

DEMOGRAPHIC IMPACT STATEMENTS, O’CONNOR’S  
WARNING, AND THE MYSTERIES OF PRISON RELEASE:  
TOPICS FROM A SENTENCING REFORM AGENDA

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I. INTRODUCTION

The *Model Penal Code: Sentencing* project (*MPCS*) is nothing like a book, journal article, or dissertation. There is no unifying narrative thread and no manageable number of discrete storylines. Instead, it is a compendium of recommendations concerning important topics that arise in the sentencing codes of the American states. This is a broad field of coverage, a bit uncertain in definition, embracing many ‘subtopics’ that have consumed whole academic careers.<sup>1</sup> Because of its scope, the project

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1. The ‘purposes of sentencing’ provision of the revised *Model Penal Code (Code)* section 1.02 raises questions of utilitarian goals and proportionality in sentencing that have spawned entire libraries of commentary. See MODEL PENAL CODE § 1.02 (1985). For example, Andrew von Hirsch has spent the bulk of a distinguished career articulating and refining the theory of just deserts, sometimes joined by the eminent British scholar Andrew Ashworth. See ANDREW VON HIRSCH, CENSURE AND SANCTIONS 1 (1993); ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 1–4 (2005). The philosopher Joel Feinberg produced, among other works, a classic four-volume set on utilitarian theory (Millsian) in criminal punishment. See generally 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984) (discussing the concept of harm and its relation to various interests, wants, hurts, offenses, rights and consent); 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985) (discussing “offense” as a state distinct from harm); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) (discussing legal paternalism and personal autonomy and the concepts of voluntariness and consent); 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) (discussing the right to criminalize on the grounds of moral wrongfulness and the consequences and ground for harming). Over nearly forty years of scholarship, Norval Morris, and now Richard Frase, have expounded and explored a theory of limiting retributivism. See generally Richard S. Frase, *Sentencing Principles in Theory and Practice*, in 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 363–65 (Michael Tonry ed., 1997) (reviewing and expanding upon Morris’s theory).

The first several lines of the revised § 1.02(2), since their earliest appearance in draft form,

encounters some subjects of genuine importance that have received little or no attention.<sup>2</sup>

One contribution of the *MPCS* is its examination of existing sentencing systems across the states and their histories over the past thirty years.<sup>3</sup> It is challenging, and at times tedious, to study and think about a large number of jurisdictions while pursuing a substantive inquiry. Most existing scholarship fails to take such a multi-systems perspective. Indeed, in academic literature, state criminal justice policy as a universe is badly neglected in favor of narrow *federal*-centric scholarship.<sup>4</sup> Roughly 95% of

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have been examined in numerous books and law review articles. It has been criticized by adherents of desert theory as too utilitarian, and by strong utilitarians as too much grounded in desert. *See* VON HIRSCH & ASHWORTH, *supra*, at 180–85 (2005) (arguing the provision is too utilitarian and insufficiently bounded by desert); Anthony N. Doob & Cheryl Marie Webster, *Looking at the Model Penal Code Sentencing Provisions through Canadian Lenses*, 7 *BUFF. CRIM. L. REV.* 139, 169 (2003) (contending that revised Code is too utilitarian); Richard S. Frase, *Punishment Purposes*, 58 *STAN. L. REV.* 67, 76, 78 (2005) (approving of revised Code’s approach as similar to Norval Morris’s theory of limiting retributivism); Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 *AM. J. CRIM. L.* 135, 140–41 (2003) (arguing that revised Code gives insufficient prominence to utilitarian goal of “public safety”); Michael H. Marcus, *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 *WHITTIER L. REV.* 295, 301–02 (2007) (arguing that revised Code gives insufficient prominence to utilitarian goal of “public safety”); Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice’s Weakest Link*, 1 *OHIO ST. J. CRIM. L.* 671, 674 (2004) (identifying the lack of priority given to “public safety” as one factor contributing to the gap between sentencing research and sentencing practices); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 146 (2008) (arguing that the revised Code offers inadequate desert constraints upon sentences); Edward Rubin, *Just Say No to Retribution*, 7 *BUFF. CRIM. L. REV.* 17, 50 (2003) (offering the suggestion that, instead of “retributive” limits on utilitarianism, the revised Code should speak in terms of “proportionality” limits); James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 87–89 (2003) (claiming that the revised Code misses an opportunity to discredit retribution theory); Malcolm Thorburn & Allan Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 *NEW CRIM. L. REV.* 278, 278, 310 (2007) (reviewing VON HIRSCH & ASHWORTH, *supra* (favoring retributive just deserts approach over revised § 1.02)).

2. For example, the awarding or withholding of good time credits can make an enormous difference in the duration of prison stays, and has become an especially important component of some determinate sentencing systems, where corrections officials have become powerful back-end decisionmakers. *See, e.g.*, MINN. STAT. §§ 244.01, .04, .05, .101 (2008) (allowing for good-time reduction of one-third of the executed sentence); WASH. REV. CODE ANN. § 9.94A.728(1)(a)–(c) (West 2008) (allowing “earned release time” for low risk and first-time offenders up to 50% of their term of sentence; for serious violent and sex offenses up to 10%; and for other offenders up to 33%). If good-time discretion is exercised arbitrarily, we have not realized much improvement over the bad old days of parole release. However, based only on anecdotal evidence, this seems not to be the case as I am told that good time in these states is usually awarded as a matter of routine. Yet, virtually no contemporary literature exists on the subject of good time in theory or practice.

3. The raw informational value of a project of this kind may be an end in itself. *See* Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 *U. PA. L. REV.* 465, 466–67 (1961).

4. *See* Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 *U. COLO. L. REV.* 645, 645–50 (1993) (describing need for increased

criminal cases arise and are sentenced in state courtrooms, yet an overwhelming share of academic writing on criminal sentencing law deals exclusively with the federal system.<sup>5</sup>

This is a gaping weakness in our national law reform discourse. State sentencing systems are vastly different from their federal counterpart, and from each another.<sup>6</sup> While the federal system is widely regarded as a failure (and there are state systems that deserve a similar judgment), some states have nurtured successful innovations in sentencing law—some large in scale.<sup>7</sup> No single jurisdiction comes close to perfection, of course, and no one state has a monopoly on best practices. However, there have been many experiments in individual states that have performed reasonably well in light of their intended goals. (In the criminal justice field, to say that a reform has “performed reasonably well” is the highest possible compliment.)<sup>8</sup>

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attention to sentencing reform activity at state level).

5. *Id.* If anything, this misallocation of intellectual resources has gotten worse since the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220, 221 (2005), which concluded that the Sixth Amendment, as construed in *Blakely v. Washington*, 542 U.S. 296, 305 (2004), applies to Federal Sentencing Guidelines. Most states adapted relatively easily to the new Sixth Amendment requirements for the sentencing process announced in *Booker* and *Blakely*. MODEL PENAL CODE: SENTENCING § 7.07B *Reporter’s Note* 310–18 (Tentative Draft No. 1, 2007). For additional details on post-*Blakely* legislation in the states, including extended statutory excerpts, see MODEL PENAL CODE: SENTENCING, *Statutory Appendix* 53–136 (Preliminary Draft No. 4, 2005).

6. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 25–71 (1996); Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1194 (2005).

7. Various authors discuss the many failures of federal sentencing law, at least in its pre-*Booker* phase. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 5, 7, 103 (1998); AM. LAW INST., MODEL PENAL CODE: SENTENCING REPORT, *Reporter’s Introduction* 115–24 (2003) (illustrating many problems with the federal sentencing law through a comparison with the proposed *Model Penal Code*). Michael Tonry has gone so far as to say that “[t]he guidelines developed by the U.S. Sentencing Commission . . . are the most controversial and disliked sentencing reform initiative in U.S. history.” TONRY, *supra* note 6, at 72. In the same work, Tonry contrasts the relative successes of many state sentencing guidelines systems. See *id.* at 25–71. For a more up-to-date evaluation of the experiences of state sentencing reform jurisdictions, see Frase, *State Sentencing Guidelines*, *supra* note 6, at 1194. Various authors provide excellent in-depth analyses of individual state systems. See generally David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, in 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH 71 (Michael Tonry ed., 2001) (discussing Washington State); Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, in 32 CRIME AND JUSTICE: A REVIEW OF RESEARCH 131 (Michael Tonry ed., 2005) (discussing Minnesota); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, in 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 39 (Michael Tonry ed., 2002) (discussing North Carolina); William H. Pryor, Jr., Circuit Judge, United States Court of Appeals for the Eleventh Circuit, Keynote Address for the Symposium: *Sentencing: What’s at Stake for the States? Lessons of a Sentencing Reformer from the Deep South* (Jan. 21, 2005), in 105 COLUM. L. REV. 943, 944 (2005) (discussing Alabama).

