arrested and convicted in the United States are disproportionately African American, Hispanic, and Native American. There is little question that the disabilities inflicted through collateral consequences have greater effects on poor people than on those better insulated by their money (Alexander 2010; Pinard 2010).

Today, the United States seems to be at a historical inflection point between the punishment buildup and whatever comes next. Thirty-five straight years of growth in national incarceration rates peaked in 2007–8, and since then there has been a slight decline. The nation's expanding community supervision rates also topped out in 2008 and dropped 18 percent by 2016 (Kaeble 2018, app. table 1, pp. 11–12). Although no longer included in the Model Penal Code, use of the death penalty has been dwindling in the twenty-first century, from a high of 98 executions in 1999 to 23 in 2017 (Death Penalty Information Center 2018, p. 1). Crime rates across the country have dropped a great deal since 1992—a massive change that followed a very long bad stretch. In the 30 years prior to the early nineties, the nation had lived through one decade of spiking crime rates followed by two decades of persistently high rates (Reitz 2018, pp. 22–28).[10]

All of these trends, with arrows pointing downward, may augur a weakening of the forces that drove the nation's buildup to mass punishment.[11]

[10] Ruth and Reitz (2003) called this the "crime spike" of 1962–72, followed by 20 years of a "high-crime plateau." Homicide rates doubled during the crime spike, and reported rates of robbery, rape, and aggravated assault skyrocketed even faster. From 1972–92, rates of serious violent crime oscillated over several-year periods, but the oscillation occurred around median levels established at the peak of the crime spike (pp. 98–102).

[11] It is harder to say whether there has been an overall softening in the uses of economic penalties and collateral consequences of conviction, partly because there is no reporting

There has been a great deal of talk, on both sides of the political aisle, about sentencing reform and broader criminal justice reform. So far, however, changes in law and practice have been modest. The good news is that there is a great deal of openness to reform in many state and local governments. There is widespread sentiment that the trajectory of criminal punishment over the past several decades was a serious mistake. Sentiment does not always translate into workable ideas for law reform, however, and can dissipate without much result.

If the present era holds genuine potential as a turning point, it would be a shame to squander the opportunity. Responsible officials need information about practical measures they can take to make their sentencing systems less gargantuan, more humane, less wasteful, more just, and more effective. Ideally, these should be lasting reforms, not crisis-driven Band-Aids. The MPCS is the product of years of effort to meet such practical needs. While it has no force of law, it does have the force that comes from speaking to subjects of dire necessity in need of invention.

III. Racial and Ethnic Disparities in Punishment

The primary MPCS approaches to disproportionalities in punishment are to ensure the issue never drops from sight, require sentencing commissions to search for causes of racial and ethnic disparities in the sentencing system on a continuing basis, charge the commissions to recommend ameliorative measures whenever disparities are found, and mandate that statistical demographic impact projections be prepared every time a change in sentencing law or guidelines is proposed—that is, a "demographic impact statement" to go alongside the familiar fiscal impact statement.

By itself, the demographic impact statement (or DIS) could fundamentally alter the evolution of American sentencing law. The goals of the DIS are to shine a spotlight on sensitive information when it matters the most, provoke debate before new laws are passed, and create a record for legislative accountability in the long run. These are not uninformed hopes.

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system to keep track of the breadth of their use. Our guess is that economic and collateral sanctions remain on the increase in most states. New counterforces have appeared on the horizon, however, including upsurges in policy research, academic study, advocacy, public awareness, and law-reform initiatives. If we count expressions of concern as tea leaves of actual moderation in practice, then, again, there may be movement away from the punishment buildup.

Over the past several decades, sobering fiscal impact statements have caused many states to soften or abandon proposed sentencing legislation or guidelines. This has especially been true in the sentencing guidelines states that have developed the most sophisticated corrections modeling tools. Repeatedly, almost to the point of routine in some states, we have seen that credible forewarning of consequences can be a conversation changer.

One of the MPCS's cornerstone provisions, section 8.07, would require all state sentencing commissions to develop a "correctional forecasting model," building on the best practices already in use in a number of states. (In our experience, the states with the most advanced software do not consider it proprietary.) Taking a further step—and a big one—the MPCS advocates a broadening of the scope of the forecasting model to include anticipated changes in sentencing outcomes broken down by race, ethnicity, and gender (American Law Institute 2017*a*, § 8.07(1), (3)).

In 2007, Minnesota became the first state to experiment with the MPCS's proposal (Reitz 2009; London 2011). This was done as a matter of sentencing commission policy rather than statutory command (Minnesota Sentencing Guidelines Commission 2017).[12] Over the past decade, Iowa, Connecticut, Oregon, and New Jersey have enacted some form of "racial impact statement" legislation (Mauer 2009; The Sentencing Project 2018).[13] None of these states follows the MPCS recommendations exactly. Most DIS legislation was developed by states in partnership with The Sentencing Project, and the laws all bear scars of political compromise.[14] Still, the

[12] Although the MPCS as a whole did not receive final approval until 2017, the DIS proposal dates back to 2002 and won "tentative approval" as official ALI policy in 2007 (American Law Institute 2002, § 1.02(2)(e); 2007, § 6A.07(3)). The inspiration for the DIS was Michael Tonry's argument that Congress and other lawmakers should be held morally accountable for foreseeable racial disparities in punishment that result from their enactments (Tonry 1995, pp. vii–viii, 104–5).

[13] See Iowa Code § 2.56(1); Conn. Gen. Stat. § 2.24b; Ore. Rev. Stat. §§ 137.656, 137.683, and 137.685; and S. 677, 217th Leg. (N.J. 2018). The DIS goes by several different names. The Minnesota Sentencing Guidelines Commission used the term "racial impact statement" until 2017 and then switched to "demographic impact statement" (Minnesota Sentencing Guidelines Commission 2017). In recent New Jersey legislation, the DIS is named the "racial and ethnic community criminal justice and public safety impact statement" (S. 677, 217th Leg. [N.J. 2018]).

[14] For example, in Connecticut and Oregon, a DIS is not drawn up routinely when new laws affecting correctional populations are introduced. Instead, in Connecticut from 2008 through 2018, a DIS was prepared only when requested by a majority of the Joint Standing Committee of the General Assembly on Judiciary. In Oregon, a request must be lodged by at least two members of the Legislative Assembly from opposite parties (Ore. Rev. Stat. §

number of states that have taken an interest is encouraging. We can now count five states with active DIS statutes or policies of one form or another. In seven other states, DIS proposals have been put forward, so far without success (Erickson 2014).

To our knowledge, the uses and effects of the "demographic" or "racial" impact projections in the five adopting states have not yet been studied. The Minnesota sentencing commission, however, has generated more information on the use of the DIS than any other state. From this, we have evidence of the feasibility of preparing a DIS in addition to fiscal impact statements and solid examples of the kind of information a DIS can add to the lawmaking process.

In one early use of the tool, Minnesota's sentencing commission forecast the demographic effects of proposed legislation to raise the penalties for attempted robbery to the same level as for the completed crime (Minnesota Sentencing Guidelines Commission 2008). The DIS included projected effects on whites, blacks, Hispanics, Asians, and American Indians. To illustrate, we focus on the discussion of African Americans in comparison with whites.

The commission's impact report laid out some basic statistics of the current system before analyzing the proposed bill. In 2006, 4.3 percent of Minnesota's general population was black, yet blacks made up a much larger 32.1 percent of the state's prison population. In turn, whites were 86 percent of the general population and 61.6 percent of those in prison (Minnesota Sentencing Guidelines Commission 2008). While the commission's report did not calculate the "disparity ratio" between black and white prison rates, the math is easily done: the black prison rate at the time in Minnesota was more than 10 times the white rate.

The commission then estimated the effects of the new law, if passed. It found, based on felony conviction data for attempted robbery, that 61.1 percent of those expected to receive enhanced penalties under the new law would be black, and 25.9 percent would be white. In addition, the commission anticipated that the average increase in prison terms under the new law would be 10 months for blacks and 8 months for whites

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137.683(2)(a)). In Connecticut, the absence of a routine-triggering mechanism has led to extremely limited use of the DIS tool. From 2008 through 2014, only one DIS was generated in the state, compared to 45 in Iowa over the same period (Erickson 2014, pp. 1447–48). Connecticut recently amended its law to require preparation of a DIS at the request of any member of the General Assembly, to take effect next year; see Conn. Gen. Stat. § 2.24b(a) (effective January 19, 2019).

(Minnesota Sentencing Guidelines Commission 2008, pp. 1–2).[15] Based on these projections, blacks in Minnesota would have been subject to the increased penalties for attempted robbery at 47 times the rate of whites, and the average increase in prison stay for blacks was expected to be 25 percent longer than for whites. In other words, the projected black/white disparities were jaw dropping.

The 2008 attempted robbery bill did not pass and was never reintroduced, but we cannot prove that the DIS was an important factor in its demise. No one has yet created a statistical measure, or oral history approach, to document the role actually played by a DIS in legislative debate or decision-making. Over 10 years of use, we have occasionally heard from Minnesota government insiders that a DIS has made a difference in stopping a particular bill. While such anecdotal opinions are encouraging, a serious study of DIS-caused effects should be high on the criminal justice research agenda.

With respect to the 2008 attempted robbery DIS, all we can say with confidence is that the information it contained was explosive. While that particular bill probably failed for other reasons,[16] it is useful to imagine how a similar DIS would play out in the debate of an otherwise popular bill. We firmly believe a DIS as extreme as the 2008 example would be a deal breaker, ethically and politically, for many legislators.

