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*ABA Roundtable on  
 “Second Look” Sentencing Reforms*

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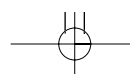
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## Taking a Serious Look at “Second Look” Sentencing Reforms

**MARGARET COLGATE LOVE**

Director of the ABA Commission on Effective Criminal Sanctions

Various criticisms of traditional parole release and broader concerns about indeterminate sentencing schemes led the proponents of the federal Sentencing Reform Act of 1984 to do away with traditional “second look” sentencing mechanisms. A principal goal of determinate sentencing reform was that the prison term imposed in open court should be the one the defendant actually served, no more and no less (save perhaps a very small reduction for good behavior in prison). But it is now essential to give “second look” sentencing reforms a serious look because that fundamental tenet of determinate sentencing has been called into question in the federal system. There appears to be an emerging consensus that, despite well-intentioned efforts to get rid of unjustifiable variations in sentencing and parole practices, the federal sentencing reforms of the 1980s substituted an unjustifiable regimen of cookie-cutter justice in which certainty and uniformity are valued above humanity. It is no longer heresy to suggest that at some point, and in some circumstances, long prison sentences that may have seemed effective and deserved when imposed, ought at some later time to be given a “second look” in anticipation of possible reduction.

Twenty years of experience under the 1984 act has highlighted the importance of some offender-specific flexibility in determining sentence length, for institutional reasons as well as considerations of fairness, efficiency, and justice. Happily, a series of Supreme Court rulings has returned a greater measure of discretionary authority to sentencing judges, providing a necessary counterweight to the discretionary authority of prosecutors affecting the federal sentencing process. Statutory mandatory minimums now stand as the chief obstacle to achieving a fair balance of rule and discretion.

Having made progress at the front end of federal sentencing, it is time to strike a new balance of rule and discretion at the back end. The legitimacy of truth in sentencing is called into question if punishments that appeared just and fair at the time of their imposition can later appear unjust and inappropriate when circumstances change. Yet the federal sentencing system seems constructed to keep sentenced prisoners out of sight and mind once their final appeals have concluded. I imagine it was this reality that led Supreme Court Justice Anthony Kennedy, in his iconic 2003 speech to the ABA Annual Meeting, to urge courts and lawyers to take responsibility for “what happens after the prisoner is taken away”:

The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.<sup>1</sup>

I came to appreciate the devilish efficiency of the federal sentencing system's construction when I was Pardon Attorney in the Justice Department in the 1990s. During this decade, petitions from prisoners sentenced under the 1984 act, and the no-parole mandatory minimum drug sentences of the 1986 Anti-Drug Abuse Act, began to flood the federal clemency system. From this back-end vantage point, I saw how the sentencing system was operating in districts across the country and could see its shortcomings illustrated in case after case. Far from eliminating discretion at the front end of



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sentencing, determinate sentencing rules had driven it underground, into the prosecutor's office. Particularly in drug cases, small fish who had nothing to trade for their freedom, or who were simply too scared to cooperate, received much longer sentences than the main perpetrators. Criminal defendants were essentially being severely punished for exercising their right to a jury trial, and so-called sentencing entrapment appeared unfortunately common.<sup>2</sup>

In my role, I came to understand how important clemency is to a legal system that makes no other provision for reducing long prison sentences. But with this understanding came frustration, for prosecutors in the field rarely supported clemency, and they had the last word as far as the political appointees in Main Justice were concerned. The Bureau of Prisons ("BOP"), historically an important source of advice to pardon officials within the Department of Justice, decided it was no longer appropriate for it to make recommendations on the merits of prisoner petitions. Nor was BOP willing to use the one relief mechanism under its control that might have taken some pressure off the pardon power, the sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i).<sup>3</sup> Prisons had become a growth industry, and prison management did not want to appear soft on crime.

In the absence of meaningful statutory sentence reduction mechanisms, the federal sentencing system reverted to its nineteenth-century roots, when executive clemency was the sole avenue for early release. But there was one important difference. Then, presidential sentence commutations were issued regularly and generously when imprisonment no longer seemed just or efficient.<sup>4</sup> In recent years, presidents rarely commute sentences, and the system for administering the pardon power resembles a lottery. By the end of his second term, President George W. Bush had granted only eleven requests for sentence reduction out of more than 9,000 prisoner petitions decided.<sup>5</sup> By way of contrast, in the decade prior to enactment of the Parole Reorganization Act of 1976, more than 2,000 commutations were granted, about 30 percent of petitions received, and this occurred at a time when the federal prison population was one-tenth the size it is today. Presidential pardoning is not what it used to be.

If "Fear of Judging" drove the front-end sentencing reforms in the 1980s, as Professor Stith and Judge Cabranes have so memorably put it,<sup>6</sup> now "Fear of Forgiving" has closed off any realistic possibility of back-end relief for the many compelling situations in which lawfully imposed prison sentences seem too long by any sensible measure.

Not only are sentence commutations few and far between, the Justice Department's clemency process has become unresponsive to the equitable claims of ordinary people: at the beginning of the Clinton administration, I was directed to deny all commutation petitions except those in which a member of Congress or the White House had expressed an interest. While this directive was later retracted, its spirit has informed the Justice Department's administration of the pardon power ever since. No more than a handful of the sixty-one commutations granted by President Clinton during his eight years in office were favorably recommended by the Justice Department.<sup>7</sup> In the final year of the George W. Bush presidency, only two applications for sentence commutation were favorably recommended by the Justice Department, while more than 4,000 applications were recommended for denial.<sup>8</sup> With the Justice Department effectively removed from the business of clemency, what had once been a routine presidential housekeeping function subject to justice-based norms began to seem more like a perk of office available primarily to those with direct access to the White House. By the end of this Bush administration, political considerations and/or personal connections had become preconditions to favorable clemency consideration by the president.<sup>9</sup>

Against this backdrop, the ABA Commission on Effective Criminal Sanctions convened the Roundtable on "Second Look" sentencing reforms to explore the desirability and practicality of returning some measure of discretion to the back end of federal sentencing, either in the form of a reinvigorated clemency program or in the form of administrative mitigation devices like parole and compassionate release. There are, of course, reasonable institutional objections to a systematic use of the pardon power as a substitute for law reform. But even if pardon should not be relied upon routinely as a substitute for law reform, could there not at least be greater use of exemplary commutations "to prompt debate or motivate a recalcitrant Congress"?<sup>10</sup> Similarly, even if a routinely available parole mechanism has no place in a determinate sentencing system, might there be room for some more limited administrative opportunities to revisit a sentencing decision, particularly one that otherwise involves decades in prison? The papers commissioned for the Roundtable explore the circumstances in which a prison sentence that has otherwise become final should be reconsidered and reduced, who should be responsible for making that decision, and how the sentence reduction mechanism should be administered.

If systemic reform is needed, should we move toward a routinely available “second look” authority for long sentences, as is suggested in the current draft of the Model Penal Code Sentencing Articles, or should we instead reserve early release for the extraordinary and compelling case that would traditionally be considered appropriate for clemency? If the former, how would such an authority be justified in a “truth in sentencing” paradigm? If the latter, how should such a system be structured and administered to ensure consistency and accountability? What role should prison authorities play in determining sentence length? Should prisoners have increased opportunities to earn good-time credit? Can sentence reduction ever be justified by budget imperatives or prison overcrowding? Should we seek to repatriate noncitizen prisoners prior to the expiration of their terms?