8. On the theme of spectacular failure in criminal justice reform efforts, see DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 7, 9 (1st ed. 1980). See generally MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY

It requires sustained study to parse and compare the many local examples that make up “American sentencing law.” Because of the paucity of such work, lawmakers and policymakers throughout the nation function in high ignorance, usually unaware of reform breakthroughs in other jurisdictions, such as Minnesota, Washington, Virginia, or North Carolina, that have been in effect for ten, twenty, or even thirty years.<sup>9</sup> Brandeis’ laboratory cannot operate as it should if we are paying insufficient attention to state-level experiments.

The revised *Code*’s target audience includes state legislators, governors, attorneys general, judges, lawyers, sentencing commissioners, corrections officials, policymakers, and opinion leaders who play a role in the development of state sentencing law.<sup>10</sup> The *MPCS* may also be of interest to legal academics and law students who wish to study or participate in the process of law reform at the state or multi-state level, but the project does not seek academic recognition as a stand-alone goal. Persons connected to the federal sentencing system are also a subsidiary audience. The revised *Code* speaks powerfully in places to the current federal system, but more often it does not.<sup>11</sup> A similar point might be made concerning the *Code*’s

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SIMPLE SOLUTIONS FAIL 35–39 (1983) (examining “[t]he process of planned change” in four sectors of criminal justice, including sentencing reform). A general attitude of futility in the pursuit of criminal justice policy is also traceable to Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 22–23 (1974). Today, it is also high praise, indeed, to say that a given rehabilitative program for convicted offenders “performs reasonably well.”

9. See *supra* note 7 and accompanying text.

10. Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 538 (2002). To date, the *MPCS* proposals have received attention by policy organizations and state legislatures in Alabama, California, and Colorado. Recent sentencing commission legislation in Alabama and Colorado had important roots in the *MPCS* project.

11. Fundamental differences between state and federal criminal jurisdictions, criminal codes, geographic scale, budgetary constraints, and institutions of enforcement make it treacherous to engage in cross-over analysis. See generally Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679, 689 (1992) (discussing how states would not likely consider complex federal guidelines). For a discussion of the ALI’s determination to avoid the defining features of the federal sentencing system when preparing a revised *Model Penal Code*, see MODEL PENAL CODE: SENTENCING REPORT, *Reporter’s Introduction* 115–25 (2003).

An example of an important policy choice found in *MPCS* that *does* speak directly to the federal system is § 6B.06(2)(b), which demands that alleged criminal conduct for which an offender has not been convicted may not be used as a basis for increased sentence severity. See MODEL PENAL CODE: SENTENCING 211, 217–20, 225–27 (Tentative Draft No. 1, 2007). The consideration of alleged “nonconviction” offenses at sentencing continues to be a serious problem in the post-*Booker* federal system, including charges of which the defendant has been acquitted. Indeed, the Court’s remedy in *Booker* was founded on the perceived desirability of allowing judges to violate the principle stated in § 6B.06(2)(b). *United States v. Booker*, 543 U.S. 220, 296 (2005) (Breyer, J., opinion of the Court in part) (Justice Breyer’s remedial opinion for a 5-4 majority rested on the desirability of encouraging judges to sentence based on the “real facts” of the case, not the facts as reflected in the charges of conviction); see *United States v. White*, 551 F.3d 381, 384 (6th Cir.

relevance to the criminal justice systems in other countries. It could not be imported wholesale across national borders.<sup>12</sup>

Because the *MPCS* has so many moving parts, this Article will focus selectively on three legal-policy debates that have occurred, or are still unfolding, in the creation of the revised *Code*: the demographic impact statement to be attached to proposed sentencing guidelines or legislation affecting sentences, the policy choice between advisory and presumptive guidelines, and the degree of determinacy or indeterminacy that a sentencing system ought to have. The topics are all important ones on the horizon of the national sentencing reform agenda. Their discussion will illustrate the kind of improvements in law that the *MPCS* seeks to promote.

## II. A BRIEF PRIMER ON ALI PROCESS

Before considering specific legal-policy debates, it may help to explain the various stages of the American Legal Institute (ALI) drafting process. The footnotes to this Article are sprinkled with references to drafts and other materials produced in the *MPCS* project to date. To those uninitiated in the ALI's operations, the documents' titles may give no useful indication of where they stand in the project as a whole, nor is it easy to understand the status of the project without this knowledge.

The "Preliminary Drafts" are new drafts at the earliest stages of the chronology.<sup>13</sup> They are typically prepared by the Reporter afresh.<sup>14</sup> Preliminary Drafts are considered by a group of expert Advisers (including many non-ALI members) invited by the ALI to assist with the project, and by a Members Consultative Group (MCG) consisting of ALI members who self-select to play a role in the project.<sup>15</sup> No votes are taken in these groups,

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2008) (en banc) (holding that enhanced penalty based on acquitted conduct is permissible under post-*Booker* federal sentencing guidelines).

12. The *MPCS* proposals outlined in *Tentative Draft No. 1* were studied in depth by England and Wales' Sentencing Working Group chartered by the Lord Chancellor and Lord Chief Justice. See SENTENCING COMMISSION WORKING GROUP, SENTENCING GUIDELINES IN ENGLAND AND WALES: AN EVOLUTIONARY APPROACH 11, 31 (2008) [hereinafter SENTENCING COMMISSION REPORT]; LORD CARTER'S REVIEW OF PRISONS, SECURING THE FUTURE: PROPOSALS FOR THE EFFICIENT AND SUSTAINABLE USE OF CUSTODY IN ENGLAND AND WALES 27–35 (2007) [hereinafter LORD CARTER'S REVIEW OF PRISONS]. The *MPCS* Reporter was appointed Adviser to the project. The Working Group's final recommendations borrow from certain features of the better American systems (e.g., comprehensive sentencing guidelines, ongoing data collection, and the desirability of resource impact projections), but push in the direction of incremental change to the existing English system rather than wholesale reform. See SENTENCING COMMISSION REPORT, *supra*, at 11, 31; LORD CARTER'S REVIEW OF PRISONS, *supra*, at 27–34 (proposing recommendations that should be made with respect to prisons, including implementation of a structured sentencing framework).

13. The American Law Institute, About the American Law Institute, at 2 [hereinafter ALI, About the ALI], available at <http://www.ali.org/index.cfm?fuseaction=about.creationinstitute> (select "Download the ALI Brochure").

14. *Id.*

15. See, e.g., Reitz, *supra* note 10, at 670 (noting "[t]he advise [sic] of the Advisers

but the *MPCS* drafts change very substantially in light of feedback from the Advisers and MCG.<sup>16</sup>

“Council Drafts” occupy the next stage of the drafting process.<sup>17</sup> They include revisions by the Reporter that take account of the views of the Advisers and MCG.<sup>18</sup> Council Drafts are considered and ultimately voted upon by the ALI Council,<sup>19</sup> a group of roughly fifty ALI members elected to five-year terms.<sup>20</sup> The Council is sometimes called the “Senate” of the organization. No draft becomes ALI policy without affirmative votes of both the Council and the ALI membership.<sup>21</sup>

Upon winning the Council’s approval, and after another round of revisions by the Reporter, a “Tentative Draft” comes forward to the ALI annual meeting for a vote by the members of the organization.<sup>22</sup> Written motions for amendment may be presented at the meeting. If a Tentative Draft receives the membership’s favorable vote, it is denoted as “tentatively approved” by the ALI, subject to later editorial changes.<sup>23</sup> Typically, ALI projects unfold through numerous Tentative Drafts that accumulate over a number of years into a final product (e.g., a new Restatement or model legislation).<sup>24</sup> For instance, the original *Model Penal Code* had twelve Tentative Drafts, and the current project may have four or five. Once all Tentative Drafts have been completed and approved, the project as a whole is put forward to the Council and membership for “final approval.”<sup>25</sup> If all goes well, multi-volume hardbound sets will soon be in press.

Throughout the multiple drafting cycles, the Reporter receives a considerable volume of comments and suggestions from knowledgeable individuals and representatives of organizations, within and outside the ALI, who take an interest in the project.<sup>26</sup>

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Committee, the Members Consultative Group, and others, is solicited”); *see also* ALI, About the ALI, *supra* note 13, at 2 (stating Advisers include judges, lawyer, and law teachers with special knowledge about the subject).