There are two more MPCS lines of attack on disproportionalities in punishment. The first is easy to overlook, but its importance should not be underestimated. Among the sentencing commission's data collection responsibilities, the MPCS adds a critical duty that no state currently imposes. Every commission must develop information systems to track the demographic characteristics of victims as well as offenders—a task that will require cooperation from other criminal justice agencies (American Law Institute 2017*a*, §§ 8.05(2)(c), 8.08(1), (2)). The importance of victim demographic information is potentially enormous. We know from studies of capital sentencing that the race of murder victims is a powerful predictor of which defendants receive the death penalty. In the most fa-

[15] The longer increase in time served for blacks was largely due to the fact that, in historical data, the average black person convicted of attempted robbery in Minnesota had a somewhat higher criminal history score than the average white person convicted of the same offense.

[16] At the time, we were told that all bills projected to increase prison costs were "dead on arrival" in the statehouse because of a statewide budget crisis. So, the DIS may have played no role at all or simply reinforced a preordained conclusion.

mous study, a murder case with a white victim was four times more likely to result in a death sentence than a case with a black victim. This victim-race-based effect was several times stronger than the disparity in outcome based on the race of the defendant (*McCleskey v. Kemp*, 481 U.S. 279 [1987]; Baldus, Woodworth, and Pulaski 1990).

If the race of murder victims had not been a focus of capital punishment research, the most shocking racial malfunctions in death penalty administration would not have been noticed. Yet, in the larger realm of subcapital sentencing, disparity research and statistical tracking focuses almost exclusively on offenders' personal characteristics, with no effort to collate victim demographics (Ruth and Reitz 2003). We predict that the collection of basic victim data could transform our understanding of racial and ethnic disparities in sentencing—possibly in unsettling ways. Stated more neutrally, no serious effort to combat disparities in criminal punishment in America can afford to ignore the currently unknown effects of victim characteristics on sentence severity. The MPCS would place the issue on every state's agenda, while today it is a question given no priority at all.

Finally, we believe the most consequential measures to ease the impact of US sentencing policies on minority communities will be overall reductions in the enormous scale and reach of any and all of the mainstream forms of punishment. Aggregate reductions could have very large indirect effects on the inequities of disparate punishment. For example, if the current ratio of black-white disparities in incarceration is 5 : 1, then a 25 percent reduction in aggregate prison and jail populations will benefit a much larger number of African Americans than whites, if all else is held equal. We will assume the 5 : 1 disparity ratio will remain unchanged and unimproved. On these assumptions, the "same" 25 percent overall incarceration drop would have five times more deincarcerative impact within black communities than among the white population.[17] The felt reduction of punitive intensity in the most disadvantaged black neighborhoods would be orders of magnitude greater.

[17] Using simplified numbers, suppose the black incarceration rate is 1,000 per 100,000 blacks in the general population, and the white incarceration rate is 200 per 100,000 whites. A 25 percent reduction in incarceration rates while holding the 5 : 1 disparity ratio constant would benefit 250 blacks per 100,000 but only 50 whites per 100,000. (The postreduction incarceration rates would be 750 per 100,000 for blacks and 150 per 100,000 for whites.)

On this reasoning, all of the MPCS limits on mass punishment, if effective, would carry benefits for every demographic group but could carry massive benefits for the minority subpopulations who were hit hardest and most disproportionately by the punishment buildup.

IV. General Sentencing Policy in the MPCS

To understand the MPCS's reexamination of mass punishment in America, we must begin with the first principles that drive everything else in the MPCS sentencing system. The opening section, the "purposes provision," lays out the affirmative objectives of sentencing and the sentencing system, and—just as importantly—places policy-driven limits on the pursuit of those goals (American Law Institute 2017*a*, § 1.02(2)). Indeed, line by line, the provision spends more ink on principles of restraint than on forward-driving objectives. In this respect, § 1.02(2) differs from most existing state legislation. Even more importantly, the statutory purposes of sentencing are enforceable throughout the MPCS system. In most states this is not so—a typical purposes provision is more decoration than law. To ensure its centrality in state sentencing laws, § 1.02(2) is expressly incorporated into dozens of later provisions and is made the backbone of many important decision points.

The MPCS describes its policy framework as "utilitarianism within limits of proportionality" (American Law Institute 2017*b*, p. 370). The general idea is that reasoned utilitarian sentencing is permissible and desirable, so long as the result is not a disproportionate punishment (see Morris 1974; Morris and Miller 1985; Frase 2013, pp. 82–84).[18] The most "Olympian" portions of § 1.02(2) lay out the core elements of the MPCS thought process:

> Section 1.02(2). Purposes of Sentencing and the Sentencing System.
>
> The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

[18] Norval Morris famously named this theory "limiting retributivism"—a choice of wording the MPCS does not adopt. One reason for different terminology is that the idea of "retribution" has acquired negative connotations in the decades since Morris first wrote. Many people now associate retribution with unrestrained punitive impulses or see it as a dressing up of emotions of vengeance that should not be encouraged in law (Rubin 2001; Whitman 2003). To avoid such possible readings, the MPCS's use of "proportionality" emphasizes the inhibiting power of retributive thought.

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

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in Subsection (a)(i);
(iii) to render sentences no more severe than necessary to achieve the applicable purposes in Subsections (a)(i) and (a)(ii); and
(iv) to avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct.

The last two subdivisions above are entirely limiting in nature, and we do not discuss them further. They are both important—subsection (iv) is groundbreaking—but we trust the basic ideas are easy to grasp from their black-letter language. Subsections (a)(i) and (ii) are more complex. They articulate affirmative purposes to be pursued through criminal sanctions but are also self-regulating in two important ways. They create a "proportionality constraint" for all of criminal sentencing and an "assessment constraint" on the pursuit of utilitarian goals. These principles bear some explanation.

A. The Proportionality Constraint

Subsections (i) and (ii) in the excerpt above establish the MPCS's "proportionality constraint."[19] While proportionality in punishment is hardly an original concept, the MPCS attempts to implement it in new ways that will give it genuine meaning in American law. For one thing, the MPCS makes proportionality a meaningful and enforceable element of sentencing law, a benchmark "with teeth." It does so statutorily, with no reliance on constitutional law. The premise is that no legal principle of proportionality in punishment operated as an effective inhibitor of any part of

[19] Proportionality in § 1.02(2)(a)(i) also serves as an affirmative basis for punishment. The MPCS contemplates cases in which the consideration of proportionality is a sufficient condition for criminal punishment of some kind, including very serious cases in which anything short of an extended prison term would be disproportionately lenient (see American Law Institute 2017*a*, § 6.11(2)(b)).

the punishment buildup from the early 1970s through the late 2000s. The constitutional law of proportionality shrank to a weak and ineffectual stature during America's punishment buildup—just when, arguably, it was most needed (Ristroph 2006).

Over the past several decades, challenges to disproportionate sentences have mainly been rooted in the Eighth Amendment of the US Constitution. Most of them have been spectacularly unsuccessful. For instance, the Supreme Court in *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Ewing v. California*, 538 U.S. 11 (2003); and *Lockyer v. Andrade*, 538 U.S. 63 (2003) upheld sentences of life without parole for a first-time drug offender caught with a large amount of cocaine and decades-long sentences for minor offenses under California's three-strikes law. To be found unconstitutionally "cruel and unusual" in cases like these, a sentence must be deemed "grossly disproportionate" in relation to an offender's crime, criminal record, and any danger the defendant might pose in the future. In applying this standard, courts have developed habits of extreme deference to legislative authorizations and sentencing court rulings. Putting aside juvenile and capital cases, gross disproportionality is a test that can almost never be met.

Despite the vacuum in constitutional jurisprudence, we know few people willing to complete the following sentence: "Disproportionately severe criminal punishments are justifiable, and should be recommended in model legislation, when. . . ." Or: "We are in favor of life sentences for people who don't deserve them when. . . ." If readers cannot comfortably fill in these blanks, or can think only of unreasonably extreme examples, then they are in substantial agreement with the MPCS that a proportionality constraint is needed whenever sentences are envisioned, threatened, imposed, or modified.

The harder questions come in the implementation of the idea. How is proportionality to be defined (if it's even possible to do so) and who gets to define it? Who gets to apply the principle in real cases? How do we avoid the trap of a toothless doctrine that is never used?

The first important step the MPCS takes is to reinvent proportionality as a statutory imperative. To make clear that a purely statutory power is envisioned, MPCS commentary uses the term "*subconstitutional* proportionality review" (American Law Institute 2017*b*, pp. 5, 9, 505–7, 523–24). The second step of the MPCS's strategy is to give its statutory proportionality review the range and horsepower to reduce any sentence otherwise authorized or required by state law—including the ability to

override mandatory minimum prison terms (American Law Institute 2017*a*, §§ 10.01(2), (3)(b), 10.10(5)(b)).

Third, proportionality analysis under the MPCS must be applied to the entire package of legal sanctions that a criminal defendant will face as a result of conviction, including the nominally "civil" collateral consequences that are likely to be applied. Regardless of how collateral sanctions are formally classified, they add to defendants' subjective experiences of punishment and have ripple effects across all the utilitarian policies of criminal punishment. Therefore, the MPCS provides: "The court may not impose any combination of sanctions if their total severity would result in disproportionate punishment. In evaluating the total severity of punishment under this Subsection, the court should consider the effects of collateral consequences likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined" (American Law Institute 2017*a*, § 6.02(4)).

Finally, the MPCS steers well clear of the permissive standards of review found in constitutional law and includes unusually strong wording intended to rule out the long-established norms of appellate court deference to sentencing judges' decisions: "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" (American Law Institute 2017*a*, § 10.10 (5)(b)). To the legally trained ear, the "independent judgment" standard is a striking delegation of power to the appellate courts. Usually on subjective issues like this, standards for reversal are not triggered unless an appellate court finds an "abuse of discretion," "clear error," or an outcome no reasonable person can abide. The MPCS's innovation is warranted, however. Today, there is no final arbiter of sentencing proportionality in any American legal system. Only the distant goal line of "gross disproportionality" is ever—albeit rarely—policed.