The conference papers are organized around three themes. The first set of papers focuses on what has been called the patriarch of early release mechanisms, executive clemency. In his 2003 speech to the ABA, Justice Kennedy challenged us to “reinvigorate the pardon process . . . [that] of late, seems to have been drained of its moral force.”<sup>11</sup> Noting that “pardons have become infrequent,” he observed that “a people confident in its laws and institutions should not be ashamed of mercy.”<sup>12</sup> How realistic is this challenge in a sentencing system dominated by administrative law concepts, and in the current political climate? Dan Kobil and Rachel Barkow both make the case for a larger and more routine role for pardon in the sentencing system, and they suggest changes in the administration of the power that would facilitate its use. Kobil proposes to place responsibility for advising the president in an expert advisory body instead of in the Justice Department to avoid disproportionate influence of prosecutors. Barkow proposes a two-part strategy for reenergizing the power in a hostile political environment, which would reduce the risk of making a mistake, and highlight the systemic benefits of clemency.

The second set of papers deals with the operation of existing provisions for sentence reduction in federal law. Douglas Berman proposes that sentencing commissions should be proactive in amending guidelines that are “broken” by virtue of their harshness, and that such amendments should generally be applied retroactively. Two papers, one by Steve Sady and Lynn Deffebach and the other by Mary Price, are critical of how the BOP administers its authority to reduce prison sentences, including in particular the authority to petition the sentencing court under 18 U.S.C. § 3582(c)(1)(A)(i). Nora Demleitner faults the BOP for failing to make full use of its limited good-time authority, arguing that it is both unfair and inefficient for the BOP to refuse to allow noncitizen prisoners to participate in drug treatment programming that may lead to a one-year sentence reduction. Dora Schriro brings the perspective of a corrections professional to the discussion, making the case for a more generous use of earned good time using risk management principles, as a strategy to promote public safety and cost savings. Sylvia Royce completes the picture by describing another underutilized sentence reduction mechanism available to the Justice Department, the treaty transfer program, which she believes could substantially reduce the staggering cost of housing more than 50,000 noncitizens in federal prison.

The third set of papers moves beyond existing federal laws and authorities to general proposals for systemic reform. Richard Frase discusses the “second look” proposals in the most recent draft of the revised Model Penal Code/Sentencing Articles, which incorporates into a decidedly determinate structure both a routine fifteen-year review and an “extraordinary” release procedure for prisoners who are aging and infirm. The paper by Mark Bergstrom and his colleagues describes the efforts underway in Pennsylvania to develop a more structured approach to indeterminate sentencing. Pennsylvania has extended the structured guidelines approach to parole decision making and is attempting to coordinate the front end and the back end through a “super commission.” The MPC and Pennsylvania systems begin in very different places, but each bends toward the other as a new sentencing paradigm combines elements of old and new.

The proceedings of the Roundtable will be the subject of a report with recommendations for specific back-end reforms of federal sentencing and corrections practice (see this volume p 211.) As has become clear through the prepared papers, there is no shortage of “second look” mechanisms in the federal system, only a general unwillingness to use them. It is therefore possible that better administration of existing authorities is all that is necessary to produce a balanced system that works fairly and efficiently. It is also possible that a few changes in the law—such as increased earned good-time credit—would prove useful in managing prison populations and reducing recidivism. It should not be difficult to justify greater use of most of these “second look” mechanisms in “truth in sentencing” terms. It seems that a conversation we have managed to avoid for two decades, about what happens after “the door is locked against the prisoner,” is now ready to begin in earnest.

## Notes

- <sup>1</sup> Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-09-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html).
- <sup>2</sup> Sentencing entrapment occurs when a person predisposed to engage in one sort of criminal activity is persuaded by government agents to engage in conduct exposing him to harsher punishment. See Application Note 15 to USSG § 2D1.1; *United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000). One fairly common scenario in commutation petitions filed in the mid-1990s involved defendants who had been persuaded to cook powder cocaine into crack, thereby triggering the much higher penalties applicable to that form of the drug.
- <sup>3</sup> BOP restricted the availability of this sentence reduction mechanism to cases of imminent death, even though it had originally sought this authority in the 1970s as an alternative to the slow and unreliable clemency process. See *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (statement of director of BOP explaining that the new procedure offered the Justice Department a more expeditious release mechanism than clemency); *United States v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978)(same).
- <sup>4</sup> In his classic 1941 study of federal pardoning practices, W.H. Humbert reported that between 1860 and 1900, 49 percent of all applications for presidential pardon were granted. In 1896 there averaged sixty-four acts of pardon for every one hundred prisoners, and in the next five years the ratio between acts of clemency and the federal prison population was, on average, 43 percent. W.H. Humbert, *The Pardoning Power of the President*, American Council on Public Affairs 111 (1941). Data from the Office of the Pardon Attorney reveal that the Justice Department relied on the pardon power as an early release mechanism long after the enactment of parole and probation statutes. See Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT. REP. 5, 7, n. 15 (2007).
- <sup>5</sup> Eight of President Bush's commutation grants reduced lengthy mandatory drug sentences. Two others commuted the prison sentences of two Border Patrol agents prosecuted for shooting a fleeing drug trafficker. The eleventh commutation, probably more accurately styled a remission, obviated Scooter Libby's prison term entirely.
- <sup>6</sup> KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).
- <sup>7</sup> By most accounts, the Justice Department made no formal recommendation in favor of clemency for sixteen Puerto Rican nationalists whose sentences were commuted by President Clinton in 1999 but instead sent the White House a report on the cases that was characterized as an "options paper." In the 2009 hearing before the Senate Judiciary Committee on his nomination to be attorney general, Eric Holder stated that he had, as deputy attorney general, recommended in favor of clemency for the sixteen.
- <sup>8</sup> Four other commutations were granted by President Bush, but three of these (Ramos, Compean, Prior) were not recommended by Justice at all. See Dan Eggen & Carrie Johnson, *Bush Commutes Sentences of Ex-Agents*, WASH. POST, Jan. 20, 2009, A2; Charlie Savage, *On Clemency Fast Track, via the Oval Office*, N.Y. TIMES, Jan. 1, 2009, A1. The fourth grantee (John Forte) was recommended for denial, though his petition had been supported by the United States Attorney.
- <sup>9</sup> See Savage, *supra* note 5. In a January 21, 2009 interview with CNN's Larry King reported in the Los Angeles Times, House Speaker Nancy Pelosi recounted her inauguration day conversation with President Bush in which he said he was "very proud" of not issuing any late-term pardons to the politically well-connected who had lobbied the White House in the final weeks. "He said people who have gotten pardons are usually people who have influence or know friends in high places," a route that is "not available to ordinary people. . . . He thought that there was more access for some than others and he was not going to do any." Josh Meyer, *Bush rejected pardons for Duke Cunningham, Edwin Edwards and Michael Milken*, L.A. TIMES, Jan. 27, 2009, A1.
- <sup>10</sup> See Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. REP. 119, 122(2001)("While presidents may wish to use systematic pardons or exemplary commutations to prompt debate or motivate a recalcitrant Congress, they ought not invoke the pardon power to convert the Presidency into a legislature of one.")
- <sup>11</sup> Kennedy, *supra* note 1.
- <sup>12</sup> *Id.*

# Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable



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## Introduction

On December 8, 2008, the ABA Commission on Effective Criminal Sanctions sponsored a roundtable conference in Washington, D.C., to begin a discussion of ways to reduce the prison terms of people convicted and sentenced for federal crimes. The authorities that permit reduction of the court-imposed sentence are known collectively as “second look” provisions, a term that originated in the project to revise the sentencing articles of the Model Penal Code.