16. ALI, About the ALI, *supra* note 13, at 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. The American Law Institute, Governance: Bylaws (as amended in May 2007), Bylaw 4.04–.05, available at <http://www.ali.org/index.cfm?fuseaction=about.bylaws> (last visited June 23, 2009).

21. ALI, About the ALI, *supra* note 13, at 2.

22. *Id.*

23. *Id.*

24. *See* Reitz, *supra* note 10, at 525–26. On some projects, the ALI collaborates with the American Bar Association, the National Conference of Commissioners for Uniform State Laws (NCCUSL), or both. ALI, About the ALI, *supra* note 13, at 2. For example, new drafting in the Uniform Commercial Code must be approved by both the ALI and NCCUSL. *Id.*

25. ALI, About the ALI, *supra* note 13, at 2.

26. *Id.* I imagine email has greatly increased the Reporters’ load in this respect, and there is

The current status of the *MPCS* project is as follows: A narrative Report was presented to the ALI membership in 2003 outlining the ambitions of the revision effort.<sup>27</sup> After several earlier iterations, and a delay occasioned by the U.S. Supreme Court,<sup>28</sup> *Tentative Draft No. 1* was tentatively approved by the ALI membership in May of 2007, following an affirmative vote of the Council in late 2006.<sup>29</sup> As of this writing, new drafting has reached the stage of *Council Draft No. 2*, which raises many issues that continue to be hotly debated.<sup>30</sup> Although it has benefited from much discussion and collective wisdom, *Council Draft No. 2* has not yet been formally approved at any level of the ALI. It will no doubt change substantially before it advances as *Tentative Draft No. 2*.

Anyone wishing to be up-to-speed on the *MPCS* project should examine the Report, *Tentative Draft No. 1*, and the latest draft-in-progress—roughly 700 printed pages of material.<sup>31</sup>

### III. SELECTED LEGAL-POLICY DEBATES WITHIN THE *MPCS*

#### A. *The Demographic Impact Statement*

Although not regularly used in the federal system, one familiar element of American sentencing guidelines reform at the state level is the fiscal

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sometimes a cacophony of conflicting viewpoints in one's inbox, but the net benefits are substantial.

27. See MODEL PENAL CODE: SENTENCING REPORT (2003).

28. See *Blakely v. Washington*, 542 U.S. 297, 303–07 (2004). *Blakely*, rewriting the constitutional law of American sentencing hearings, was decided less than two weeks after the Advisers and MCG had given their support to a draft expected to go forward to the Council and ALI membership. On this schedule, *Tentative Draft No. 1* would have been approved in 2005. The 5-4 decision in *Blakely*, overruling every federal circuit court and every state appellate judiciary (save one) to have considered the issue, came as a great surprise to most observers. See *Blakely*, 542 U.S. at 297; see also *Sixth Amendment—Allocation of Factfinding in Sentencing*, 121 HARV. L. REV. 185, 225, 229–31 (2007) (discussing the debate among commentators disagreeing with the *Blakely* decision). Six months later, aspects of *United States v. Booker* were nearly as surprising as the precursor *Blakely* decision. *United States v. Booker*, 543 U.S. 220 (2005). For a discussion of the new, perplexing, and contradictory aspects of this line of decisions, see Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1087 (2005). Adaptations to *MPCS* drafting to accommodate *Blakely*, *Booker*, and related cases delayed the project two years. See generally MODEL PENAL CODE: SENTENCING §§ 7.07A–.07B, at 375–79 (*Tentative Draft No. 1*, 2007) (proposing legislative provisions to comply with *Blakely* and related cases).

29. See MODEL PENAL CODE: SENTENCING (*Tentative Draft No. 1*, 2007).

30. There is a brief supplement to *Council Draft No. 2*: A Reporter's Memorandum to the Council, dated November 23, 2008, which expands upon the draft's commentary on the subject of life sentences, and the ALI's general disapproval of sentences of life without parole. See MODEL PENAL CODE: SENTENCING § 6.06 cmt. b, at 37–38 (*Council Draft No. 2*, 2008). In a nutshell, this addendum would signal the ALI's grudging endorsement of life without parole in circumstances where it provides the sole alternative to the death penalty. *Id.*

31. As Reporter, the author is always happy to supply a status report on the *MPCS* project. The author may be reached at reitz027@umn.edu.

impact statement that many sentencing commissions generate whenever new guidelines or statutory changes affecting sentencing are proposed.<sup>32</sup> Because of the predictive quality of sentencing guidelines<sup>33</sup> combined with computer modeling technology, these impact statements tend to be relatively accurate. State legislators treat them as credible statements of long-term consequences.<sup>34</sup> The shocking dollar figures in fiscal impact statements have often stopped punitive legislation that otherwise would have been voted into law, or have occasioned amendments before passage.<sup>35</sup> Just as importantly, when new laws will require prison construction according to the impact statement, immediate planning for the budgetary consequences can begin.<sup>36</sup>

Extrapolating from this proven technology,<sup>37</sup> the *MPCS* project, since its earliest draft in 2002, has recommended that a demographic impact statement (DIS) should be generated by sentencing commissions and attached to proposed guidelines and sentencing bills alongside monetary impact statements.<sup>38</sup> At a minimum, the DIS would model the racial, ethnic, and gender composition of future sentencing populations if the

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32. Professor Richard Frase reported that, as of 2005, the sentencing commissions in at least ten states were called upon to make fiscal impact projections. Frase, *supra* note 6, at 1196–1206, 1196 tbl. 1 (noting the “resource impact” projections used on a regular basis in Arkansas, Delaware, Kansas, Maryland, Minnesota, Missouri, North Carolina, Ohio, Oregon, Washington; projections sometimes used in the District of Columbia, Pennsylvania, Wisconsin, and the federal system). Virginia should be added to this list, see VA. CRIM. SENTENCING COMM’N, 14TH ANNUAL REPORT, GEN. ASSEM. 11–12 (2008).

33. State sentencing guidelines that achieve even a moderate degree of “compliance” among sentencing judges render future sentencing patterns more predictable than in non-guidelines systems. The projections are based on the assumption that judicial compliance rates will remain roughly similar over time, and that departures from guidelines will likewise cluster in patterns that can be modeled upon past judicial behavior.

34. See Frase, *supra* note 7, at 131–32; Wright, *supra* note 7, at 39–40.

35. HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 115 (2003).

36. For detailed state-specific discussions, see Boerner & Lieb, *supra* note 7, at 71–131; Wright, *supra* note 7, at 39–105; Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL’Y 279, 279–81 (1993).

37. Sentencing commission researchers for many years have told me that the same projection technology used to model the future use of prison bed spaces could easily predict who, demographically speaking, will likely end up occupying the additional beds. The Minnesota Sentencing Guidelines Commission, the first sentencing commission to generate such projections, did so relatively easily by drawing upon projection models already in place. See Frase, *supra* note 7, at 279.

38. See MODEL PENAL CODE: SENTENCING § 1.02(2)(e) (Preliminary Draft No. 1, 2002) (one governing purpose of the new code is “to ensure that unjustified racial and ethnic disparities in sentencing are reduced or eliminated, and that reasonable steps are taken to forecast and prevent such unjustified disparities when laws and guidelines affecting sentencing are proposed, revised, or enacted”).

proposed change in sentencing law were to take effect. The device could perhaps be expanded to include other personal characteristics.

The goals of the DIS are to bring to light sensitive information when it matters the most, provoke debate before new laws are passed, and create a mechanism for legislative accountability in the long run.<sup>39</sup> The final language of the *MPCS*, approved by the ALI membership in 2007, is set out below, with subsection (3) especially relevant:

§ 6A.07. Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts.

(1) The Commission shall develop a correctional-population forecasting model to project future sentencing outcomes under existing or proposed legislation and sentencing guidelines. The commission shall use the model at least once each year to project sentencing outcomes under existing legislation and guidelines. The commission shall also use the model whenever new legislation affecting criminal punishment is introduced or new or amended sentencing guidelines are formally proposed, and shall generate projections of sentencing outcomes if the proposed legislation or guidelines were to take effect. The commission shall make and publish a report to the legislature and the public with each set of projections generated under this subsection.