The MPCS offers an institutional solution to this problem. Yes, proportionality is a principle that all actors in the MPCS system are called upon to honor, but it does not snap into an effective legal instrument until someone is given final, dispositive power. The buck must stop somewhere, or proportionality is adrift. As with much of the law, the identity of the decision-making authority is a question that can be answered, even if there is no prior consensus on correct answers. In the MPCS, the ultimate powers to define proportionality through precedent, and to re-

verse individual sentences that are disproportionately severe, are placed in the judiciary. It is a major advance in American law, we believe, to empower such a final "subconstitutional" decision maker.

B. The Assessment Constraint

The MPCS also introduces a new "assessment constraint" on the pursuit of utilitarian goals via criminal sentences. Utilitarian purposes may be pursued only "when reasonably feasible" (American Law Institute 2017*a*, § 1.02(2)(a)(ii)).[20] This standard is a creation of the MPCS, with no prior incarnation in American law. And yet, as explained in commentary, the assessment constraint codifies what ought to be an uncontroversial principle, in a relatively mild way:

> 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 administration of a criminal sanction. Thus, for example, the intuition that a defendant will be dangerous in the future (formed, for example, by a judge or a parole board) would not be enough to support an extended prison term on incapacitative grounds. There must be some reasonable ground for the prediction of future criminal behavior. . . . The threshold of reasonable feasibility . . . does not require scientific proof that a given sanction imposed on a particular offender will yield a known result. It demands only that there be grounds that support a reasonable belief that the utilitarian benefit will be realized. (American Law Institute 2017*b*, pp. 9–10)

The assessment constraint is meant to bring the question of reasonable feasibility into the foreground, when in the past it has been overlooked to the point of obliviousness. Even a modest requirement of reasonable feasibility would be a seismic change in commonplace American sentencing practices. For example: the most difficult utilitarian strategy to defend, in light of current knowledge, is the pursuit of general deterrence through the use or threat of increasingly severe penalties. Serious criminologists have found little or no empirical evidence of the deterrence-through-severity hypothesis (in contrast with findings that increases in

[20] More prosaically, the idea of reasonable feasibility also rules out the consideration of purposes that are simply not apposite to a particular case, such as the goal of victim restitution when there is no victim.

the speed and likelihood of punishment can promote general deterrence; von Hirsch et al. 1999; Webster and Doob 2012; Nagin 2013; Travis, Western, and Redburn 2014, chap. 5). Similarly, some well-intended rehabilitative programs have been shown to increase, rather than decrease, participants' risk of reoffending (Martinson 1974; Cullen et al. 2005; Center for the Study and Prevention of Violence 2010). When persuasive evidence surfaces that a utilitarian intervention is not a plausible way to achieve its goals, the assessment constraint can be mobilized to discourage its continued use. As stated elsewhere in the purposes provision, one heartfelt goal of the MPCS is to weed out sentences that are themselves criminogenic (American Law Institute 2017*a*, § 1.02(2)(a)(iv)). Unfortunately, serious study of criminal sentences across the United States yields a surprising number of examples.

V. The MPCS on Prison and Jail Sentences

The problems of "mass incarceration" were high on the minds of everyone connected to the MPCS drafting process (although the term is not officially adopted in the MPCS or its comments). There was consensus from the beginning, never questioned over 15 years, that the MPCS should aim toward major changes in the scale and use of prison and jail sentences nationwide. This concern is embedded in nearly all of the MPCS, even in provisions with no express reference to incarceration policy.[21]

A. Institutional "System Design"

The entire institutional structure of the MPCS is designed to bring prison size, jail populations, and the use of all other correctional resources under the deliberate control and management of state policy makers. In broad brush, the MPCS system includes a permanent sentencing commission empowered to promulgate presumptive sentencing guidelines. Importantly, the commission must be required to create guidelines projected to yield sentenced populations that will fit the capacities of existing (or funded) correctional resources. An important component of such a

[21] Over the years of drafting, the ALI leadership and membership became convinced that all other forms of mainstream criminal punishments in the United States had exploded to crisis levels, along with prison and jail populations. This extended what otherwise might have been an 8- to 9-year project to a full 15 years.

system is a modicum of guidelines enforceability through appellate review of trial court sentences. Finally, several decades of experience suggest that it is difficult to control prison populations if parole boards are the central decision makers with power over time served. The MPCS, for this and other reasons, advocates that the prison-release discretion of state parole boards should be eliminated, so that lengths of prison stays are for the most part a product of judges' sentences and predictable good-time discounts.

It is a fundamental goal of the MPCS system "to ensure that adequate resources are available for carrying out sentences imposed and that rational priorities are established for the use of those resources" (American Law Institute 2017*a*, § 1.02(2)(b)(iv)). The commentary calls this the capability of "correctional resource management" (CRM; American Law Institute 2017*b*, pp. 16, 32–33). CRM tools can inhibit or reverse prison growth, if those outcomes are desired in a particular state. They can also reprioritize the use of existing bed spaces (e.g., incarcerating serious violent offenders for longer terms and fewer drug offenders for shorter terms). Admittedly, CRM tools can also be used to push incarceration rates upward, if that is a state's policy goal (Zimring 1977; Tonry 1993). Indeed, the federal sentencing system was a splendid success at doing exactly this—for two solid decades. In the history of state sentencing systems, however, CRM has generally been used to slow or stop incarceration growth (Frase 2013). The main reasons for this, we think, are that prisons and jails are expensive, they are a significant chunk of all spending at state and local levels, and state governments must balance their budgets.

Importantly, CRM is not concerned only with the bottom line of total spending. It has been used in a number of states to "tilt" the use of existing prison spaces toward violent offenders (Wright 2002; Frase 2005). Incremental leniency can then be apportioned across nonviolent criminals, who are the much larger group among convicted felons. Line-by-line adjustments of this kind are possible with or without changes in prison size. In a deincarceration era, they are a way to make prison downsizing as policy responsive as possible.

CRM extends beyond incarceration to cover the resources required by community corrections and rehabilitative programming throughout the system. These are not separate issues. For example, a state may want to divert large numbers of drug offenders, currently receiving prison sentences, to treatment programs in their communities. In order to do

so, the state must find ways to get trial judges to alter their sentencing patterns en masse, and the state must be in a position to project costs and fund the necessary community treatment slots in time for the inflow of new clients. Most states are extraordinarily poor at this kind of medium-term planning, but a few states (North Carolina is high on the list) have made strides toward purposeful resource allocation across different divisions of corrections (Wright 2002). In our view, successful deincarceration policy will often depend on a synchronized beefing up of community programming and services.

The major institutional building blocks of CRM in the MPCS are drawn from decades of experience in a handful of states, starting with Minnesota in 1980. The major elements of system design in the MPCS are in this sense "proven."[22] You need a sentencing commission with serious research capacity, good models for fiscal impact projections, and the ability to create sentencing guidelines that are, at least to a modest extent, legally enforceable. The commission must be ordered to tailor its guidelines to available resources or to whatever levels of funding the state desires to commit for the future. For the right degree of enforceability of guidelines, you need appellate review of sentencing decisions, with some deference to trial courts (but not too much), and full power to correct legal errors. With luck, this setup will generate a predictable bell curve of sentencing patterns centered on the "presumptive" sentences indicated by guidelines. If overall patterns are reasonably forecastable, so are future expenses. If the projected costs are too high, the commission can revise its guidelines accordingly (American Law Institute 2003).

For CRM to work, you also need some way to predict how long sentences will actually be, on average, after they are imposed. For this and other reasons, the MPCS recommends abolition of the prison release discretion of parole boards. In the traditional framework, parole boards can and do change prison policy with every governor, after every headline case of a released prisoner who does something horrible, with approaching elections, before and after lunch, or at the drop of some other hat (Travis 2002; Reitz 2012).

[22] Of course, "proven" successes of the past do not guarantee continued successes in the future. It is wrong to be entirely agnostic, however. We believe that the institutional model for the MPCS system—basically the Minnesota model—has worked well in a number of states because of sound design, down to the level of details, supported by reasons why it should work. Many hundreds of pages of commentary in the MPCS explain each "design decision" within the greater whole.

Contrary to conventional wisdom, parole boards in the 1980s, 1990s, and 2000s were not in the business of reducing sentences but were turning into "parole denial boards." Nationwide trends in parole release ran in the direction of greater severity and longer prison stays as boards became more vulnerable to political pressure and more risk averse. One trial judge in Pennsylvania complained to us that he once sentenced a defendant to 5–10 years in prison on the assumption that it would translate into 5 years of time actually served until release. In fact, by the time 5 years had gone by, the state parole board was keeping prisoners in for much longer than before, so that the defendant's actual prison term was likely to be much closer to 10 years. The parole board had effectively resentenced the defendant to more than the judge's intended punishment, out of sync with its own norms several years earlier. This pattern appears to have been a common one in paroling states. At the peak of the prison buildup, states with indeterminate sentencing systems had significantly more prison growth, and had reached much higher prison rates on average, than states that abolished their parole boards' release discretion. On average, states with determinate systems and sentencing guidelines experienced the least growth in prison rates during the buildup years (Stemen and Rengifo 2010; American Law Institute 2011, app. B).