It has taken a long time to add back-end issues to the conversation about federal sentencing reform, because providing for midcourse correction of a sentence lawfully imposed has been regarded as fundamentally at odds with principles of truth in sentencing. That article of determinacy’s faith is now being questioned, as reflected in the report that follows.

The roundtable format involved brief presentation of papers followed by a moderated discussion among participants at the roundtable. The moderator was Jeremy Travis, president of John Jay College, who deftly managed a large and occasionally unruly group of judges, practitioners, and academics. Following the morning and afternoon ses-

sions there was an opportunity for comments from the observers on points that had not previously been raised. Justice Anthony Kennedy joined the roundtable for part of its afternoon session. Participants are identified by name only with their permission. A list of participants follows the report, and the papers prepared for the conference are also published in this issue.

## Overview of Issues

Second look provisions fall into two conceptually distinct categories. The first includes provisions that authorize reduction of a prison term when extraordinary circumstances make the term originally imposed seem unreasonable or unjust. Sometimes these extraordinary circumstances are present from the very beginning, even if they don’t become apparent until later. Sometimes they arise after the passage of time, if continued imprisonment comes to seem unjust because a prisoner’s circumstances change, or because our collective view of an appropriate punishment changes. With this first category of second look provision, the justification for sentence reduction is peculiar to an individual prisoner, like terminal illness or exigent family circumstances, and has nothing to do with generalized concerns about overincarceration. Most sentencing systems include some fail-safe mechanism to deal with such situations, clemency being the classic example. The question is when fail-safe mechanisms should be called into play, and how they can most effectively be administered.

The second category of second look provision consists of sentence reduction mechanisms that are available on a more routine basis to all or most similarly situated prisoners and can therefore be factored into the prison term imposed by the court (unless enacted after the fact). This sort of sentence reduction mechanism is not aimed at doing justice in a particular case but rather at addressing correctional management and budget concerns. Parole and good time are paradigmatic examples of this second kind of sentence reduction authority, as are repatriation mechanisms like treaty transfer. Retroactive application of changes in sentencing guidelines or laws is a systemic remedy that may claim a place in both categories.

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Extraordinary sentence reduction mechanisms like clemency are essential elements of a just system no matter how long a prison term may be, though their value in monetary terms is by definition hard to quantify. The fiscal impact of routine sentence reduction mechanisms can be easily determined, and their value in human terms is considerably greater when prison terms are relatively lengthy, as they are in the federal system.<sup>1</sup> Both types of second look authority can and should be administered with an eye toward improving public safety outcomes.

In the years since enactment of the 1984 Federal Sentencing Reform Act (SRA), most of the interest in reforming the system has focused on the length of the prison term initially imposed by the court at the front end and not on the possible need to take a second look at sentences at the back end. This is hardly surprising, given the premium the SRA placed on certainty and finality. Under the “truth in sentencing” principles of determinacy, the prison term imposed in open court, pursuant to a set of generally applicable rules promulgated by an expert administrative body, was supposed to be the one the defendant actually served, no more and no less. Good-time credit was reduced to a minimum and made automatic, so that it is useful only to punish bad conduct. Early release on parole supervision was abolished entirely. It does not appear that the drafters of the SRA gave much thought to “extraordinary” cases, though they extended into the new law a provision authorizing a court to reduce a prison term for “extraordinary and compelling reasons” at the request of prison authorities.

But the laudable guiding principles of determinacy were undermined in the federal system almost from the beginning by a political environment that produced sentencing rules of extraordinary severity.<sup>2</sup> Lengthy prison terms imposed with little regard to individual circumstances have made federal “truth in sentencing” hard to defend on moral or any other grounds, and all the more so without access to a reliable fail-safe mechanism.<sup>3</sup> Without any ability to affect the duration of their punishment, prisoners may have no incentive to deal with the behaviors that brought them to prison in the first place. An individual’s circumstances can change so dramatically over the course of twenty or thirty years that the sentence originally imposed may no longer be justifiable, even without some intervening extraordinary development, blurring the distinction between the two categories of second look mechanisms. It is to this unsettling situation that the papers prepared for the conference are addressed.<sup>4</sup>

The conference papers point out that there are a number of authorities in existing law by which federal prison sentences may be reduced, both in extraordinary circumstances and more routinely. The roundtable discussion confirmed participants’ experience that these authorities are used infrequently or not at all. The Justice Department (including prison officials) has been reluctant to take actions or implement policies that would result in shortened prison terms, and programs to repatriate noncitizen

federal prisoners have been underutilized or not utilized at all. Executive clemency, never a reliable tool of justice even in its nineteenth-century heyday, has been essentially unusable since the system for its administration in the Justice Department broke down during the Clinton administration. The one hopeful note is the relative ease with which courts have given retroactive effect to the 2007 changes in the crack cocaine sentencing guidelines. Notwithstanding the attorney general’s dire predictions of violence in the streets and paralysis in government, thousands of prisoners have had their sentences reduced in the past year without unduly burdening the system.

If there was a single point of consensus around the table, it was that a just sentencing system ought to include some second look mechanism for mitigating the necessary harshness of the first look, particularly when a prison term is very long and a prisoner’s circumstances (or society’s views) have changed since the sentence was imposed. It was generally agreed that second look authorities can and should be reconciled with principles of determinacy to bolster their legitimacy, and justified in terms of public safety and economy as well as fairness. Federal law already includes several second look mechanisms that could be administered more aggressively by prison authorities to conserve correctional resources. In a few cases, existing authority could be helpfully modified. Opinion was divided as to whether the constitutional pardon power should be used to deal with systemic issues as well as exceptional cases. Different second look authorities should be viewed in relationship to one another, and their functions distinguished to the extent possible.

The report that follows summarizes the questions raised and viewpoints expressed in the course of the day, and it concludes with specific recommendations made by individual roundtable participants to the new administration, to Congress, and to the courts.

## Second Look Roundtable

*There is a sense of urgency, a sense of loss that we had something in earlier times in our nation’s history that we’ve lost that was important to us. There is also a sense of a hope that some very concrete actions will be recommended to us throughout the day that we can move on as an agenda for change.*

Jeremy Travis

### I. Reinvigorating the Pardon Power and Improving Its Administration

Executive clemency has not been used for many years as a routine early release mechanism, and no one proposes such a role for it now. But there is a felt need in the federal system for some way to reduce a prison sentence that is regarded as unjustly harsh, either because a prisoner’s circumstances have changed or because the prison term imposed was disproportionate to begin with. Papers prepared by Rachel Barkow and Dan Kobil argue for greater use of the pardon power as an error-correcting mecha-

nism, both defining error in this context broadly.<sup>5</sup> Understanding that clemency operates in a hostile political and jurisprudential climate, their papers both suggest ways to administer the power to enlist public support for its use.