(2) Projections under the model shall include anticipated demands upon prisons, jails, and community corrections programs. Whenever the model projects correctional needs exceeding available resources at the state or local level, the commission's report shall include estimates of new facilities, personnel, and funding that would be required to accommodate those needs.

(3) The model shall be designed to project future demographic patterns in sentencing. Projections shall include the race, ethnicity, and gender of persons sentenced.

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39. The inspiration for the DIS was Michael Tonry's argument that lawmakers should be held accountable for the foreseeable racial impacts of their actions. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* vii–viii (1995). Tonry was speaking at the time of the 100:1 crack-powder cocaine ratio brought into federal sentencing law in 1987. *See* MODEL PENAL CODE: SENTENCING REPORT, *Reporter's Introduction* 122 (2003). With co-author Henry Ruth, I have offered additional thoughts about how the information generated by a DIS should be used. *See* RUTH & REITZ, *supra* note 35, at 115–16. Of course, this represents the personal views of the authors and not an official policy of the ALI. *Id.* at 115.

(4) The commission shall refine the model as needed in light of its past performance and the best available information.<sup>40</sup>

As this provision advanced through the ALI over five years, it encountered no opposition. However, many believed that the DIS would never actually be implemented by state government officials. This judgment was based on the fact that § 6A.07(3) asks state officials to *require themselves* to stir up the hot-button issue of race and punishment with every proposed guideline or sentencing law. Charges of racism, overt or unconscious, would be the expected currency of the ensuing debate.

Of course, a § 6A.07(3) projection will not always complicate the political prospects of proposed sentencing laws or guidelines. In many scenarios, a DIS might be helpful to passage. For example, several sentencing commissions have in recent years recommended amendments to statutes and guidelines to roll back the use of incarceration for certain categories of drug offenders. They have met with mixed success in their legislatures.<sup>41</sup> If such proposals had been accompanied by DISs as contemplated in the *MPCS* (none ever has), the projections would likely have shown that the proposed amendments would reduce preexisting racial and ethnic disparities in states' imprisonment rates. Because drug offenders make up an especially large percentage of the nation's growing population of women prisoners, the DIS might have focused legislators' attention on an opportunity to confront the problem of the over-incarceration of women, particularly women of color.<sup>42</sup> Putting specifics aside, in many scenarios the DIS could provide independent or supplemental justification for changes in sentencing laws that would reduce prison rates for targeted offenses; the push might be forceful indeed.

Still, especially when new laws or guidelines would escalate penalties, the DIS may expose appalling facts, reminding everyone of existing disparities in punishment and projecting worse to come. This could cause discomfiture from numerous viewpoints. For example, a projection attached to a proposed increase in prison use for armed robbery might show that the added increment of severity would affect African Americans disproportionately. This could fuel allegations of racist motivation behind the proposed law. On the other hand, the hypothesized projection would be

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40. MODEL PENAL CODE: SENTENCING § 6A.07, at 355–56 (Tentative Draft No. 1, 2007).

41. See Kansas Sentencing Commission, Kansas Department of Corrections, *2003-Senate Bill 123: Alternative Sentencing Policy for Non-Violent Drug Possession Offenders: Operations Manual* (July 1, 2008); Minnesota Sentencing Guidelines Commission, Updated Report on Drug Offender Sentencing Issues (Jan. 31, 2007). The long struggle of the U.S. Supreme Court with crack-powder is another example. See *supra* note 39 and accompanying text. Section 6A.07, as a whole, is an example of a *MPCS* recommendation that might be incorporated usefully into the federal lawmaking process.

42. Regarding the over-incarceration of women, especially for drug offenses, see RUTH & REITZ, *supra* note 35, at 114.

based on data showing higher-than-average rates of commission of armed robberies among African Americans in distressed urban neighborhoods. This datum could be used to reinforce racial stereotypes. Additional painful facts could arise, such as the victims of armed robbery (and other violent crimes) being themselves disproportionately African American. Justified outrage about racial disparities in punishment sometimes collides with the incommensurable concern that black victims have been historically—sometimes unforgivably—underprotected by state and local law enforcement.<sup>43</sup> The complexities of race, crime, victimization, and punishment only multiply as one examines more closely this peculiarly American tragedy. In many ways, § 6A.07(3) calls for a conversation no one wants to have.<sup>44</sup>

Although these problems and others have hardly been resolved since the *MPCS* drafting first suggested the DIS, at least two states—Minnesota and Iowa—have now committed to the use of such a device. Minnesota was the first to put a toe in the water. In late 2007, the Minnesota Sentencing Guidelines Commission, by its own action rather than by legislation, began to prepare DISs to accompany the fiscal impact projections it had given its legislature since 1980. By consensus among staff and commissioners, the Commission did so shortly after learning of the *MPCS* recommendation. Isabel Gomez, a former Minneapolis trial judge who was then executive director of the sentencing commission, pushed for the idea and encountered no resistance. As Gomez explained, “The commission members thought it was a good idea, so we just started doing it.”<sup>45</sup>

In Iowa, unlike in Minnesota, the DIS originated from legislation. In 2008, shocked by statistics showing the state to be a national “leader” in racial disparities in incarceration, the Iowa legislature passed a new law requiring the legislative services agency to prepare a “correctional impact statement” prior to the legislative debate of any proposed change in law affecting criminal sentencing.<sup>46</sup> The statement must include projections of “the fiscal impact of confining persons pursuant to the [proposed] legislation, [as well as] the impact of the legislation on minorities.”<sup>47</sup> The governor’s press release termed this a “minority impact statement.”<sup>48</sup> As of

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43. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29–75 (1997); RUTH & REITZ, *supra* note 35, at 32–37; John J. DiIulio, Jr., *The Question of Black Crime*, PUB. INT., Fall 1994, at 3, 7, 9.

44. Government officials are not the only group reluctant to delve deeply into the realities of race, crime, and punishment in the United States. See TONRY, *supra* note 39, at viii (explaining Professor Tonry’s decision to write a book about race and punishment in America came only after numerous potential authors had turned down his request—as editor of a book series—to author a monograph on the subject).

45. Personal conversation with Isabel Gomez, Executive Director, Minn. Sentencing Comm’n, February 12, 2008.

46. IOWA CODE ANN. § 2.56(1) (West 2008).

47. *Id.*

48. Press Release, Chet Culver, Governor, State of Iowa, Governor Culver Signs Minority

this writing, the Minnesota Sentencing Guidelines Commission staff is assisting Iowa officials in their efforts to build the technical apparatus needed to generate their minority impact projections.<sup>49</sup> To date, no impact projections have been made.

The implementation of the DIS is too new to know how it will fare. Although a number of statements have been produced by the Minnesota Commission over the past year, none has had any observable effect on political debate. The state legislature in the past two years has been unwilling to pass sentencing legislation of any kind that would increase the need for prison spaces. This has been due entirely to budgetary concerns, including a longstanding “no new taxes” pledge by the governor, so the possible additional check of the DIS has not been tested. The first true test will come when a troubling DIS is attached to a proposed change in sentencing law that might otherwise be viable.

The early DISs in Minnesota raise significant questions, however, about the kind of information that should be included in such projections and how it should be reported. Minnesota’s statements set out several introductory paragraphs on the current breakdown by race and ethnicity of the state’s general population, the total population of convicted felons, and the prison population (with numbers set out for whites, blacks, Hispanics, Asians, Asian Americans, and “other/unknown”). For example, the DIS states that African Americans make up only 4.3% of the state’s general population, but 32.1% of the state’s prisoners. Background information of this kind is helpful if not essential. The information is presented clearly, both in text and in a bar chart. However, not immediately obvious from the DIS is that the African American imprisonment rate is roughly thirteen times the white rate when computed on a per capita basis against the

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Impact Statement Bill Into Law (Apr. 17, 2008), available at [http://www.governor.iowa.gov/news/2008/04/17\\_2.php](http://www.governor.iowa.gov/news/2008/04/17_2.php) (last visited May 11, 2009); see also IOWA CODE ANN. § 2.56(1). It is not clear that the *MPCS* recommendation played a direct role in Iowa’s legislation. Marc Mauer, Executive Director of The Sentencing Project, a Washington, D.C. nonprofit organization, was instrumental in Iowa’s process of passing legislation concerning racial impact statements. See Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 19 & n.1, 46 (2007).