On questions of system design and the benefits of CRM, the MPCS relies on decades of experience in states such as Minnesota, Washington, Kansas, North Carolina, and Virginia (Knapp 1986; Anderson 1993; Wright 1997; Hunt 1998; Boerner and Lieb 2001; Frase 2013). There is a track record standing behind all of the MPCS's recommendations, albeit in a small minority of states. To our knowledge, the American Law Institute did not produce any revolutionary ideas concerning institutional design.[23] Rather, the MPCS plagiarized from the more successful states and combined all of the best ideas the reporters could "borrow." In the model legislation business, this is considered an especially solid foundation (and not, we hope, intellectual thievery). The CRM

[23] The possible exception is the MPCS's provision on correctional overcrowding, which creates mostly administrative mechanisms to reduce prison, jail, probation, and postrelease supervision populations when they exceed operational capacities (American Law Institute 2017*a*, § 11.04). Emergency release statutes already exist in a dozen states for prison populations (a few for jails, too). These laws have not been used very often, however, and the MPCS tries to fashion a new approach that will be more effective. In addition, no state has ever created a safety valve for overcrowding in community supervision populations. This is probably the MPCS's major innovation in system design, but we have yet to see whether it will be attractive to state legislatures and successful when adopted.

tools created in Minnesota for controlling prison population growth have worked reasonably well in a number of states. This is an impressive achievement in criminal justice reform; most well-intentioned ideas fail miserably (Rothman 1980; Feeley 1983; Marvell 1995, p. 707). There may be other methods of bringing correctional populations under control, including ideas of our own, but the only proven and replicated approach is the presumptive-sentencing-guidelines-determinate-sentencing model pioneered in Minnesota.

B. Multiple Attacks on Mandatory Minimum Prison Sentences

A good sentencing guidelines system is one way to implement deliberate controls over prison and jail population sizes. The restraining power of guidelines can be thrown out the window, however, through operation of mandatory imprisonment laws that "trump" the guidelines. Mostly these are statutory, although a number have been brought in by voter initiative. In some states and the federal system, prison growth has been driven in large degree by mandatory minimum sentencing laws that, once enacted, take on a life of their own. Typically, sentencing commissions must work within a superstructure of sentencing statutes that they have no power to change. This is a recipe for uncontrollable incarceration rates.

The American Law Institute, like other law reform organizations, has long disapproved of all mandatory minimum imprisonment laws. The original Model Penal Code expressed its blanket condemnation by negative implication: Judges were always given the option to impose a probation sentence, or suspended prison term, no matter how serious the offense of conviction. "Mandatories," as they are sometimes called, were ruled out by omission (American Law Institute 2017*b*, p. 145).

The MPCS continues the original Model Penal Code's across-the-board policy with some added layers. First, the MPCS includes black-letter language that expressly supersedes all mandatory minimum penalties enacted in the past: "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" (American Law Institute 2017*a*, § 6.11(8)).

Beyond this affirmative prohibition and repeal, however, the MPCS addresses the reality that all American states currently have a number of mandatory minimum penalties up and running in their criminal codes and are unlikely to repeal most of them for decades to come. This is so

even though the American Law Institute, the American Bar Association, and others have laid down a firm line in the sand for decades. Realistically, therefore, Plan A (total abolition) should be accompanied by a Plan B. On the assumption that few states will rush to fall in line with § 6.11(8), the MPCS recommends a dozen additional, incremental measures that would mute the impact of mandatory minimums where they continue to exist (American Law Institute 2017*a*). These are, in order of appearance:

- § 6.04(3) (courts may order a deferred adjudication in a criminal case even when the offense charged is one that carries a mandatory prison penalty).
- § 6.14(6) (when sentencing defendants who were under age 18 at the time of their offenses, judges are not bound by otherwise-applicable mandatory sentences).
- § 6.16(5)(b) (sentencing judges may approve dispositions negotiated at victim-offender conferences even when they differ from an otherwise applicable mandatory prison sentence).
- § 9.03(6) (prohibits sentencing commission from formulating guidelines based on severity levels of mandatory-punishment statutes).
- § 9.08(3) (authorizes judges to deviate from a mandatory minimum sentence when an offender is identified through actuarial risk assessment to pose an unusually low risk of recidivism).
- § 10.01(3)(b) (grants sentencing judges an "extraordinary-departure power" to deviate from the terms of mandatory-penalty provisions).
- § 10.09(2) (on the government's motion, trial court may reduce sentence below the requirements of any mandatory prison penalty when defendant has provided substantial assistance in the investigation or prosecution of another person).
- § 10.10(5)(b) (creating 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; the standard of review is the appellate court's "independent judgment," with no deference to the legislature).
- § 11.01(3) (good-time credits are subtracted from the minimum term of a mandatory minimum prison sentence).

- § 11.02(5) (the MPCS's new sentence-modification power for extremely long sentences supersedes any mandatory minimum penalty originally imposed).
- § 11.03(8) ("compassionate release" for aged and infirm inmates, or based on other "extraordinary and compelling circumstances," supersedes mandatory minimum penalties).
- § 11.04(1.3) (granting emergency powers to corrections officials, sometimes requiring court approval, to release prisoners in conditions of prison overcrowding; these emergency powers supersede any mandatory minimum terms of incarceration imposed on otherwise eligible prisoners).

C. Other Strategies

We cannot summarize all of the hundreds of pages in the MPCS that speak to incarceration, but we discuss two highlights below.

1. *General Deterrence and the MPCS.* One of the MPCS's most important recommendations is that sentencing judges should not be allowed to consider general deterrence as a reason to sentence someone to incarceration or to extend the length of a confinement term longer than is justified on other grounds. Instead, the MPCS authorizes prison and jail sentences on only two grounds—incapacitation of dangerous offenders and seriousness of the offense (American Law Institute 2017*a*, § 6.11(2), (3); see also § 10.02(4)).

The omission of general deterrence as a justification for imprisonment prompted one of the most extended debates in the entire project.[24] One decisive argument for exclusion was that sentencing judges, in any particular case, lack reasonably trustworthy information that a harsher sentence will reduce crime in the outside world. A judge may have a strong personal belief that more punishment will yield better deterrence,

[24] The reporters' initial draft of § 6.11(2), omitting general deterrence, was supported overwhelmingly by the project's advisers (experts handpicked by the Institute; American Law Institute 2015*a*, numbered as § 6.06(2); ALI Model Penal Code Sentencing Advisers and MCG Participants 2016). In the ALI Council, however, the proposal met strong resistance. Many experienced judges (and others) argued that, especially in white-collar cases, it was important for judges to have discretion to tailor sentences to "send a message" to the community of potential offenders. They believed that, even if deterrence-through-severity was a failed policy in most contexts, it could be an effective disincentive in the risk-benefit calculations of white-collar offenders (American Law Institute 2015*b*).

but this is exactly the kind of unexamined utilitarian optimism the assessment constraint is designed to foreclose. Even if we believed deterrence-through-severity were a promising policy, judges would still have no information concerning the degree of extra severity needed in each case to bring about the desired effect. A belief that "more punishment is better deterrence" could support any increased use of incarceration. As Judge Patricia Wald phrased it, prison policy founded on general deterrence at sentencing "is a big weapon without a target mechanism" (Wald 2015).

The MPCS does not suggest that the theory of general deterrence can never play a role in a state's prison policy. Section 6.11(2) is addressed to sentencing courts and does not apply to policy making at the system-wide level. Thus, if general deterrence is to support some uses of incarceration, this should be expressed through statutorily authorized penalties and presumptive guidelines sentences. While we do not place stock in the deterrent effectiveness of heavy threats such as three-strikes laws or the felony murder rule, at least those measures convey the idea that all prospective criminals will suffer the threatened fate. It is even less plausible to seek general deterrence through sentence enhancements determined case-by-case according to the idiosyncrasies of each judge. Even at the broadest policy level, however, the MPCS would disapprove of deterrence-based punishment schemes without supporting information of (at least) reasonable feasibility. To date, that is lacking (Nagin 2013; Travis, Western, and Redburn 2014). Perhaps this will change for some types of crimes or offenders. For example, if there is someday reasonable support for the belief that white-collar offenders can be deterred by the threat of significant prison terms, a sentencing commission would be justified in writing guidelines based on that approach (but see Schell-Busey et al. 2016).

2. "*Evidence-Based*" *Risk Prediction and the MPCS.* The MPCS endorses incapacitation of dangerous offenders as a rationale for prison sentences, but only in limited and "domesticated" ways (American Law Institute 2017*b*, pp. 378–88). The code's premise is that American sentencing systems have been heavily responsive to judgments of recidivism risk for more than a century, but those judgments are usually of poor quality and, when they most count, are almost always administered through shabby, nontransparent processes. Risk-based sentencing is as American as apple pie, gone bad. In our experience, most current engines of American incarceration policy overpredict risk or are heavily biased by risk aversion. This can result in larger numbers of prison sentences, or ex-

tensions of time served, that are unnecessary by any reasonable measure (Piehl, Useem, and DiIulio 1999). Some observers have posited that incapacitation policy run wild was the largest single contributor to mass incarceration (Zimring and Hawkins 1995).

From the American Law Institute's viewpoint, crime prevention through incapacitation is a core value that no American jurisdiction would be willing to give up and is the only legitimate utilitarian purpose of incarceration that should be allowed to operate in case-by-case sentencing decisions (American Law Institute 2017*b*, pp. 151–53, 175–80).[25] The crucial task for the twenty-first century is to find appropriate principles of constraint. Limits on blunderbuss incapacitation theory are needed in any realistic program to reduce American incarceration rates.

We should mention the most obvious strategy of containment first: that risk-based sentencing is always subject to the MPCS's proportionality constraint, even in the face of a highly credible and highly worrisome risk score. As discussed earlier, the MPCS statutory version of proportionality is meant to be a lower ceiling than in pre-MPCS American law and is a tool courts are supposed to use without deference to other branches. If the MPCS succeeds in breathing life into "subconstitutional" proportionality review, risk-based sentencing is one of the most important contexts in which it will operate.