Summarizing her paper at the roundtable, Professor Barkow proposed to apply lessons of sentencing reform to clemency decision making, to reduce risks while emphasizing benefits. She recommended the creation of a clemency advisory board composed of all segments of the justice community,<sup>6</sup> including prosecutors and victims, and consideration of less risky categories of offenders. A clemency commission could produce the same kind of data as a sentencing commission to highlight clemency's cost savings and public safety gains, since "mercy hasn't really worked as a politically saleable way of approaching clemency." She pointed to recent examples of state governors who have used their pardon power successfully (Ehrlich of Maryland, Kaine of Virginia, and Huckabee of Arkansas), and who publicly grounded their pardoning in religious faith or obligation of office, in both cases gaining a measure of protection from political blowback. She emphasized that pardoning becomes easier with regular exercise:

While these changes may yield only modest improvements initially, each successful clemency grant makes the case for additional grants. That is, as the practice of clemency once again becomes a regular one, bearing societal benefits, the risk of any one decision going wrong is not as great. The result should be, over time, a return to an era in which clemency is a key part of a functioning system of justice.

Professor Kobil agreed that coalition building and a reliable system for administering the power can give political cover to an executive otherwise disinclined to take the safe course of inaction in clemency matters. He expressed concern about prosecutors exercising too much influence in the federal clemency advisory process, and recommended that this responsibility should be placed in the hands of an independent body of experts instead of the Justice Department:

There is an inherent conflict of interest present when the Justice Department acts as the primary gatekeeper for clemency, given that its primary role is to prosecute cases and enforce the law. . . . This tension is particularly pronounced when it comes to commutations, a form of clemency by means of which the president shortens or eliminates the very sentences that federal prosecutors have worked hard to impose. Although many states are also struggling with how to exercise the clemency power in a meaningful fashion, no state gives the primary authority for processing clemency requests to the office of the attorney general or to another body charged principally with prosecutorial duties.

The roundtable discussion centered around three questions:

- What is the most useful and appropriate role for the pardon power to play in a determinate sentencing system?
- Under what circumstances should executive clemency be used to reduce a lawfully imposed sentence?
- How can the pardon power be insulated from politics to permit the executive to act more boldly to set an agenda?

There was general consensus around the table that there are institutional objections to using the pardon power routinely to reduce prison sentences in a highly regulated system. Grants of clemency can demonstrate the need for law reform, but they should not be expected to substitute for it, with the president in effect acting as a legislature of one. As Judge Nancy Gertner put it, clemency may be an appropriate remedy for the occasional sentencing error, but "you can't use [pardon] at the back end to make up for severe problems at the front end." The pressure put on the clemency mechanism to perform a routine second look function may reflect on Congress's wisdom in abolishing parole, but using the pardon power in this fashion would set the president at cross-purposes with Congress.<sup>7</sup> Moreover, proposals to "ramp up" clemency in the federal system may be stymied by the resources this would require from prosecutors and courts. Kate Stith remarked that proposals for clemency commissions seem to reflect nostalgia for parole. Citing the Connecticut clemency board as an example, she suggested that data-driven clemency decision making could avoid an entitlement system like the one that led to Willie Horton's release in Massachusetts. Another participant noted that political constraints on exercise of the power might be avoided if a commission or board made "routine large-scale recommendations to be approved routinely."

At the same time, no one disagreed that the pardon power can and should play an error-correcting function—though not everyone agreed about what constitutes error in this context. For example, if many crack cocaine sentences are unjustly long, it does not follow that clemency is the appropriate remedy to reduce the length of those sentences on a wholesale basis. John Steer proposed a distinction between cases involving individuals whose circumstances have changed since sentencing, which may appropriately be addressed through clemency or some other "extraordinary" second look authority, and cases where there has been a generalized change of heart about the fairness of a particular sentencing scheme, which the president should address by seeking changes in the law and applying them retroactively. He cited the recent example of the changes in the crack cocaine guidelines.

When pardon is used to cut short prison sentences lawfully imposed pursuant to guidelines or statutory mandatory minimums, it risks disrespecting courts as well as Congress. Prosecutors can also be expected to resist the use of commutations to undo the results of their

work. In this view, pardon is most appropriately used when neither Congress nor the courts have specifically acted, to restore rights after a sentence has been served. Garland Hunt explained how the Georgia Board of Pardons and Paroles uses pardon to help people leaving prison get “back on track” with jobs and licenses, so that they are less likely to commit another crime.

Albeit institutionally limited, pardon has an important role in signaling the need for law reform. A few judicious commutations of crack sentences may illustrate where change is necessary. Moreover, the pardon power has frequently and profitably been used to check the other branches and can send a powerful message to the president’s own executive troops. Pardon is a powerful narrative-framing device that helps the president speak to the public about issues of criminal justice. Mark Earley spoke to the enduring relevance of the second chance narrative, involving opportunity for change and restoration: “Dollars and cents only work to justify pardoning when there is a crisis like there is now, but these themes are very enduring over time.” Jorge Montes pointed out that pardon can change the public conversation entirely, as with the capital commutations in Illinois by Governor Ryan, or President Ford’s pardon of the disgraced President Nixon.

Nancy Gertner noted that “there is no public support for mercy toward prisoners,” so that the argument for a more proactive use of the pardon power must be grounded in considerations of public safety, evidenced-based practices, the effect of long sentences in making communities dysfunctional and ultimately on the crime rate. John Gleeson expressed the hope that the current financial crisis would provide an incentive to reduce prison populations, on the theory that “no crisis should go to waste.”

In addition to institutional and political limitations on the use of clemency, there are functional objections to wholesale pardoning of classes of prisoners. A number of people agreed with Carol Steiker’s point that “we can’t really expect from clemency the kind of scale that could deal with the problems of overincarceration.” Professor Steiker thought clemency offers two unique opportunities: it allows the executive to act free from judicial or congressional oversight, and it also permits “the occasional, sporadic insulation from ordinary politics that a lame duck executive enjoys at the end of a term.”

Yet it was pointed out that the pardon power has been used in the recent past in several states to deal with short-term problems of prison overcrowding, and there is historical precedent for systemic pardoning in the federal system. Marc Miller mentioned the Kennedy drug commutations as well as the Ford and Carter clemency commissions. Mark Noel described how Colorado Governor Ritter is moving aggressively to address cases of elderly prisoners as well as juveniles through clemency commissions. The objection to large-scale pardoning in a determinate system seems to be principled rather than practical.

Most agreed that, with all of its risks and limitations, pardoning remains an important part of the chief executive’s job description. Cases of true error aside, when a system of punishment is as inflexible and severe as the federal one, there will be cases, and even classes of cases, that present compelling equitable reasons for using it. Doug Berman remarked that just as “the government gets it wrong in lots of other settings, it gets it wrong lots of times in the criminal justice system and we need a robust clemency function to constantly deal with that.” Grounds for clemency in individual cases may be present as early as sentencing itself, and remarked upon by the sentencing judge. More frequently, they may arise years later when a prisoner’s circumstances have radically changed. Judge McKee described such a situation in these terms:

One time I was meeting with a group of lifers at a maximum security prison in Pennsylvania, and one of them said to me “the sentence that I got of life imprisonment, I got no problems with it, it was fair when I received it.” He was forty-eight years old and he had been sentenced when he was nineteen. He said “I killed two people. I deserve to get life imprisonment. That was a fair sentence. The problem is that the person that sentence was imposed upon no longer exists. I am a totally different person. The person that the sentence was imposed upon died probably about four or five years ago and I see that now.” I think that is where clemency comes into play.