49. Reliable projections will be harder to generate in Iowa’s indeterminate sentencing system than within Minnesota’s guidelines structure. Part of the difficulty is that judicial sentencing behavior can change rapidly in an indeterminate system, especially when new criminal sentencing laws are put into effect. It is even more treacherous to make predictions of the parole board’s release decisions far into the future. Systems with a great deal of unstructured sentencing discretion at the front- and back-ends force correctional projection researchers to make a large number of soft assumptions. The picture is materially different in states with well-constructed guidelines systems. Stable compliance rates under guidelines, and predictable patterns in sentencing departures, simplify the task for state sentencing commissions. Projection researchers need make fewer guesses. In addition, Minnesota possesses thick retrospective data on sentencing practices compiled annually by the sentencing commission since 1980. These data, far superior than exist in Iowa, are enormously helpful to the projection process.

general population.<sup>50</sup> One might ask whether a well-conceived DIS should make the disparity ratios explicit. Other potentially useful background information is omitted entirely. The Minnesota DIS does not disclose actual rates of imprisonment for different races and ethnic groups, and fails to include information about jail populations. More thought should be given to how much background, including historical trends and comparison to other states or the nation as a whole, should be reported to make the DIS projection intelligible in context.

Moreover, the Minnesota DIS' have no confident sense of direction concerning what sort of projection should be communicated. In one DIS, attached to proposed legislation that would have increased penalties for attempted robbery, the Commission's impact statement states:

Minorities are even more over-represented among persons sentenced to prison for attempted aggravated robbery than non-minorities and their sentences would be increased if this bill were to be adopted. Among offenders sentenced to prison for attempted aggravated robbery in 2006, 25.9 percent were white, 61.1 percent were black, 9.3 percent were American Indian, and 3.7 percent were Hispanic. The average increase in sentence length for those offenders would be 8 months for white offenders, 10 months for black offenders, 15 months for American Indian offenders, and 23 months for Hispanic offenders.<sup>51</sup>

Such a statement probably does not tell the legislature or the public all they need to know. Let us massage the figures provided by the Commission in order to flesh out foreseeable impacts not driven home in the DIS. Partly because the white conviction rate for armed robbery is so much lower in Minnesota than the black conviction rate, any increased penalty increment for the offense could be anticipated to result in a staggering disparity ratio of 47:1 (the number of times the added punishment would be applied to black offenders relative to general population compared with its application to white offenders relative to general population). Furthermore,

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50. This calculation is possible based on the percentage figures reported in the DIS introduction, even if one does not know the absolute population statistics. The DIS states that whites are 86% of the state's general population, and blacks are 4.3%. See Minnesota Sentencing Guidelines Commission, *Racial Impact for HF3101: Domestic Abuse No Contact Orders* (Mar. 13, 2008); *Racial Impact for HF2949: Adding Salvia Divinorum to Schedule Iv Drugs* (Feb. 27, 2008); *Racial Impact for HF3175: Robbery-Increased Penalties* (Feb. 29, 2008) (all on file with author). In contrast, whites make up 50.9% of the state's prison population, and blacks 32.1%. See *supra*. Assuming the state's population is 100 people, relative prison rates can be calculated from these numbers. It does not matter how large the state's population actually is because the ratio of black-to-white prison rates would remain the same.

51. Minnesota Sentencing Guidelines Commission, *Racial Impact for HF3175: Robbery—Increased Penalties 1–2* (Feb. 29, 2008) (on file with author).

for each application of the proposed law in prison cases, the average severity increment for African Americans could be expected to be 20% higher than for whites (ten months versus eight). Over time, this would amplify the expected 47:1 differential impact.

Thus, in a state that already experiences a 13:1 disparity ratio in black-white prison rates, a manipulation of the statistics in the DIS tells us that the proposed legislation would without question exacerbate this disproportionality to an unknown degree. With more information, a trained researcher could project this figure, although it would grow year-by-year (assuming all else in the state's sentencing law stayed the same) until the composition of the prison population reached a new equilibrium that reflected the stiffer sentences for attempted robberies. Merely speculating, this single proposed change in the criminal code might result, in five or ten years, in a new disparity ratio of 15:1 or 16:1. It would be possible to ask a sentencing commission to quantify such an expected long-term impact in a DIS, if we thought the information important. Certainly—and this is my main point—the policymaking community should give careful thought to what goes into a DIS, in addition to the threshold question of whether there should be such a device at all. Section 6A.07 of the *MPCS* encourages states to consider these questions.

As an exercise in model legislation by the ALL, § 6A.07 illustrates two tendencies. First, the main body of the provision,<sup>52</sup> on fiscal impacts, was borrowed from existing law in a number of states. The provision sets out and assembles detailed background on a “best practice” that has a solid track record in a number of jurisdictions, and recommends other states follow suit. Second, subsection (3) stretches the envelope beyond anything before required in American law. The hope behind such an innovation is that a handful of states will experiment with the DIS and, if it proves useful, other jurisdictions will take notice. It remains to be seen whether this will be the course of § 6A.07(3), but the early signs are promising.

### B. *Presumptive versus Advisory Guidelines*

Beyond the DIS, the *MPCS* also addresses new questions that have arisen in the post-*Blakely* era of sentencing guidelines reform.

Justice Sandra Day O'Connor, dissenting in the 2004 decision *Blakely v. Washington*,<sup>53</sup> offered dire warnings about the practical and political effects of the Court's ruling.<sup>54</sup> A 5-4 majority held that, under Washington State's presumptive sentencing guidelines scheme, a judge may not depart upward from the guidelines sentencing range based on a finding of fact made by the judge during sentencing proceedings.<sup>55</sup> The Court ruled that,

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52. See *supra* note 32.

53. 542 U.S. 296 (2004).

54. *Id.* at 314–26 (O'Connor, J., dissenting).

55. *Id.* at 297, 305 & n.8, 308–09 (majority opinion).

under the Sixth Amendment’s jury trial guarantee and the Fourteenth Amendment’s Due Process Clause, a finding of fact legally necessary to support an aggravated sentence must be made by a jury under the reasonable doubt standard of proof.<sup>56</sup> For reasons not easily explained, six months later in *United States v. Booker*,<sup>57</sup> the Court held that the Sixth and Fourteenth Amendment principles essential to the *Blakely* decision had no application to judicial fact-finding during sentencing proceedings in an advisory sentencing guidelines system.<sup>58</sup> While it is a fascinating project to try to untangle the Court’s jurisprudence in this area, space limitations force me to assume that the reader is generally familiar with the convoluted decisions in *Blakely*, *Booker*, and related cases.<sup>59</sup> The necessary points for present purposes are: (1) the Supreme Court recently announced a constitutional rule that requires jury fact-finding at sentencing proceedings, at least some of the time, in presumptive guidelines jurisdictions; and (2) advisory guidelines systems are exempt from the rule.<sup>60</sup>

Justice O’Connor’s *Blakely* dissent was strongly worded, even strident. She said, “What I have feared most has now come to pass: Over twenty years of sentencing reform are all but lost.”<sup>61</sup> Her particular concern was that many jurisdictions would abandon successful sentencing guidelines reforms that had regulated judicial sentencing discretion through the use of legally-enforceable sentencing guidelines.<sup>62</sup> If such systems are to be maintained, Justice O’Connor said, they must now pay the “constitutional tax” of setting up bifurcated jury fact-finding proceedings—a first trial for guilt and innocence, and a second to determine sentencing facts.<sup>63</sup> Making matters worse, Justice O’Connor predicted that the facts juries would be allowed to resolve at sentencing would be far more limited than those judges were accustomed to weighing prior to *Blakely*.<sup>64</sup> To avoid the tax, Justice O’Connor predicted that American legislatures would, from *Blakely* forward, prefer regimes in which judges’ sentencing discretion is

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56. *Id.* at 311–12.

57. 543 U.S. 220 (2005).

58. *Id.* at 233. Although *Booker* generated two separate majority opinions, both commanding only 5-4 votes, the Court was unanimous in its view that advisory guidelines systems did not raise the constitutional concerns that motivated the *Blakely* decision. *Id.* at 233 & n.2, 258–59. This consensus view embraced not only advisory sentencing guidelines, but also traditional sentencing regimes in which judicial sentencing discretion is unencumbered by guidelines of any sort. *Id.* at 260.

59. For those who want further information, see generally Reitz, *supra* note 28, as I have examined and critiqued this line of cases elsewhere.

60. *Booker*, 543 U.S. at 232–33.

61. *Blakely*, 542 U.S. at 326 (O’Connor, J., dissenting).

62. *See id.* at 323–24.

63. *Id.* at 318.