As a further deontological cut point, the MPCS rejects the use of incarceration for minor offenders, however prolific they may be. Incapacitation is not an eligible consideration in favor of a prison or jail sentence unless aimed at "dangerous" recidivism (American Law Institute 2017*a*, §§ 1.02(2)(a)(ii), 6.11(2)(a)). While the MPCS does not define dangerousness, it presumes that much generic recidivism risk will not count. The precise meaning of the term is left to the common law process in each state, one case at a time (Morris and Miller 1985).

The affirmative velocity of the MPCS's incapacitation policy is also inhibited by the assessment constraint. Prison policy based on the incapacitation of dangerous people is not "reasonably feasible" unless there is a reasonably accurate way to identify who the dangerous people are. The MPCS states that a court may not send someone to prison or jail

[25] The MPCS rejects rehabilitation by itself as a justificatory goal of incarceration, although it requires prisons and jails to provide reasonable opportunities to those incarcerated to participate in rehabilitative activities (American Law Institute 2017*a*, § 6.11(4)). And, as just explained, it disapproves the consideration of general deterrence by sentencing judges as a reason to incarcerate or to lengthen a term of stay.

unless it is "reasonable to believe" the defendant is a "dangerous offender," and that incarceration is "necessary" to prevent that risk of serious reoffending (American Law Institute 2017*a*, § 10.02(4)(a)). Most venues of American sentencing today would flunk this test. Moreover, under the MPCS, this is a standard the appellate courts must enforce on review.

If there were a genuine burden of proof placed on a finding of unacceptable recidivism risk in sentencing decisions, including prison release decisions, American incarceration rates would be lower than they are today. Even a forgiving burden of proof would topple most present-day practices. Nationwide, many risk decisions are supported only by "common sense" and hunches (Morris and Miller 1985). Actuarial tools, as they are used today, are not necessarily the cure. In general, the best available technologies for predicting serious criminal behavior are of middling-to-fair reliability, and most criminal justice decision makers are not using risk scales that are anywhere close to the state of the art. Some of the instruments are unforgivably bad, have never been validated in the state that is using them, or have been "modified" by nonexperts before being put in use (Reitz 2012; Desmarais, Johnson, and Singh 2016). In states that take the assessment constraint seriously, unasked questions about these common practices would be pushed to the foreground.

Overall, the MPCS would make judgments of recidivism risk a much more confined factor in American sentencing decisions than it is in most states today. It is especially concerned with risk-based decisions that ratchet up the harshness of prison sentences. In contrast, however, the MPCS encourages the use of risk assessment to identify and divert low-risk offenders who would otherwise be prison bound. Statistically speaking, it is much easier to find "true positives" for low risk of recidivism than for high risk. The number of people who will not commit serious crimes in their future lives is much larger than the number who will. Probabilistically, they provide a bigger target to shoot at (Gottfredson and Gottfredson 1985; Hayes and Geerken 1997). According to solid research findings, the use of risk assessment as a prison-diversion tool is more likely to prove "reasonably feasible" than an attempt to identify high-risk candidates for extralong prison terms. At least one state (Virginia) has shown that this can work (Kern and Farrar-Owens 2004; Kleiman, Ostrom, and Cheesman 2007; Reitz 2017).

The MPCS's most forceful move in addressing risk-based prison policy is to move it into the courtroom. In prison cases today, risk-based

sentencing discretion is largely held by parole boards, in states where the boards are given a major share of discretion over lengths of prison terms. Among other problems, the procedural regularities that attend parole release decisions are intolerably poor. Prisoners have no right to a lawyer and are given no meaningful opportunity to challenge an adverse risk score. Indeed, they have no access to the worksheet, software, or instrument used by the board. In many states, prisoners have no right to see any section of their files. If someone has filled in a prisoner's criminal history score incorrectly, they have no recourse. If the person who prepared the report has no training or experience, this goes undiscovered. If the instrument itself is of abysmal quality, no one at the parole stage is in a position to speak up. If the instrument is discriminatory in its application, there is no one to detect the problem, let alone make a constitutional equal protection challenge (Reitz 2017).

The MPCS recommends the elimination of back-end release discretion in most cases and relocates the consideration of risk into the judicial sentencing stage (American Law Institute 2011, app. B; 2017*a*, § 6.11(9)). The primary reason for this preference is procedural fairness. There is a nonnegotiable Sixth Amendment right to counsel at judicial sentencing, which includes representation by an attorney at state expense if the defendant cannot afford to pay, and the right of adequate preparation before the sentencing hearing. Standard courtroom process permits factual and legal challenge to risk scores in individual cases and constitutional challenge of the instruments as a whole. Litigation may even provide expert defense witnesses at state expense, if needed to cross-examine the prosecution's allegations of risk. The elements of procedural fairness pile up further. As decision makers, judges are more insulated from political pressure than parole board members. Even elected judges cannot be fired by the governor at a moment's notice. There is a right to take a judicial appeal against sentence in every state, narrow in some jurisdictions and more fulsome in others, but in all instances more meaningful than prisoners' rights to appeal from a parole deferral. We cannot imagine, for instance, that any existing administrative appeals process in an American paroling system would seriously entertain a claim that a parole board's decisional instrument is constitutionally problematic. In every state, in contrast, it is ground for appeal that a judicial sentence was unconstitutionally imposed. Taken individually or as a whole, the standard procedural safeguards afforded to defendants at sentencing are nearly unimaginable at the parole release stage (see Rhine, Petersilia, and Reitz 2017).

The MPCS's policy of placing "risk discretion" in the courts is also supported by the current state of recidivism research, which teaches that sentencing judges are in as good a position as parole boards to evaluate recidivism risk, despite the fact that parole boards have the advantage of observing the offender over a passage of time. Contrary to conventional wisdom, studies show that a person's in-prison behavior does not tell you very much about how they will behave once they are released. One old but colorful quote by the late Hans Mattick, an influential corrections scholar in the 1960s and 1970s, was: "You cannot train an aviator in a submarine" (Morris 1974, p. 16). If we are trying to decide in a particular case whether a prisoner should be released after serving 2 years in prison, and we are committed to an evidence-based approach to risk of serious recidivism, the trial court already has the best information available to make a decision. There is no reason to wait 2 years for the parole board. Over years of prediction science, the addition of "dynamic" factors concerning an inmate's progress in prison has not been shown to add predictive value. Such factors exist in theory, of course, but have never been nailed down (Wong and Gordon 2006, p. 279; LeBel et al. 2008, p. 133; Skeem et al. 2017).[26] Indeed, the notion of parole boards' special competency to discern, person-by-person, which prisoners have been rehabilitated and which have not has never gotten a whiff of empirical support.

One benefit of the "domestication" of risk assessment, by moving it to the courtroom, may be to block the use of new machine-learning risk prediction tools until they are better understood. Right now, proponents of risk assessment through artificial intelligence concede that it is impossible for human beings to understand how artificial intelligence (AI) has reached a particular decision. We may be able to assess how often the algorithm is right and how often it is wrong, and some of the results look quite impressive, but present technology cannot tell us why it has sorted individuals into higher and lower risk categories. An AI does not "think" in a way that is recognizable to human beings (Berk 2012; Popp 2017). Even so, there is a good possibility that contemporary parole boards will

[26] As two leading researchers have put it, "empirical investigation of dynamic risk is virtually absent from the literature. . . . The field's next greatest challenge is to develop sound methods for assessing changeable aspects of violence risk. . . . To date, the scientific focus on dynamic risk and risk management has been more conceptual than empirical . . . it is unclear what the most promising dynamic risk factors are" (Douglas and Skeem 2005, pp. 347, 349, 352, 358).

soon begin to use such black-box prediction tools.[27] After all, their processes have always lacked transparency. The mysteries of machine learning do not look like much of a step down from a procedural fairness perspective. Indeed, if there is a strong empirical case that the AI predictions are more accurate than older generations of risk instruments, the culture of parole in America would suggest that only applause is in order.

We believe the use of machine-learning algorithms for "in-out" and length-of-incarceration decisions will receive a much more skeptical reception in the courts, by a mile, than in the low-visibility milieu of parole release. However much trepidation the reader may have today about actuarial risk assessment as a sentencing tool, and we agree trepidation is warranted, things could get much more frightening in the absence of greater transparency, adversarial testing, and decision makers with at least a fig leaf of political insulation.

VI. Probation

From its first use in the United States in the mid-nineteenth century, probation has been a popular disposition, serving the dual functions of surveilling probationers and offering them assistance in rehabilitation and reintegration (Klingele 2013). Even as imprisonment rates rose throughout the late twentieth century, probation's popularity did not diminish: probation rates continued to rise as well (Phelps 2013). Between 1970 and 2010, the number of individuals on probation more than quadrupled, growing from just over 800,000 to more than 4 million. Although the number of individuals on probation has fallen for 9 consecutive years, more than 3.6 million people remained on probation in the United States at the end of 2016 (Kaeble and Cowhig 2018).

Although probation has traditionally been framed as an alternative to incarceration—and therefore a counterpoint to the trend of growing incarceration rates—it is a sanction in its own right. Conditions of probation can impose significant restraints on individual liberty, and there are almost no legal constraints on the number and kind of conditions to which probationers can be subjected (Klingele 2013; Doherty 2016). In addition, and often as a result, many times probation sentences do not end successfully because a probationer has committed a new crime or has repeat-

[27] As of this writing, Pennsylvania was very close to doing so.

edly violated conditions of the terms of his or her release, which can range from participation in treatment programs to location monitoring to restrictions from associating with other convicted individuals. When probation fails, probationers often find themselves incarcerated, thereby increasing custodial populations.