Categorical uses of clemency to address problems in law enforcement are more problematic. There have in the recent past been large-scale grants of clemency, in Ohio and Missouri to battered women convicted and sentenced before a defense based on their abuse was recognized in the courts, in Georgia to resident aliens unfairly targeted for deportation, and in Illinois and New Mexico to capital defendants. As noted, some expressed the view that mandatory minimum penalties for crack cocaine present a similarly appropriate subject of systemic clemency. While the theoretically better approach in such situations may be to change the law and to make the change retroactive, deserving cases may languish in the run-up to a new law, and some cases may be omitted from a general rules change. Moreover, decisions about retroactivity may be influenced by institutional considerations (e.g., burden on courts) that are thought to make the president a more appropriate decider. Historically there are examples of clemency being used systemically to override or preempt an unpopular law, such as Wilson’s commutations in liquor law cases and Kennedy’s commutations in Harrison Act narcotics cases.

Following up on the procedural suggestions for limiting risk in the Barkow and Kobil papers, many agreed with the idea of a clemency commission composed of professionals, independent of the influence of prosecutors in the Justice Department, which would operate with a

degree of transparency pursuant to articulated standards, and that could produce reasoned justifications for clemency grants. Such a commission might also be given responsibility for making recommendations to courts pursuant to statutory sentence-reduction authorities that are now the province of the Bureau of Prisons. The pardon boards in Georgia and Connecticut were cited as models of fairness and efficiency in processing large numbers of clemency cases, though both boards have authority to act independent of the state governor. Judges Friedman and Walton said that they had experienced federal pardoning as fundamentally and perhaps necessarily unfair, citing the Iran-Contra and Scooter Libby cases, which led them to conclude that a general second look authority might have more legitimacy if placed in the courts.

At the end of an extended discussion about the absence of political will to address the overly harsh federal sentencing system, Al Alschuler suggested that the roundtable make specific recommendations to incoming President Obama about exercising his pardon power:

I hear a lot of talk at this table about all that's wrong with the sentencing system and the corrections system and nobody thinks there is a political will to do anything about it. The best chance may be the president. Could the ABA Commission on Effective Criminal Sanctions write a letter to the president recommending the reinvigoration of clemency? It should say that clemency is really messed up. There is a backlog of petitions in the Justice Department and the pardon program is staffed by professional prosecutors. None of the requests are granted. Clemency doesn't exist anymore except for special favors for political friends which is a totally intolerable system. Move it out of the Justice Department. Put it in the White House. Let the president appoint a commission that includes law enforcement people and prosecutors so he has a little bit of cover. Would that do any good? I don't know. If I were president and I had a long agenda of activities and there was political risk in letting people go who might commit other crimes, maybe not. But at least the more letters you write like that, the more cover you give the president in case he's inclined to do something. So I wonder if that couldn't be a concrete agenda item.

Marc Miller recommended that the roundtable urge President Obama to grant one commutation or pardon every day, and that each grant be justified in terms of some general principle:

Even very small numbers could have a huge effect in terms of symbolism and raising a debate, a discussion about the power of pardon and commutation. I think it would be stunning if the new Justice Department and the new president found one person a day of the 200,000-plus now in the federal system whose sentence could be commuted or whose conviction pardoned.

Each grant could be accompanied by some statement of general principle that could be applied to other cases in the following days, because in part it is the absence of statements of general principle that has given second looks and pardon and commutations in particular such a disreputable name. I think it would lead to healthy debate. If the first 100 pardons or commutations were done carefully, there would be no measurable risk of a bad story appearing down the road.

Several participants introduced a theme that would be explored in the afternoon session: a parole-like early release system need not be inconsistent with a truth-in-sentencing regime if properly explained and tightly administered. Reports on parole systems in Pennsylvania and Virginia indicate that modern paroling systems are functioning with a considerably higher degree of accountability and reliability than in the past. However, no one was prepared to recommend that a routine early release authority resembling parole be brought back to the federal system.

The following "conclusions" do not represent specific recommendations of the roundtable, or even a consensus of its participants. The most that can be said about them is that they are points on which a number of people seemed to agree.

Conclusions:

- The president should use his pardon power more aggressively to reduce prison sentences in cases involving extraordinary circumstances, however defined, though pardon is not a satisfactory substitute for a more routinely available and regularly constituted sentence reduction mechanism.
- Commutation of particular classes of sentences (e.g., crack cocaine mandatory minimums) could send an effective policy message to Congress.
- The president should be urged to review the system for administering the pardon power in the Justice Department, which in recent years has proved inadequate to support a regular and proactive use of the power.
- The usefulness of the pardon power in the federal system would be enhanced if it were administered in a more regular and transparent fashion by an independent expert clemency commission that would operate with a degree of transparency pursuant to articulated standards, and that could produce reasoned justifications for clemency grants.
- The clemency commission could be enlisted to double duty as gatekeeper for the judicial sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i), or to administer retroactive changes in the law or sentencing guidelines.
- The National Governors Association should undertake to educate governors about the various ways that the pardon power can be used as an instrument of government.

## II. Existing Federal Sentence Reduction Mechanisms

The central question raised by this series of papers was posed by Jeremy Travis:

Federal law creates a variety of alternatives to be merciful in some way, but there are many reasons to be risk averse in using that authority. How do we ensure that institutions or individuals have incentives to be merciful?

The answer from state correctional officials is that it is easier to sell mercy if it increases public safety and saves money. At least the latter concept seems to have a good bit less relevance in the federal system. Richard Frase noted:

I don't have confidence that determinant sentencing can work in a system that really doesn't care about the budget.

### A. Second Look Authorities Available to Federal Prison Officials

The SRA authorizes a court at any time to reduce a term of imprisonment on motion of the Bureau of Prisons (BOP) based on "extraordinary and compelling reasons." See 18 U.S.C. § 3582(c)(1)(A)(i). This statute, which amounts to a judicial clemency authority, is the only provision in the SRA that permits midterm reduction of a term of imprisonment. However, it is used very little because BOP interprets its gatekeeper function narrowly, invoking the court's authority only when a prisoner is close to death.<sup>8</sup> Even impending death may not be sufficient to accomplish a prisoner's compassionate release: BOP brings back to court fewer than twenty cases each year out of a prison population that now exceeds 200,000.