64. *Id.* at 319. Justice O’Connor mentioned the defendant’s perjury or obstruction of justice at trial as a sentencing factor that could no longer be considered at sentencing in a *Blakely*-compliant system—by judge or jury—as well as facts in aggravation of the offense that came out during the trial itself, e.g., the discovery that the defendant had sold drugs only to children. *Id.*

unbounded by rules.<sup>65</sup> Thus, Justice O'Connor believed that the premium placed on the jury trial right in *Blakely* would yield perverse results in the long run: "The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries."<sup>66</sup>

Many dissents in Supreme Court history have charged that the sky will fall because of the majority's missteps.<sup>67</sup> Five years after *Blakely*, with the benefit of hindsight, we can begin to ask whether O'Connor's strong words were prescient, or overstated. No final historical verdict is possible of course. But I will attempt an interim report, taking the perspective of someone primarily interested in the 95% of criminal cases sentenced in state rather than federal courts.<sup>68</sup> The report is based on a review of post-*Blakely* activities in state courts and legislatures, and educated guesses about what state governments will do in the next five or ten years. From this vantage point, Justice O'Connor's dissent appears overstated in one or two important ways, but surprisingly on the mark in its assessment of *Blakely*'s unintended consequences.<sup>69</sup> Especially when measured against foundational policy values of the *MPCS*, there have already been "disastrous" practical consequences in *Blakely*'s wake.<sup>70</sup>

Both before and after *Blakely*, the *MPCS* project has recommended the use of presumptive sentencing guidelines—those that exist alongside a legal "departure" standard that judges must satisfy before deviating from

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65. *Id.* at 320, 321 n.1.

66. *Id.* at 314. One irony little noted in the literature is that juries' decisions bear far greater relationship to the expected sentence in a presumptive guidelines system than in an advisory guidelines structure, or in an indeterminate system. Juries become slightly more important than before in the criminal process if states choose to comply with *Blakely* by creating jury fact-finding procedures at the sentencing stage, but juries are marginalized if states choose to avoid *Blakely* by adopting a discretionary system.

67. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 542 (1966) (White, J., dissenting).

68. *See supra* note 5 and accompanying text.

69. The federal-centric judgment is admittedly different than the view from the fifty states. For instance, the federal judges of my acquaintance believe their sentencing system (for now) has benefited from the decisions in *Blakely* and *Booker*. Congress may someday change that perception. *See Reitz, supra* note 28, at 1101 (observing that under the Court's new Sixth Amendment jurisprudence, Congress could substitute a system of mandatory minimum guidelines for the now-advisory guidelines). My view is that the federal system has been marginally changed, probably for the better, but most of the features I found objectionable prior to *Booker* remain in place. *See MODEL PENAL CODE: SENTENCING REPORT, Reporter's Introduction* 115–25 (2003) (discussing defects in the federal guidelines system, only one of which was undue rigidity); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 524 (1993) (criticizing real-offense sentencing laws, including the "relevant conduct" provision of the federal sentencing guidelines); Kevin R. Reitz, *Structure: The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 173 (2005) [hereinafter Reitz, *Structure: The Enforceability of Sentencing Guidelines*] ("[T]he reordering of federal sentencing in *United States v. Booker* was far less radical than it first appeared.").

70. *See Blakely*, 542 U.S. at 314 (O'Connor, J., dissenting).

the sentencing commission's prescriptions.<sup>71</sup> Successive *MPCS* drafts have never imagined that the departure standard should be tightly restrictive of judicial sentencing discretion, but have consistently recommended that guidelines be enforceable to a "modest" degree. *Tentative Draft No. 1* states that trial courts should be permitted to depart from sentencing guidelines for "substantial" reasons related to the statutory purposes of sentencing, and that departures should be subject to appellate review.<sup>72</sup> In contrast, advisory guidelines have no formal, legal bite.<sup>73</sup> They are recommendations rather than presumptions.<sup>74</sup> They are sometimes accompanied by a departure standard, albeit an unenforceable one, and often include a procedural requirement that a sentencing judge give reasons when departing from the guidelines (but the adequacy of the reasons is not reviewable).<sup>75</sup>

The majority view within the ALI has been that advisory guidelines are often better than no guidelines at all, but they are a weaker institutional tool than their presumptive counterparts for achieving important objectives of sentencing law reform.<sup>76</sup> Comparing the two frameworks, presumptive guidelines are more often respected by judges, produce more consistency of thought and transparency in sentencing proceedings, are more effective in reducing racial disparities in sentencing decisions, are more reliable in introducing systemic controls on prison population growth (see previous section), are superior at implementing line-by-line policy priorities in how

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71. See, e.g., MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 4, 2005). This is the last pre-*Blakely* draft, which included a firm recommendation that states should create a system of presumptive guidelines.

72. See MODEL PENAL CODE: SENTENCING § 7.XX(2), at 264 (Tentative Draft No. 1, 2007) ("A sentencing court may base a departure from a presumptive sentence on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02 (2)(a), provided the factors take the case outside the realm of an ordinary case within the class of cases defined in the guidelines."). Trial courts are also given power to depart from mandatory penalties in the *MPCS* scheme, but these departures encounter a more demanding legal standard. See *id.* § 7.XX(3)(b), at 265 ("Sentencing courts shall have authority to render an extraordinary-departure sentence that deviates from the terms of a mandatory penalty when extraordinary and compelling circumstances demonstrate in an individual case that the mandatory penalty would result in an unreasonable sentence in light of the purposes in § 1.02(2)(a).").

73. See Reitz, *Structure: The Enforceability of Sentencing Guidelines*, *supra* note 69, at 156–60.

74. *Id.*

75. See *id.* (arguing that American sentencing guidelines systems can be arrayed on a continuum from "purely advisory" to "mandatory").

76. Observers with close focus on the federal system often think otherwise. See, e.g., FEDERAL JUDICIAL CONFERENCE REPORT OF THE PROCEEDINGS 56 (1991); STITH & CABRANES, *supra* note 7, at 143–48 (calling for federal sentencing reform that would have made the then-mandatory federal guidelines into advisory guidelines). I share the view that, from a uniquely federal perspective, and given the peculiar history of the federal sentencing guidelines, the current advisory system is better than the pre-*Booker* system of enforceable guidelines. The current setup may also be better than any legally-enforceable framework Congress is likely to create in the foreseeable future.

prison bed spaces should be filled, and have proven essential in state systems to the inculcation of meaningful appellate review of trial court sentences.<sup>77</sup> Each one of these accomplishments is to be celebrated, especially given the fact that *any* success in criminal law reform is profoundly surprising. Many observers would say that the course of U.S. criminal justice history over the past thirty years has been overwhelmingly grim.<sup>78</sup> The advent of “better” state guidelines systems, in the ALI’s collective judgment, has been one of the bright lights in a predominately dark chapter of American law.<sup>79</sup> The majority of those “better” systems, starting with Minnesota in 1980, has been built around presumptive sentencing guidelines.<sup>80</sup>

Traumatic injury to the prospects of future adoptions of presumptive guidelines systems by state legislatures is therefore regrettable. Five years ago, state guidelines systems were about one-half presumptive, one-half advisory.<sup>81</sup> Since Minnesota implemented the first presumptive guidelines in 1980, and Pennsylvania the first advisory system in 1982, there had been slow but steady growth of both kinds of structures across roughly twenty states. If seen as a race, the two system types were running neck-and-neck.

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77. For the advantages of a presumptive guidelines system, see MODEL PENAL CODE: SENTENCING REPORT, *Reporter’s Introduction* 63–115 (2003). For an extended narrative discussion, see MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum* xxxiv–xxxv (Tentative Draft No. 1, 2007). For bulleted points of discussion, see *id.* at 43–45, which outlines ALI’s post-*Blakely* assessment of presumptive and advisory guidelines systems.

The ALI’s policy preference for presumptive guidelines, formally approved in *Tentative Draft No. 1* in 2007, contained an important post-*Blakely* concession. Advisory guidelines are now recognized in the draft as a second-order recommendation for states that choose not to adopt or maintain presumptive systems. A series of Official Comments throughout the draft suggest amendments to the black-letter statutory language of the *MPCS* that would transmute the *Code*’s presumptive system into an advisory regime of sentencing “recommendations.” See MODEL PENAL CODE: SENTENCING § 1.02(2), cmt. p & app. A (Tentative Draft No. 1, 2007) (including the appendix which collects all the amendments necessary to switch over to an advisory system).