One of the challenges to formulating model law on probation is the dearth of scholarly attention the subject has received in recent decades.[28] To help fill some of this gap, the MPCS reporters, through the Robina Institute of Criminal Law and Criminal Justice, helped lead a series of projects over 5 years that focused on better understanding of the use of probation, parole, and economic penalties across the country. Not only did these projects illuminate the day-to-day challenges faced by courts and correctional agencies in the area of probation supervision but they also revealed the wide disparities that exist between US and foreign rates of probation supervision. The discovery of "American exceptionalism in probation supervision" intensified the MPCS's efforts to create new provisions governing probation and probation revocation.

Recognizing that probation is the sentence imposed on more than half of all criminal defendants in the United States (Kaeble and Cowhig 2018), and that the revocation of probation is a significant contributor to prison population size, the MPCS addresses all of these issues. In doing so, the MPCS extends its preference for parsimony in punishment to community sentences.

It does so first by making clear that not all noncustodial sentences merit probation (American Law Institute 2017*a*, § 6.05(3)). In many jurisdictions, probation serves as a default sentence in cases where prison and jail are not imposed. As the comments to section 6.05 make clear, "the Institute disapproves of the use of probation when the sanction serves no definable purpose" (American Law Institute 2017*a*, p. 66). Probation should be imposed only in cases where it is needed to advance accountability or rehabilitation, or to plausibly reduce the risk of criminal reoffending.

[28] The MPCS project benefited from hands-on collaborations with state and local jurisdictions in more than a dozen states, which generated over 60 publications through the supportive research of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School. We believe that the MPCS provisions on community supervision and economic sanctions are stronger than they otherwise would have been, because they reflect the combined investments of the American Law Institute and the Robina Institute.

In cases where supervision is warranted, section 6.05 sets forth general principles governing probation and its attendant conditions. Recognizing that states vary tremendously in the authorized maximum length of supervision, the MPCS provides clear guidance to courts on appropriate sentence length. By prohibiting terms of supervision longer than 3 years for felony offenses and 1 year for misdemeanors, it attempts to focus limited probation resources and reduce the "contingent liability" created by the imposition of overly long probationary sentences that may begin to interfere with probationers' ability to reintegrate into the law-abiding community successfully.

Conditions of supervision receive significant attention in the MPCS. Courts retain broad discretion to impose probation conditions that promote accountability for criminal conduct, advance rehabilitation and reintegration, and reduce the risks of reoffense (American Law Institute 2017*a*, §§ 6.05(2), (8)). Nonetheless, the ability to impose conditions is not absolute. A key innovation is the requirement that courts apply the MPCS's core proportionality and do-no-harm principles to the cumulative weight of the conditions imposed in any given case by ensuring that no single condition or set of conditions "place[s] an unreasonable burden on [an] offender's ability to reintegrate into the law-abiding community" (American Law Institute 2017*a*, § 6.05(9)). In recognition of the need for parsimony, the MPCS permits courts to reduce conditions of supervision at any time during the probationary period but does not allow courts to increase the number or kind of conditions unless there has been a material change of circumstances that affects either the treatment needs or reoffending risk posed by a probationer.

Section 6.05(9) codifies a growing best practice in corrections: the use of incentives. Incentives have long been used by parents, educators, and businesses to improve performance. Not surprisingly, incentives can motivate positive behavior in probationers, too (Mowen et al. 2018). Section 6.05 encourages courts to offer incentives to probationers who meet treatment goals and demonstrate compliance with their supervision conditions. Such incentives might include reduction in economic sanctions, lightening of supervision conditions, or a reduction in the length of the sentence itself.

Even perfectly tailored conditions do not guarantee compliance with court orders. Often, probationers will fail to comply with some or all of the conditions to which they are subject. What to do when that happens is the subject of section 6.15, which jointly governs violations of proba-

tion and postrelease supervision. Under this section, community correctional agencies are appropriately treated as the frontline responders to rule violations. These agencies not only are positioned to detect violations but also to assess their relative seriousness. The MPCS encourages agencies to use a range of responses to rule violations, ranging from verbal reprimands through petitions for revocation.

Recognizing the seriousness of the liberty interests at stake when revocation is pursued, the MPCS ensures that probationers are guaranteed due process in accordance with both constitutional standards and basic principles of fair process. This includes a right to counsel at revocation hearings. When a court finds that a violation has occurred, it, too, has a range of responses at its disposal. The court may order revocation, but it may instead impose lesser sanctions, including formal reprimands, amended conditions of supervision, periods of home confinement, intermittent detention, or location monitoring. Whenever a sanction is formally imposed, whether by a probation agency or by the court, it must be "the least severe consequence needed to address the violation and the risks posed by the offender in the community, keeping in mind the purpose for which the sentence was originally imposed" (American Law Institute 2017*a*, § 6.15(4)).

Under the MPCS, accountability is not limited to probationers. Correctional agencies are required to fulfill their mission of providing appropriate supervision and services to those in their charge. Recognizing that the size of the community corrections population deserves as much attention as the size of the institutional correctional population, the MPCS requires the legislature to create a mechanism for reducing the size of any correctional population—including the number of people on probation—whenever the population exceeds the operational capacity of the relevant correctional agency. In the context of community corrections, this means that for more than 30 consecutive days the probation agency has reached "a threshold beyond which the supervising agency cannot supervise the offenders under its charge" in accordance with either professional standards or statewide standards (American Law Institute 2017*a*, § 11.04(1.2)(b)). Upon petition from the probation agency, a court that finds such conditions exist must "declare an overcrowding state of emergency," which authorizes the agency head to advance discharge for individuals approaching the end of their probationary terms, or those who have been in substantial compliance with their terms of supervision for 1 year or more. This provision extends to the community context the

emergency release authority that exists in some states to manage prison overcrowding. In doing so, it recognizes that the restrictions on liberty probation imposes can only be justified so long as the sanction provides actual surveillance or support to those being supervised. When a probation agency loses its ability to do that due to extreme resource constraints, an adjustment in population size may be the only way to restore its ability to perform its legitimate functions.

VII. "Back-End" Sentencing Issues

A number of MPCS provisions look beyond fines, probation, jail, and prison sentences to what has often been referred to as the "back end" of the correctional system. Although the MPCS abolishes indeterminate sentencing—and with it, discretionary parole release—it recognizes the importance of and recreates two legitimate functions of parole. First is the supervision and assistance that accompanies a period of postimprisonment supervision. Second is the opportunity, in cases of lengthy sentences or those presenting unusual circumstances, to reexamine whether the full term of imprisonment imposed by the court is truly necessary to serve the purposes of punishment.

The first of these functions, surveillance and support, is recognized by section 6.13, which authorizes courts to impose a period of postrelease supervision following a term of custody to hold an offender accountable for his or her conduct, promote "rehabilitation and reintegration into law-abiding society," reduce the risks of reoffending, or address a need "for housing, employment, family support, medical care, and mental-health care during th[e] transition from prison to the community" (American Law Institute 2017*a*, § 6.13(2)). Conditions of postrelease supervision, like conditions of probation, may be broad ranging, but may not, either alone or in combination, "place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community" (American Law Institute 2017*a*, § 6.13(9)). Although reasonable criticisms of the effectiveness of parole supervision have been offered (Scott Hayward 2011), the relatively higher risks and needs posed by those leaving custody justify postrelease supervision in at least a portion of cases. To minimize the risk that terms of postrelease supervision will interfere with achievement of the goals they are intended to promote, the MPCS specifies that terms of postrelease supervision are not required and when imposed may not last longer than 5 years for felony offenses or 1 year for a misdemeanor.

The decision to authorize postrelease supervision was uncontroversial among members of the Institute. Much more contentious was the decision to include provisions that authorize courts to revisit legally imposed sentences. Three provisions, of varying scope, invite judicial reexamination under a variety of conditions, including when a criminal statute has been repealed or invalidated (§ 10.09(3)(b)); when compelling circumstances, such as infirmity, arise (Principles of Legislation § 11.03); and when a person has served 15 or more years of any sentence of confinement (Principles of Legislation § 11.02).

New to the MPCS, but not to state practice, is section 10.09 that details technical circumstances in which sentences may be altered. Its primary provisions authorize courts to reduce sentences under circumstances in which most states allow adjustments to be made, including the correction of arithmetical, technical, or other clear errors, and to reward defendants who have offered substantial assistance in investigating or prosecuting crimes when the value of that assistance was not known or fully appreciated at the time of sentencing. While the MPCS goes further than most states in permitting these modifications to take place at any time before the termination of the sentence, it is the final subsection (3) that most significantly widens existing laws on sentence modification:

> § 10.09. Sentence Modification.
>
> (3) Except as otherwise specified by the legislature, when doing so advances the purposes of sentencing set forth in § 1.02(2), the court may at any time prior to the termination of sentence, upon petition by either party or the department of corrections reduce the sentence of a defendant who is:
>
> (a) serving a term of confinement, probation, or postrelease supervision based on a guideline sentencing range that has subsequently been lowered by the sentencing commission and made retroactive;
> (b) serving a sentence for violation of a criminal statute that has subsequently been repealed by the legislature or interpreted by [the State Supreme Court or the United States Supreme Court] not to reach the conduct for which the defendant was convicted.

Subsection (3) gives courts discretion to reduce sentences when the maximum penalty or guidelines range for a crime has been reduced through

a change the legislature has made retroactive, and in cases where the statute under which a defendant has been convicted has been repealed or otherwise invalidated. In both circumstances, the change in law calls into question whether, under prevailing moral norms, a defendant should be required to complete the full term of an earlier-imposed sentence. While requiring a person to serve such a sentence is legal, it may be neither necessary nor just. Section 10.09 gives the court discretion to apply the benefit of changing norms to these defendants. As the American prison population has grown, so, too, has the number of those who are elderly and infirm, as well as the number of prisoners who are parents of dependent children.