Mary Price told the story of Michael Mahoney, a man who got one bad break after another from the justice system after he reported the theft of a pistol. Sentenced to fifteen years as an "armed career criminal" on the basis of three small drug sales many years before, Mahoney died in prison after a long battle with liver disease, despite recommendations from the sentencing judge and prosecutor, as well as the prison warden, that he be allowed to die at home.<sup>9</sup> Indeed, the sentencing judge wrote to the BOP director asking him to bring a sentence reduction motion in Mahoney's case but got no response. In 2007, after the Sentencing Commission promulgated policy offering a more expansive interpretation of "extraordinary and compelling reasons," BOP issued regulations reiterating what Steve Sady has dubbed its "death rattle rule" and stated its unwillingness to modify its policy to comply with the Commission's policy guidance. Under these circumstances, it is fair to ask whether BOP should remain in a position where it can effectively bar the courthouse door to prisoners with meritorious claims.

Mr. Sady described how BOP's reluctance to seek extraordinary sentence reduction also informs its administration of routine authorities to consistently produce

longer rather than shorter prison sentences.<sup>10</sup> For example, BOP calculates good-time credit using a declining balance method, which results in prisoners getting credit for only 12.8 percent of the total sentence, rather than the 15 percent specified in the SRA. While courts have refused to invalidate BOP's method of calculating good time, they have made clear that it is not mandated by statute. Mr. Sady estimated that it has already cost \$913 million in additional prison time, and will cost \$93 million per year going forward based on the current prison population.<sup>11</sup>

BOP has also failed to fully implement authorities that provide for sentence reduction for successful program participation, including its in-patient drug treatment program, and it unilaterally abolished its boot camp program without adequate explanation. It also does not fully use its authority to transfer prisoners to community corrections facilities and home detention at the end of their prison sentences, which could result in a substantial savings and earlier reentry to the community. Nora Demleitner described how BOP's policies add to the time noncitizen prisoners spend in federal prison by disqualifying them from eligibility for a variety of programs, including the in-patient drug treatment program, without regard to whether they will be automatically deported as aggravated felons.<sup>12</sup>

Roundtable discussion focused on the fact that incentives in the federal sentencing and correctional system go all the wrong way, against mercy and in favor of punishment. Prisoners have no incentive to improve themselves in prison since they have no hope of earning good time or gaining early release on parole. One of the proposals discussed by the roundtable would make available to BOP additional good-time credit that could be earned by prisoners for program participation. Corrections officials have no incentive to exercise their discretion to make a potentially career-ending early release decision, just as executive officials all the way up to the president have no incentive to be merciful. Justice system agencies and professionals (including judges) all have become increasingly prosecutorial in outlook. Because BOP is located in the Justice Department, it is unduly influenced by prosecutors' agenda and attitudes.

Reluctance to take risk affects BOP willingness to implement policies that would prefer or appear to prefer some prisoners over others. Thus, for example, BOP has no incentive to process noncitizen paperwork for treaty transfer because this might be interpreted as preferring noncitizens over citizens. Aversion to risk sometimes goes to extremes: until last year, women in federal prison were shackled during labor. BOP has assumed too much authority to bar prisoners from court and effectively decide their claim under the sentence reduction statute, as Michael Mahoney's case demonstrates. It was generally agreed that it would be helpful to substitute in the gatekeeper role an entity with less institutional incentive to deny sentence reduction requests, perhaps the clemency commission suggested earlier in the day. Several partici-

pants recommended that the new administration appoint new BOP leadership to review policies affecting sentence length and to set a new tone.

BOP was not without its defenders at the roundtable. For example, Reggie Walton pointed out that BOP has had a hard time finding adequate halfway house space because of resistance from the community. BOP has been unable to open a federal halfway house in Northern Virginia, so that people who by rights ought to go there for reentry placement all go to the District of Columbia.

Budgetary considerations also exercise an important braking influence on excessive sentences in state systems. Richard Frase noted that

one of the things that make determinant sentencing work in the states is that corrections budgets are a very big part of state budgets, which has led states with determinant sentencing systems to use impact assessment tools to lessen the use of unnecessarily severe sentences. In the federal system the corrections budget amounts to a rounding error. It's a no-brainer for Congress to be tough on crime and not worry about adding another decimal point to the federal deficit. And I think that's still true in the current fiscal crisis. So I don't have confidence that determinant sentencing can work in a system that really doesn't care about the budget.

John Gleeson urged that even for the federal system "there is a very powerful fiscal argument to be made and now is as good a time as any for that to be made."

Experience in many state corrections systems has been quite different. Garland Hunt (Georgia) and Dora Schriro (Arizona) both described the growing reliance of state correctional officials on risk assessment tools and "evidence-based practices" to prepare prisoners for release from the moment they enter the system. They also noted that a change in culture is taking place in state systems under pressure of budget constraints. Mary Price remarked that the advocacy community could do a better job of emphasizing the public safety aspect of second look mechanisms like earned good time, drug treatment, and boot camp programs. Federal prosecutors must be engaged in the reentry discussion in the way that state prosecutors have been and must be persuaded that it is in their interest to move people out of prison (or, in the case of noncitizens, out of the country) sooner, or keep them out altogether. It is easier to sell mercy if it increases public safety and saves money.

As previously noted, the following "conclusions" do not represent specific recommendations of the roundtable but are points with which a number of people seemed to agree.

Conclusions:

- The attorney general should establish an alternative gatekeeper to decide which cases should be brought to the attention of court for possible sentence reduc-

tion under 18 U.S.C. § 3582(c)(1)(A)(i), and limit BOP's role to filing the motion in court.

- BOP should modify its calculation of good time to give prisoners credit for a full 15 percent of their sentence.
- BOP should maximize its use of routine sentence reduction mechanisms and give full credit for participation in drug treatment and other programs.
- BOP should restore its boot camp program.
- BOP should reinstate its pre-2002 policy of allowing defendants to serve short sentences in the community. It should administer its prerelease policies to ensure that prisoners spend at least a full year in a community placement or home detention at the conclusion of their sentences.
- BOP should not discriminate against noncitizen prisoners in eligibility for drug treatment and other programming that may result in a reduction in prison time, or in eligibility for community corrections placement, unless security considerations dictate otherwise, as determined on a case-by-case basis.
- The administration should seek legislation to restore the former system of good-time allowances toward the satisfaction of federal prison terms and related purposes through the adoption of a work incentive program whereby federal inmates would receive good-time credit for full-time employment in prison.

## **B. Retroactive Application of Changes in the Law**

Doug Berman argued<sup>13</sup> that a preference for harsh prison sentences is built into the DNA of guideline sentencing: "what has really defined the determinate sentencing era is a collective determination to make sure not a single person ever gets punished too lightly." What Hamilton described in Federalist 74 as the "necessary severity" of all punishment systems is what makes "easy access" to a safety valve essential:

The reason why second look mechanisms are so important is because we can expect, we should expect, first looks to be dysfunctionally harsh. That's why a parole system was included in modern imprisonment systems, and why the Framers included a pardon power in our founding document.

Searching out and fixing guidelines that are flawed due to unjust and/or ineffective severity should be a priority for the Sentencing Commission:

The realities of modern mass incarceration—combined with my view that our nation's historic commitment to protecting individual liberty and limiting government power should prompt extreme concerns about excessive terms of imprisonment—lead to the conclusions that (1) unduly harsh guidelines are the type of broken guidelines now most in need of fixing, and (2) sentencing commissions now

need to become persistently proactive in fixing broken harsh guidelines and in making sure fixed guidelines benefit as many individuals as possible.