78. This footnote could be expanded beyond the length of this Article. See, e.g., FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 94–99 (1996); TODD R. CLEAR, *HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS, AND THEIR COMMUNITIES* 39–64 (1994); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3 (2003).

79. See Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 707 (1995) (“Sentencing guidelines are strongly associated with comparatively slow prison population growth whenever the legislature charged the sentencing commission to consider prison capacity when establishing presumptive sentencing ranges. . . . These findings are a refreshing departure from the usual negative results when evaluating criminal justice reforms.”).

80. The reliance of the *MPCS* project on the “Minnesota Model” is acknowledged in the MODEL PENAL CODE: SENTENCING REPORT 50–63 (2003).

81. See Richard S. Frase, *Is Guided Discretion Sufficient?: Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 446 tbl. (2000).

This scorecard has changed noticeably in the aftermath of *Blakely v. Washington*, decided in 2004. To avoid Justice O'Connor's constitutional tax, presumptive guidelines systems in Tennessee and Ohio were converted into advisory schemes, one by statute and the other by judicial opinion.<sup>82</sup> The loss of the Ohio system is especially unfortunate because it was one of the most innovative sentencing guidelines schemes in the country. It worked with narrative principles rather than a two-dimensional grid and provided the foundation for a rich and growing body of sentencing law in the appellate courts.<sup>83</sup> Ohio's system was also one of the state sentencing reforms that had been most successful at restraining aggregate prison growth since its implementation in 1996.<sup>84</sup> The MPCs had intended to hold out Ohio to other states as a promising alternative format for enforceable sentencing guidelines;<sup>85</sup> post-*Blakely*, Ohio's system is now a formerly-promising, defunct alternative. This is a shame for Ohio itself, but also an injury to other states that may in future years have been inspired to follow Ohio's lead.

Another single-state *Blakely* story with potential ripple effects unfolded in Massachusetts. Legislation to adopt presumptive guidelines was pending in that state when *Blakely* was decided in June 2004.<sup>86</sup> Although the proposed Massachusetts system would have been one of the most progressive in the nation by giving judges, for example, the power to depart from some mandatory minimum penalties,<sup>87</sup> the legislation had to be withdrawn following *Blakely* because it was constitutionally defective.<sup>88</sup> Although the chances of enactment were less than certain before *Blakely*, Massachusetts was poised to become the first major Northeastern state to adopt a presumptive system that borrowed from—and even improved upon—other jurisdictions using the Minnesota model. Massachusetts' enactment of presumptive guidelines would have been a major event on the national scene—the kind other states notice, study, and think about emulating. *Blakely*, however, snuffed the candle.

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82. TENN. CODE ANN. § 40-35-210(c) (West 2005); *State v. Foster*, 845 N.E.2d 470, 498 (Ohio 2006) (declaring formerly presumptive statutory guidelines are now advisory).

83. See Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1, 2–3 (2002) (including a useful discussion of appellate case law under the state's new sentencing principles).

84. See MODEL PENAL CODE: SENTENCING, *Reporter's Study* 25 fig.2 (Council Draft No. 2, 2008).

85. See MODEL PENAL CODE: SENTENCING § 6B.02 cmt. c, at 172–73 (Tentative Draft No. 1, 2007).

86. See Francis J. Carney, Jr., *Developing Sentencing Guidelines in Massachusetts: A Work in Progress*, 20 L. & POL'Y 247, 248 (1998) (outlining the Massachusetts proposal).

87. *Id.*

88. For outlines of the Massachusetts proposal, which had been many years in the making, see *id.* Regarding the failure of the legislation in the 2004 session, I rely on a personal communication from William Leahy, Chief Counsel, Massachusetts Committee for Public Counsel Services (Sept. 9, 2005).

In the post-*Blakely* period, only Alabama has moved to a sentencing-commission-sentencing-guidelines framework, choosing to adopt an advisory guidelines structure.<sup>89</sup> In 2007, California went far along the path to enacting sentencing reform based on the commission-guidelines model, but one complication along the way was the specter of trials of fact at sentencing hearings.<sup>90</sup> (California was at the time dealing with the probable impact of *Blakely* on its statutory sentencing scheme, which the Supreme Court invalidated in *Cunningham v. California*.)<sup>91</sup> To my knowledge, no state in the country is presently contemplating sentencing reform based on the Minnesota presumptive guidelines model. In the difficult terrain of comprehensive, whole-system reform, always an ambitious undertaking, *Blakely* gives favored status to a second-best solution.

There have been additional *Blakely* costs. Even in states that retain presumptive guidelines systems post-*Blakely*, some chose to compromise their guidelines in order to reduce the number of jury trials required for aggravated sentences. Minnesota and Washington, most notably, widened their guidelines ranges to allow judges greater unguided discretion to pronounce aggravated sentences.<sup>92</sup> Alaska made a similar change to a system that shares some attributes of presumptive guidelines.<sup>93</sup> In these jurisdictions, the guidelines now provide weaker restraints upon the severity of sentences, and probably have lost some of the predictive power necessary for accurate fiscal and demographic impact statements.<sup>94</sup> In addition, the strange incentives emanating from *Blakely* have supplied new ammunition to proponents of parole release discretion—another development at odds with the best wisdom of the *MPCS* project.<sup>95</sup> A number of state courts have held that indeterminate guidelines systems—where guidelines coexist with parole release agencies—are exempt from *Blakely*'s jury trial jurisprudence.<sup>96</sup> The state courts are probably right, but the policy implications are unfortunate.

If collective wisdom of the ALI is correct that presumptive sentencing guidelines systems are the rarest of prizes—an example of successful reform in American criminal justice, then the multi-decade project of sentencing reform in the states took a blow from *Blakely* from which it

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89. See generally Pryor, *supra* note 7 (discussing sentencing reform in Alabama).

90. See *Cunningham v. California*, 549 U.S. 270, 293 (2007).

91. *Id.*

92. For the marginal injuries suffered by the Minnesota system, see Richard S. Frase, *Blakely in Minnesota, Two Years Out: Guidelines Sentencing is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73, 80 (2006). For Washington State's departure guidelines, see WASH. REV. CODE ANN. §§ 9.94A.535, .537 (West 2005).

93. ALASKA STAT. § 12.55.155(a), (f) (2008).

94. See *supra* Part III.A.

95. See *infra* Part III.C.

96. See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 437–39 (2005); see also *People v. Drohan*, 715 N.W.2d 778, 791 (Mich. 2006).

may not soon recover. However, the *MPCS* project may act as a counterweight to *Blakely* and the newly-slanted playing field that tilts toward advisory guidelines. The ALI clearly intends that it do so. But this has become more of an uphill battle than it would have appeared in 2003 when the “race” between presumptive and advisory guidelines was still very close across sentencing reform jurisdictions.

### C. *Determinacy, Indeterminacy, or Some of Both?*

Beyond the question of sentencing guidelines, important insights concerning mechanisms for prison release decisions have sprung from the latest round of drafting in the *MPCS* project. The ALI’s thorough and deliberative process has led to the observation that academics and policymakers have been too categorical in making a sharp separation between “determinate” and “indeterminate” sentencing structures.<sup>97</sup> The standard definition of an “indeterminate” sentencing system—which applied to all U.S. jurisdictions as recently as 1974—is a system in which judges sentence offenders to prison for an indefinite term, often a wide range of years, subject to large reservoirs of discretion in a parole board to determine the actual release date of each inmate.<sup>98</sup> Historically, parole boards were created because law reformers of the Progressive Era believed most criminals could be rehabilitated during a prison term, but they also thought it was impossible to know ahead of time how long this personal transformation would take.<sup>99</sup> Reformers of that era trusted that a parole board with sufficient information and expertise could discern, case-by-case, when the rehabilitative process had in fact taken hold.<sup>100</sup>

The standard definition of a “determinate” sentencing system posits the absence of a parole board with prison release authority—or parole-release abolition. Typically, in such systems the sentence pronounced in the courtroom bears a close and predictable relation to the sentence that will in fact be served by the offender. The prisoner may still be awarded good time credits, but the potential discount from good-time adjustments is usually less than the sentence discount (or premium) controlled by parole boards in indeterminate structures. In addition, good time is in theory dispensed or withheld on relatively fixed criteria relating to an inmate’s conduct in the institution, rather than predictions of his future behavior.

The traditional definitions are not wrong, so far as they go, but they oversimplify. Intensive state-by-state inquiries carried out in the *MPCS* project over the past two years—and searching debates among the

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97. MODEL PENAL CODE: SENTENCING, *Reporter’s Study* 31 (Council Draft No. 2, 2008).