The second provision governing sentence reduction is section 11.03, which expands judicial power to alter sentences when a "prisoner's advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons warran[t] modification of sentence" (§ 11.03 (1)), drawing on state statutes that authorize discretionary "compassionate release" to prisoners facing end-of-life issues and other significant hardships.

Section 11.03 provides several safeguards for the responsible exercise of judicial discretion in modifying sentences. Sentencing commissions are charged with developing guidelines for addressing petitions for sentence modification on the basis of compelling circumstances. In addition, courts are directed to develop procedures for the timely assignment of cases filed under this section, for screening and dismissing applications that plainly lack merit, and for scheduling hearings in cases where they are warranted. The broad power given to trial courts under this provision is checked by the core requirement that sentencing changes be made only when they are justified in light of the purposes of sentencing found in § 1.02(2). Consequently, while aging, infirmity, or other compelling reasons are a precondition to relief under section 11.03, they do not guarantee that a prisoner will receive a lesser sentence. Instead, those circumstances provide an opportunity for the court to reconsider whether the sentence originally imposed remains necessary to ensure the purposes for which it was imposed.

The most controversial new MPCS section pertaining to sentence adjustment is undoubtedly section 11.02, known colloquially as the "second-look" provision. It has no parallel in any state or federal code, and for that reason alone was opposed by some. This provision, styled as a "principle of legislation," directs the legislature to create a judicial

panel or authorize a judicial decision maker to hear petitions for de novo resentencing brought by any prisoner who has served 15 years or more of a custodial sentence. Although no state has yet adopted this approach to reexamining long sentences, the provision has attracted notice from scholars and policy makers alike (Love and Klingele 2010; Ryan 2015; Charles Colson Task Force on Federal Corrections 2016).

In relevant part, the provision reads:

> § 11.02. Modification of Long-Term Prison Sentences; Principles for Legislation.[29]
>
> (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. . . .
> (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. . . .
> (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

[29] This section was denominated § 305.6 during the preapproval drafting process.

> provision to prisoners who were sentenced before its effective date, and should authorize retroactivity procedures in light of the commission's advice.

The MPCS, in most respects, embraces a determinate sentencing system. Not surprisingly, then, the introduction of wholesale resentencing for the longest (and, likely, most serious) cases initially struck many members of the Institute as inconsistent with the structure of the larger MPCS. But unlike indeterminate release mechanisms that vest release decisions in the hands of executive branch actors, section 11.02 returns to the judiciary the task of reconsidering the need for prolonged periods of detention. Judges, not parole officers, decide how much confinement is needed to serve the purposes of punishment, and they do so with the ability to reflect on ways in which advances in technology and shifts in punitive sensibilities may cast doubt on the wisdom of sentences imposed decades earlier.

There are several reasons for reconsidering lengthy sentences of the kind imposed in recent decades. Modern sentences are supersized, compared both to international punishment norms and to America's own traditional sentencing patterns and practices. Many of the long sentences being served by today's prisoners were imposed at a time when crime rates were high and the public demand for strict punishment was strong. As crimes rates have fallen steadily, and moral assessments of the needed severity of punishment have softened slightly, there is good reason to invite reexamination of the need for prolonged incarceration in individual cases. While decades-long detention may sometimes be necessary to punish extreme wrongdoing, the passage of time and changes in the ability of correctional agencies to deliver effective treatment and surveillance may reduce or eliminate the need for continued detention. As the MPCS explains, the second-look mechanism "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" (American Law Institute 2017*b*, p. 568).

There is no question that altering sentences many years after their imposition risks upsetting the expectations of crime victims and the broader community. To ensure that valid concerns are not ignored, the second-look mechanism requires courts to consider victim statements made at the time of sentencing, which may be supplemented with information about changed crime victim circumstances. Moreover, states are directed

to develop procedures that guarantee fair process throughout second-look proceedings, and sentencing commissions are directed to create guidelines specific to second-look decisions. With these safeguards in place to guide the exercise of discretion, the American Law Institute agreed that the challenges created by America's unprecedented punishment buildup justify this new mechanism for ensuring that long sentences remain just and necessary to further the legitimate purposes of punishment.

VIII. Economic Sanctions

Although not widely appreciated, the nation's use of economic penalties surged in tandem with other punishments during the punitive buildup era. Across the criminal justice system, there has been steady growth in fine amounts, asset forfeitures, costs, fees, and assessments levied against offenders. At the same time, a wave of new statutes and state constitutional provisions has authorized or mandated victim restitution as part of a criminal sentence. Given the unpopularity of criminal offenders and the need for revenue to maintain growth in criminal justice institutions, the "piling on" of restitution, fines, fees, and forfeitures has found no natural stopping point. To make matters worse, the average person caught up in the criminal justice system has become less able to bear these penalties, as gaps between rich and poor have continued to grow.

The freedom with which economic sanctions are imposed in America does not proceed from a widespread belief that they are sufficient punishments for any but the least serious offenses. Economic sanctions in practice yield little retributive satisfaction. Instead, the general growth in economic penalties has been borne of need: sustained budgetary shortfalls have led governments and correctional vendors to turn to offenders as new sources of revenue for operating all facets of the criminal justice system, from courts to corrections.

Many of these new economic sanctioning policies raise questions about conflicts of interest in the administration of criminal law, felt most by agencies authorized to seize or collect assets from offenders and retain some or all for their own use. Asset forfeitures and a variety of costs, fees, and assessments, little used before the 1970s and 1980s, have in recent decades become major revenue sources for local and state criminal justice agencies. Fines, even at the level of traffic offenses, have become an important revenue source for local governments.

In some American jurisdictions, probationers and parolees are regularly charged with supervision and program fees, and the proceeds are used to help fund the probation and parole supervision agencies. Probation officers in some locales are perceived by their clients as bill collectors, with the imperative of collection displacing efforts to provide services and enforce nonfinancial conditions. It is common practice to extend probation terms for nonpayment of financial penalties, even if all other probation conditions have been met—it may be to an agency's advantage to keep "paying customers" on probation or parole even if early termination would otherwise be warranted. In addition, offenders are often barred from participating in needed treatment programs when they are unable to pay required program fees.

It is an understatement to say that research and policy debate have not kept stride with these larger trends, resulting in the adoption of laws and practices that are underexamined, unprincipled, and counterproductive to the goal of public safety (American Law Institute 2017*b*). The MPCS accordingly calls for an across-the-board rethinking of economic penalties—and significant reductions in their overall use.

Although the MPCS provides detailed guidance on the imposition and collection of restitution, fines, forfeitures, fees, costs, and other financial assessments, the single most important economic sanctions provision applies across the board. Section 6.06(6) states simply that "no economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction" (American Law Institute 2017*a*). This language creates a new limiting principle of "reasonable financial subsistence" (RFS) to constrain governments' power to assess economic sanctions of all kinds, including victim restitution.[30] The RFS limit goes further than any existing constitutional or statutory command in American law.[31] If adopted, it would prohibit the use of financial penalties for a very large percentage of criminal defendants nationwide.

[30] The RFS provision supplements other limits on sentence severity in the MPCS, such as the statutory "subconstitutional" proportionality doctrine discussed earlier.

[31] Federal constitutional law, in theory, prohibits the use of incarceration for nonpayment when an offender lacks the "ability to pay" economic sanctions. This sets too low a floor for public-policy purposes. Also, enforcement of the rule is spotty.

In many ways, it seems obvious to require courts to consider a defendant's ability to meet his or her basic needs and those of his or her family before imposing a sentence that could intensify their poverty. Theoretically, it would not be an illegal abuse of discretion for sentencing judges to do so in many cases today. In fact, however, courts and other agencies do not calculate reasonable life expenses when considering whether defendants have the ability to pay economic sanctions—if they consider ability to pay at all. This results in many cases in which the total criminal justice debt levied on defendants is patently uncollectable. When this happens, the aggregate of economic penalties is a legal fiction and an exercise in futility, with little legitimacy from the defendant's point of view, and much demoralizing emotional force.

The primary rationale for the RFS constraint, however, is utilitarian. It is designed to prevent economic penalties from interfering with the overriding goal of returning offenders to productive, law-abiding lives. The best available evidence suggests that economic sanctions have negative effects on offender rehabilitation and reintegration when they disrupt the fundamentals of stable work, housing, and family life—or provide incentives to seek earnings in the illegal economy. Much like bankruptcy law, a primary goal of the sentencing system should be to reposition ex-offenders so they may become productive and successful participants in the law-abiding economy.[32] The RFS standard eliminates perverse incentives for offenders to offend, thereby undermining achievement of overriding goals of public safety, and instead promotes reintegration by ensuring offenders are not forced to choose between discharging their financial obligations to the criminal justice system and meeting their families' basic needs.

The MPCS also recommends mass abrogation of revenue-raising user fees and other surcharges (American Law Institute 2017*a*, § 6.10). Realistically, in the short or middle term, the best-case scenario is that a small number of jurisdictions will follow the MPCS's lead. It therefore offers a series of second-best recommendations addressed to states that do not implement a blanket prohibition on such revenue sources (American

[32] One of the most famous statements of the President's Crime Commission in 1967 was that "warring on poverty . . . is warring on crime." In the intervening 50 years, there has been much study and debate of the poverty-crime connection. Yet there are few who would say that the exacerbation of poverty is sensible crime-control policy.

Law Institute 2017*a*, alternative § 6.10). Every incremental step toward reducing criminal justice systems' reliance on costs, fees, and assessments makes their eventual abolition more practicable.