Guidelines that are too harsh can be readily identified by judicial departure and variance patterns and by the Commission's own studies.

When broken guidelines are fixed, “[p]rinciples of equal justice and sentencing parsimony both strongly suggest that, as a general rule, not only future defendants but also past defendants ought to get the benefit of any and all guideline fixes.” Even as large a retroactivity exercise as the changes to the crack guidelines, which affected more than 10 percent of the federal prison population, was made surprisingly easy by careful preparation by the Sentencing Commission and practitioners in addressing public safety and administrative concerns. A number of roundtable participants expressed satisfaction that the chaos in the courts and community predicted by the attorney general did not come to pass.

Conclusion:

- The Sentencing Commission should make it a priority to search out and amend guidelines that are flawed due to unjust and/or ineffective harshness and should make all such changes retroactive.

### C. Repatriation of Noncitizen Prisoners

Sylvia Royce identified a number of institutional reasons for the limited use of treaty transfers to reduce the enormous number of noncitizens—upwards of 50,000—in federal prison.<sup>14</sup> Among other things, transfer is often opposed by prosecutors based on the seriousness of the offense, and the BOP bureaucracy has no incentive to facilitate the application process. While a substantial number of transfers would free up prison resources for the benefit of citizen prisoners, this would also likely result in closing some BOP facilities and possibly even putting some BOP staff out of work.

Two-thirds of foreign inmates in BOP custody are from Mexico, and they transfer at a very low rate because Mexico does not want to take them back. A substantial number are from countries like Colombia and Cuba with whom we have no treaty relationship. Thus improving treaty transfers would not greatly reduce the numbers of foreign inmates in federal prison. The transfer program could, however, repatriate perhaps 4 to 7 percent of the federal prison population if the Justice Department had the will to do it. The necessary bureaucracy is in place and for the most part we would have the cooperation of our treaty partners. Like many of the other sentence reduction authorities discussed in this report, there is no need for a change in the law, only a more proactive approach by those responsible for executing it.

There is an additional authority for repatriating noncitizen prisoners that has not been used since its enactment in 1996. Under 8 U.S.C. § 1213(a)(4)(B), the attorney gen-

eral and the states are authorized to deport noncitizens convicted of an eligible nonviolent offense prior to the completion of their term of imprisonment. While a number of states have already taken advantage of this authority, the Department of Justice has not issued regulations to implement this authority for federal prisoners and no federal prisoner has been granted this early release. In addition, for federal prisoners the number of eligible nonviolent offenses is fairly limited and does not include drug offenses.

Conclusions:

- The attorney general should take steps to facilitate the repatriation of noncitizens in federal prison who are eligible for treaty transfer or who are eligible for reduction of sentence pursuant to 8 U.S.C. § 1231(a)(4)(B).
- Congress should give the attorney general the same authority to deport noncitizen prisoners under 8 U.S.C. § 1213(a)(4)(B) as is available to the states by broadening the list of eligible offenses.

### Justice Kennedy Joins the Roundtable

Justice Kennedy joined the roundtable and spoke about his expectation that the cost of incarceration may help reduce prison sentences:

Sometimes you have to use an economic calculus to inspire human compassion. But I'll take an enlightened and humanitarian view from wherever I can get it. And the cost of keeping prisoners is something that gets attention. If people do the right thing for an odd reason, fine. I'll take it.

He suggested that it is important to present sentence reduction issues in an innovative way to appeal to the public. Greater use of the pardon power could be encouraged by insulating the pardoner by commission and by preparing prisoners for reentry. He praised the reentry courts now operating in a number of federal districts and suggested that providing work release opportunities to prisoners could be an effective way of shortening prison terms while also saving costs of incarceration. He expressed surprise that we do not repatriate prisoners to countries in whose prison systems we have confidence, such as those in European countries. Reprising a theme of his 2003 ABA speech, he noted that the medical profession seems to be more concerned about life behind bars than lawyers and judges.

### III. Proposals for Systemic Reform

#### A. The Model Penal Code/Sentencing Proposal

Richard Frase described the work underway in the American Law Institute to revise the sentencing articles of the Model Penal Code.<sup>15</sup> He reported that the current ALI draft is based on principles of determinacy but contains four sentence modification procedures: good-time credit administered by prison authorities; early release for age or

infirmity, also controlled by prison authorities, though with a role for the court; a fifteen-year review by the sentencing court based on fundamental change in a prisoner's circumstances; and retroactive application of Guidelines changes, involving a resentencing by the court. The draft also assumes a vigorous role for executive clemency, making a total of five different second look provisions.

In the current draft, the provision for good time is an automatic 15 percent credit against the sentence that can be lost for misconduct, though earlier drafts of the provided for more credit that could be earned. (The original Model Penal Code provided for as much as 40 percent good-time credit, consisting of 20 percent to be lost for bad conduct, and 20 percent for "meritorious conduct."). There have been proposals to broaden the age/infirmity provision to cover at least as much ground as the federal sentence reduction provision in 18 U.S.C. § 3582(c)(1)(A)(i), so that it would serve as a general "extraordinary circumstances" provision available at any time after imposition of sentence. There has also some concern about the department of corrections serving as gatekeeper, in light of the disincentives for that agency to take a proactive role in reducing prison sentences. The provision giving retroactive effect to Guidelines changes evidently does not apply to non-Guideline changes in the law.

The provision that has been most controversial in the ALI draft is the one permitting prisoners to return to court after fifteen years to seek release based on a fundamental change in their circumstances since sentencing. Judge McKee recalled that it was Michael Tonry who spoke in favor of having some opportunity for reconsideration of long sentences at the 2007 meeting of the Advisers, where the idea of a second look originated:

We can't lose sight of the fact that when you imprison somebody for ten years, fifteen years, twenty years, there's a human toll that should not be ignored in the process. And in fact when you put somebody in jail for that length of time, you take away all hope. And out of that a great despair arises.

As the roundtable discussed this provision, some were concerned that having a generally available back-end release provision will reduce the incentive to impose reasonable sentences at the front end. Making a fifteen-year review routinely available may pose an unacceptable burden on courts and counsel, though it will apply only to a small number of people (those sentenced to more than eighteen years in prison), and only on a one-shot basis. (Presumably later petitions for early release would be handled either through the age/infirmity provision or through clemency.) One federal trial judge said he thought the fifteen-year review provision was unrealistic: "We can't remember individual defendants, and hauling them to court so many years later for the necessary full evidentiary hearings is impractical."

In defense of the fifteen-year review in the ALI draft, Professor Frase noted that the concept of a second look originated with the Advisers, and the reporter was not given extensive guidance about how it should be implemented. Because few jurisdictions have well-developed sentence reduction mechanisms other than clemency or parole, the reporter had to patch together a hybrid mechanism that may benefit from further refinement.

Dora Schriro recommended, based on her experience in managing several state corrections systems, that the ALI draft make provision for at least some earned good-time credit in addition to the 15 percent "bad time" in the existing draft, to give prisoners an incentive to participate in programming and generally to have some degree of control over how long they stay in prison. Almost all state sentencing systems include at least some way that most prisoners can earn credit for working and for participating in educational and treatment programs. Good-time systems can be managed so as to minimize manipulation by prisoners and maximize rehabilitative effect, particularly with the new concern about preparing prisoners for returning to the community from the moment they arrive in prison. Prison officials know a lot more now about what works to reduce the likelihood of recidivism than they did thirty years ago, and they know that encouraging program participation is an important piece of a reentry strategy.