98. *Id.* at 1.

99. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 69 (1980).

100. For the best historical account, tracing the theory and practice of the parole release process from the 1890s into the 1970s, see *id.* at 44.

Advisers, MCG, and Council Members—have led to new ways of conceptualizing the systemic architecture of prison-release. As a threshold matter, it is important to recognize that there are pockets of determinacy and indeterminacy in every American jurisdiction’s arrangements for prison sentences. While the most important policy choice faced in each jurisdiction is which approach is superior as a *general* platform, sub-issues abound. Even among state systems that the literature categorizes as strictly “determinate,” manifold prison release mechanisms exist to qualify the description: some still use parole release for certain offenses, nearly all award good-time credits—and some good-time formulas are generous indeed, some permit judicial resentencing months or even years into a prison term, most have provisions for the compassionate release of inmates who are seriously ill or disabled, some authorize sentence reductions for extraordinary acts of heroism by prisoners, and all recognize a clemency power with potential to operate as a legal *deus ex machina*—albeit seldom exercised these days.<sup>101</sup>

We are poorly equipped to know the best way to shape, mix, and match the above grab-bag of prison release authorities. Sixteen years ago, Kay Knapp wrote that few people in each state actually understood, as a technical matter, how release calculations were to be made.<sup>102</sup> That may still be true today. Worse, there is little or no evaluation literature of the various mechanisms of indeterminacy catalogued above. Even if we had a strong grasp of their legal attributes, we would not know which ones to cheer, and which to deride.

Recent *MPCS* drafts have struggled mightily with these issues. *Council Draft No. 2*, the latest in the series, addresses questions of parole release discretion (which the draft would abolish), good time (which the draft would retain, although there remains uncertainty about the best formulation of the provision), compassionate release (which the draft would retain and expand in scope beyond most existing state provisions), and a novel mechanism for a judicial “second look”—a power of sentence modification—deep into the execution of long-term prison sentences (which would have been a wholly new proposal not based on prior state or federal law).<sup>103</sup>

All of these subject areas are important, difficult, and have been insufficiently studied in the past, but the innovative “second look” provision has generated by far the most prolonged disagreement in the

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101. See generally American Bar Ass’n, ABA Commission on Effective Criminal Sanctions: *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable* 4–6 (Mar. 15, 2009).

102. Kay A. Knapp, *A Reply to Professor Alschuler*, 64 U. COLO. L. REV. 737, 738 (1993).

103. MODEL PENAL CODE: SENTENCING 85–102 (Council Draft No. 2, 2008). There is no draft provision at present that speaks to the clemency power, nor was there in the original *Model Penal Code*.

current drafting cycle. This is reflected in numerous changes of direction in black-letter proposals over successive drafts. The first draft to grapple with the question of prison release, in 2007, contained no second-look provision.<sup>104</sup> The second draft, in early 2008, featured an expansive second-look provision that would have authorized trial judges to perform many of the functions previously assigned to parole boards, albeit in an environment of transparency, enforceable rules, and reviewability of decisions.<sup>105</sup> The next draft, *Council Draft No. 2*, published in later 2008, fell back to a much narrowed second-look process intended to affect only a small percentage of prisoners who had served at least fifteen years of even longer prison sentences.<sup>106</sup> Following the Council's meeting in December 2008, it seems that even the narrowed provision will not go forward as ALI policy. Instead, the Council has asked the Reporter to lay out a variety of options for states to consider—with a judicial second-look mechanism as one possibility—for adding a component of indeterminacy to especially long prison terms. No specific recommendation has gained support.

The zigs and zags taken by the second-look provision expose a series of difficulties that have not been dealt with adequately or explicitly in American law. If one takes the view that a determinate sentencing scheme is *generally* preferable to an indeterminate arrangement (a conclusion that has not been controversial in the ALI), one eventually is faced with special problems attached to extremely long sentences. In a purely determinate regime, for example, all life sentences would be penalties of life-without-parole (LWOP). The United States, compared with other developed nations, already imposes an extraordinary number of LWOP and other life sentences,<sup>107</sup> along with high numbers of lengthy prison terms stretching forward twenty, thirty, and forty years.<sup>108</sup> For those who believe that many

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104. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 5, 2007).

105. MODEL PENAL CODE: SENTENCING 78–84 (Preliminary Draft No. 6, 2008).

106. MODEL PENAL CODE: SENTENCING 85–102 (Council Draft No. 2, 2008).

107. As of 2004, more than 33,000 prisoners in the United States were serving life sentences with no possibility of release. See MARC MAUER ET AL., *THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT* 9 (2004). Elsewhere in the developed world, natural life sentences remain rare. *Id.* at 28. No such sanction exists in Canada, where the most severe available penalty is a life sentence with parole eligibility at twenty-five years. See Canada, Criminal Code, R.S.C., ch. C 46, § 745 (2009). Many European criminal justice systems authorize, yet rarely employ such a penalty. See Catherine Appleton & Brent Grøver, *The Pros and Cons of Life without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 603, 610 (2007). In the United Kingdom—a nation with one-fifth the United States population, only twenty-two prisoners were serving “whole life” sentences in 2005. *Id.* at 603. A few nations, such as Germany, France, and Italy, have declared natural life sentences unconstitutional. *Id.* at 610.

108. Thirty-nine separate cells of the federal sentencing guidelines include penalties of thirty years or more without departure from the guidelines. 3 UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 1277 (2008). Even the Minnesota Sentencing Guidelines, which produce the second-lowest per capita prison population in the nation, authorize prison sentences of up to forty years, without departure, at the top of the grid for second-degree

American prison sentences are excessive, determinacy without qualification would lock in the worst of our sentencing mistakes. As *Council Draft No. 2* argued:

When a legal system imposes the heaviest of incarcerative penalties, it ought to be the most wary of its own powers and alert to opportunities for the correction of errors. On this principle, determinate sentences are least justifiable as they extend in length from months and years to decades. Both moral and consequentialist judgments become suspect when their effects are projected forward into a distant future.

On proportionality grounds, societal assessments of offense gravity and offender culpability sometimes change over the course of a generation or comparable period. In recent history, for example, there has been flux in community attitudes toward some classes of drug offenders, and even in crime categories as serious as homicide, such as when a battered spouse kills an abusive husband or in cases of assisted suicide. The prospect of changing norms, which might render a proportionate prison sentence of one era disproportionate in the next, is of greatest concern for extremely long confinement terms.

On utilitarian premises, lengthy sentences may also fail to age gracefully. The cumulation of knowledge may reveal that sentences thought to be well founded in one era were in fact misconceived. An optimist might hope and expect this to be so. For example, research into risk assessment technologies has from time to time yielded significant improvements. A prediction of recidivism risk made today may not be consistent with the state of prediction science twenty years later. Similarly, with ongoing research, new and effective rehabilitative or reintegrative interventions may become available for long-term inmates who previously were thought resistant to change. It is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past.<sup>109</sup>

This final subject of this Article is far from an end point in the ALI process. Unlike the DIS and the preference for presumptive over advisory guidelines, the ALI will continue for at least another year to study the question of how best to preserve the benefits of a generally determinate sentencing structure, while making special allowance for the unique American tendency to authorize and impose extremely long prison terms. Already, however, the ALI has brought attention to a badly neglected

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murder. MINNESOTA SENTENCING GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 57 (2008).

109. MODEL PENAL CODE: SENTENCING § 6.10A cmt. b, at 59–60 (Council Draft No. 2, 2008).

subfield of sentencing law, having to do with low-visibility mechanisms for indeterminacy, attached to even the most definite-seeming of penalties. No one has yet given adequate time and energy to the question of when the edifice of determinacy should give way to other concerns, or how back-end release discretion should best be organized and exercised when it exists. Having identified this gap, the *MPCS* will continue its pursuit of sensible recommendations.

#### IV. CONCLUSION

This Article has touched on only a small fraction of the *MPCS* corpus. The other authors in this symposium issue focus elsewhere, and demonstrate one of the greatest advantages of the *MPCS* undertaking: Because the *Model Penal Code* is something of a “brand name,” both in academic and legislative domains, any revision of its terms attracts the close attention of many knowledgeable people. The Reporter could not be more grateful for thoughtful input of this kind. The recommendations contained in the revised *Code* always reflect the collective wisdom of a small army of experts who have given selfless attention to the difficult problems of criminal sentencing.