There are six second-order recommendations. First, the RFS standard would eliminate the imposition of many costs, fees, and surcharges in the first instance. Second, the MPCS provides that all costs and fees must be approved in advance by sentencing courts and may not be levied, increased, or supplemented with surcharges at a later time. In a related provision, sentencing courts are required to set a total dollar ceiling upon all financial sanctions that may be collected from an individual defendant. Third, no costs, fees, or assessments may be imposed in excess of actual marginal cost expenditures in the offender's case. Fourth, agencies or entities charged with collection of the fees are barred from retaining the monies collected, and collection surcharges or penalties may not be added. Fifth, the imposition of costs, fees, and assessments cannot violate statutory principles of sentence proportionality. Sixth, economic sanctions other than victim restitution may not be made formal "conditions" of probation or postrelease supervision—meaning that nonpayment cannot be a basis for sentence revocation.

While simple in theory, serious administrative obstacles impede states from adopting the MPCS economic sanctions provisions wholesale. Many courts, corrections agencies, police departments, and other government entities have become dependent on fines and "user fees" imposed on convicted individuals (Shaw 2015) and on remunerative asset forfeitures, which generally do not require a charge or conviction. Ending governmental agencies' dependence on funds received from offenders will require legislatures to step up financial support for core government institutions and functions.

IX. Collateral Consequences

Nearly 80 million Americans have criminal records (Murray 2018). As a result of these past contacts with the criminal justice system, individuals often face ongoing employment and licensing restrictions, disqualification from public benefits, registration requirements, and (for some) deportation. Since the 1980s, when "civil" collateral consequences of conviction were few, there has been an explosion in the collateral consequences authorized by state and federal law. The collateral consequence provisions of the MPCS attempt to ameliorate the punitive force of these laws

that lie at the periphery of the sentencing process (or outside it entirely) but take effect only as the result of criminal conviction.

While collateral consequences are ostensibly "civil" by legal definition, they fall squarely within criminal sentencing policy. In some cases, the combined weight of collateral sanctions is far more punitive than the formal criminal sentence (Chin 2012). Their reach is broad and long: many persist for the remainder of the convicted person's life and can only be lifted by the increasingly elusive remedy of executive pardon (Love 2015). Article 7 treats collateral consequences policy as equal in importance to incarceration and community supervision policies, addressing collateral consequences in three ways. First, it requires public education about the civil restrictions that flow from criminal conviction. Second, it limits the degree to which legislatures may restrict the rights of convicted individuals to participate in the democratic process through voting and jury service. Finally, it creates mechanisms by which courts (or other designated government agencies) can provide individualized relief from mandatory collateral consequences.

Article 7 requires states to confront the number of collateral consequences that attach to any given offense. In most jurisdictions, they are scattered throughout statutes and regulations; policy makers cannot easily determine the cumulative effects of conviction for any given crime on convicted individuals. Section 7.02 requires the sentencing commission to "compile, maintain, and publish" a compendium that lists, for every crime contained in the state's criminal code, all penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court. By doing so, the MPCS requires lawmakers, at a minimum, to confront the number and weight of the consequences that attach to each violation of the criminal code.

Section 7.04 is the centerpiece of article 7, setting forth the basic rules the court must follow with respect to notifying defendants about collateral consequences and granting relief from collateral consequences at sentencing, and for the duration of the sentence. This section provides the following guidance on when relief from collateral consequences should be granted:

> § 7.04(2). Notification of Collateral Consequences; Order of Relief.
>
> At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-

applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.
(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney.
(c) The court may grant relief from a mandatory collateral consequence if, after considering the guidance provided by the sentencing commission under § 7.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence is not substantially related to the elements and facts of the offense and is likely to impose a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public-safety considerations do not require mandatory imposition of the consequence.
(d) Relief should not be denied arbitrarily, or for any punitive purpose.

In addition to permitting courts to grant relief during the sentence pursuant to section 7.04, the MPCS provides relief mechanisms for otherwise mandatory collateral consequences under a variety of different circumstances. Courts may grant relief under section 7.05 to a person who has finished serving a criminal sentence, or who is serving a sentence in a different jurisdiction, if a mandatory collateral consequence will have an adverse effect on the person's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

Other provisions of article 7 severely restrict the ability of jurisdictions to limit the right to vote and to serve on juries—rights that deeply affect convicted individuals' ability to reintegrate into the community. These two restrictions have well-documented disparate effects on minority communities (Cammett 2012; Roberts 2013). Section 7.03 strongly encourages jurisdictions to eliminate disenfranchisement as a consequence of conviction and prohibits barring individuals from voting except during the duration of a custodial sentence imposed for a felony offense. States are permitted to impose mandatory jury service exclusions only until the sentence imposed by the court, including any period of community supervision, has been served.

Finally, section 7.06 authorizes courts or other designated agencies to grant relief from most mandatory collateral consequences to individuals who are 4 or more years past the end of their most recent sentence and have no current charges pending against them. To maximize the availability of relief, the MPCS directs courts "not [to] require extraordinary achievement" and to show sensitivity "to any cultural, educational, or economic limitations affecting the petitioner" (American Law Institute 2017*a*, § 7.06(3)(b)).

Initially, the debate over whether to include article 7 in the MPCS rivaled the debate over the "second look" among project advisors and ALI members. The Institute engaged in deep discussion over the degree to which criminal courts should concern themselves with matters of civil law at all. There were also serious questions raised as to whether courts possess adequate expertise to determine when restrictions on housing, employment, licensing, and benefits can be lifted without imperiling public safety. Over time, however, as members became aware of the degree to which excessive collateral consequences continue to impede successful reintegration of former offenders, support grew for creating limited mechanisms for relief.

Article 7, accordingly, is careful to limit the court's role in deciding whether an individual offender should be prohibited from securing any particular benefit or opportunity. The court may decide only that, as a matter of law, the individual may not be categorically prevented from seeking the benefit or opportunity in question. Any order would not prevent authorized decision makers from later considering the conduct underlying a conviction when deciding whether to confer a discretionary benefit. The MPCS thus strikes a balance between the court's knowledge of the material facts of the particular case and the expertise of specialized agencies, such as licensing boards, to determine whether the facts of any individual's case justify denial of a particular benefit or opportunity.

X. Conclusion

In the end, the MPCS covers nearly all aspects of sentencing in America—if the field is defined to include those forms of punishment that are imposed on truly large numbers of people (measured in hundreds of thousands, or millions). The aggregate human consequences are immense. With groups this large, even incremental improvements can bring sizable benefits. The MPCS also defines "sentencing" as a subject best understood from the viewpoint of the human beings who must live through

their sentences from beginning to end, from pronouncement in court to final discharge. Accordingly, it deals extensively with the ongoing—and sometimes never-ending—consequences that are experienced as punishments long after formal "sentencing" in the courtroom. In the eyes of the MPCS, a judicial sentence is merely a point along a line that stretches, unknowably, into the future. After the courts have done their part, many other officials will render later-in-time decisions with profound impact on offenders' experiences of their sentences. Scaled up from the individual to the societal level of policy concern, it is this experiential perspective that really matters. Cumulatively, it is all the actions taken during the life course of a sentence that determine whether the highest purposes of criminal punishment are served or frustrated.

The one major area of "sentencing-as-experienced" that the MPCS barely touches is the subject of conditions of confinement in America's prisons and jails. The topic was addressed in the original Model Penal Code, but not extensively. Fifty to 60 years later, the total US incarceration population is about seven times larger than at the close of the 1960s. Arguably, the subject of conditions of confinement has become seven times more important.

When the MPCS project was about 10 years into its 15-year course, however, the American Law Institute decided that a serious examination of prison and jail conditions would have to be done as a separate venture, if undertaken at all. For one thing, it would have added years to an already epic-length project. In addition, it was reasonable to ask whether the reporters, advisers, and other groups assembled for the MPCS had the necessary expertise to confront the various and difficult (some say intractable) problems strewn through the nation's prisons and jails. Going a step further, serious doubts were expressed about whether the ALI has the institutional competency to make a large contribution in this area, or whether such a project would end up as a well-meant waste of resources.

In our unofficial capacities as authors of this essay, not as ALI reporters, we hope the Institute will seriously consider, and ultimately launch, a new project on conditions of confinement in America. If we posit for a moment that America's prison and jail systems will remain large for decades to come, even if sentencing reforms begin to take hold, then the human stakes of "life inside" will remain enormous and, in some places, at crisis levels.

The experience of imprisonment and jail confinement across the United States is wildly different from place to place. We have no doubt there are "best practices" to be identified and "worst practices" to be ferreted out.

We fear the worst of these are not just slightly bad but merit extreme levels of concern. The law-abiding community tolerates the darkest of these realities largely because they are out of sight—which is perhaps the greatest attraction of incarceration as a criminal sanction. A project that shines a spotlight on conditions of confinement in America would make a contribution on that basis alone.

We also believe great progress is possible. On the side of optimism, there are many other countries that handle their (much smaller) prison populations in ways that are more humane and effective than average practice in America. A conditions-of-confinement project would not be an exercise in utopianism; it would fit the standard American Law Institute paradigm: build on precedent, while aspiring to do even better. A great deal of raw material for prison and jail reform exists, but it will take a well-resourced effort to marshal it and synthesize it into workable recommendations.

As to doubts about the ALI's competency, we wonder who else—that is, what other organizations of comparable stature—could possibly take this on. The American Law Institute is very good at recruiting the expertise it needs for its big projects. (Many of the group appointed to serve as MPCS advisers were not Institute members; many are nonlawyers.) Exploration of how the reporters and drafting groups might be constituted for a conditions of confinement project would be a worthwhile step, with some emphasis on cross-national expertise.

Ultimately, such a project would be a huge investment and could not be launched without considerable support from within the American Law Institute and its outside constituencies. We conclude this essay in the hope that such extensive support might materialize. Among other things, the project would complete a very large portion of the MPCS mission that the MPCS itself was unable to explore.

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