Judge Wald suggested that an effort should be made to classify the various situations to which each of the five second look provisions would apply. In addition to the routine availability of earned good time, there are a variety of postsentence circumstances that may warrant sentence reduction ("changes in the offender like age and ill health or family circumstance, the offender's post sentencing meritorious acts, changes in the victim and the community, changes in societal views of the crime, or changes in sentencing rules"). If the age/infirmity provision were broadened to cover additional circumstances warranting sentence reduction, the principal difference between that and the fifteen-year provision might then only be procedural, relating to how much a prisoner would have to show, and to whom, before getting his case considered by the court. It is not clear how the substantive standard for sentence reduction under these two statutory provisions would differ from the standard for executive clemency.

Steve Saltzburg and others expressed concern that that the ALI draft is "a generation behind" because it is based on the undesirable inflexibility and "no way out" flaws of determinate sentencing. When there is no possibility of release before expiration of sentence for anyone, corrections systems stop trying to correct and just warehouse. It should be possible to have a "somewhat determinant" system that has a parole-like mechanism built in but avoids the entitlement approach that discredited indeterminate systems. It may be preferable to assign the back-end decision-making role to an administrative entity similar to the clemency board discussed in the morning session.

Nancy Gertner pointed out that the ALI draft, like the 1984 Act, ascribes too much importance to institutions. It assumes the worst about parole boards and is unduly optimistic about the ability of any sentencing commission, no matter how able, to avoid the need for second looks. If the architects of determinate sentencing wanted a more data-driven approach to sentencing, she is not sure they got it in the Federal Guidelines. Moreover, experience in the states that began with exemplary guidelines has shown the distorting influence of the legislative override. And, even with good guidelines, there will still be mistakes made at the front end. Apart from mistakes, why should someone wait fifteen years to have their changed circumstances considered, and why should they only have one shot at it? As to the age/infirmity provision, experience under the federal sentence reduction statute suggests that a corrections department is not institutionally suited to be the gatekeeper for second look provisions. Not only are corrections officials likely to be risk averse, they also don't have relevant information to decide cases where changed circumstances don't involve issues like a prisoner's health. Increasingly states like Pennsylvania are experimenting with systems that combine aspects of determinate and indeterminate systems.

Jeremy Travis gave an example from his own experience that goes to the desirability of having a person come back to the sentencing judge for a second look:

When I was the director of NIJ, we established a reentry court in Hamilton County, Ohio. The judge there used a little known provision of the Ohio sentencing statute that allowed the judge to reopen the original sentence. He would say to a defendant as he was sentencing him, "I am taking your presentence report and translating it into a set of things that you are to do while you are incarcerated. I have a deal with the corrections and rehabilitation department that those four things you have to work on, you're going to get those programs while you're away. You are entitled by law to petition to come back before me after some period of time, some percentage of your sentence, and we'll see how you're doing. If you're doing well, I'm going to release you into my reentry court."

So here you have one judge, a sentencing judge, sending all those messages to the defendant in front of him: "Here are the things we as a society expect you to do." So it is not as Justice Kennedy said, that we wash our hands. We actually care about what happens in prison.

Reggie Wilkinson remarked that "you would be proud of that court today. It is amazing what their recidivism rate is versus the state recidivism rate." Travis conceded that such a proposal may not be realistic in most jurisdictions, in light of judicial resource issues.

Judges Wald and Friedman reported that the ALI Council had recently voted to recommend in favor of the fifteen-year review provision (except for life sentences), as well as an expanded "extraordinary circumstances" provi-

sion similar to the one in 18 U.S.C. § 3582(c)(1)(A)(i). However, several questions have been left open relating to the standards and procedures applicable under each of the five headings, pending redrafting by the reporter and discussion by the Annual Meeting in May. The roundtable proposed the following questions for consideration by the reporter:

1. **Standard:** Can a different standard be identified for each of the five types of sentence reduction contemplated by the ALI draft? Is there a substantive difference between the standards applicable to the fifteen-year review provision and the compassionate release provision ("fundamental change" vs. "extraordinary circumstances"), or is the main difference in procedural entitlement?
2. **Who Decides?** Should there be a gatekeeper or alternative decision maker (ALJ or commission) for prisoner petitions at the fifteen-year mark, to lighten the burden on courts and counsel? Should corrections remain as the gatekeeper for prisoner petitions under the "extraordinary circumstances" provision, or should a similar alternative decision-making structure be established?
3. **Good-Time Credit:** Consider adding an additional 15 percent good-time credit to be earned for participation in work and other rehabilitative activities, as in the current Model Penal Code, to give prison authorities tools to encourage participation in reentry programming.
4. **Retroactive Changes in Guidelines:** Consider whether the provision in the ALI draft that authorizes retroactive application of Guidelines changes should be extended to deal with changes in the law.

#### **B. Modified Indeterminate Sentencing: The Pennsylvania Model**

Mark Bergstrom<sup>16</sup> reported on the "indeterminate structured sentencing" of the Pennsylvania system, where guidelines developed by an expert body limit discretion not just in imposing the sentence but also in making the decision to parole. Issues that led to the abolition of parole were absence of standards to guide discretion and lack of transparency, both of which are remedied by placing the standard-setting function for front- and back-end sentencing decisions in the same expert body. The Pennsylvania Sentencing Commission is now responsible for drafting both sentencing guidelines and parole guidelines using the same evidence-based risk assessment tools, which coordinates front- and back-end decision making and also provides a degree of insulation for decision makers in case a particular parole decision proves controversial. Similar guidelines could be used to inform clemency decisions. There may not be a big difference as a practical matter between determinate and indeterminate systems: presumptive parole that is not an entitlement but depends on behavioral change and program participation is just another way of looking at a good-time system.

Mr. Bergstrom explained that while different institutional concerns inform the sentencing decision at the front and back ends, they should be coordinated. Thus, for example, while a release decision should concern itself with risk to the community, it should also consider the more general purposes of sentencing that apply at the front end.

Garland Hunt of the Georgia Board described how the parole guidelines work in Georgia, and how the Board has hammered out a system that is accepted by the courts and the prosecutors. As current chair of the Association of Paroling Authorities International, he is working with parole boards across the country to develop guidelines and procedures to make parole decision making more consistent, transparent, and reliable. Jeremy Travis responded that the reforms being introduced by state parole boards suggest that

sentencing happens at many places, at the front end, at the middle and the back end, and that the parole board is a part of the sentencing continuum. So you're responding to critiques of the parole boards in ways that the states were responding when they set up sentencing commissions. Aiming to reduce disparity, develop guidelines, use risk factors, and have upward or downward departures. It feels to me like parole boards are becoming like sentencing commissions.

Rick Kern of the Virginia Parole Board described the geriatric release provision enacted at the time parole was abolished in that state, which is predicated on the criminological truth that people age out committing crimes. In Virginia, prisoners are eligible for geriatric release at age sixty after ten years in prison, or at sixty-five after five years. The problem is that the decision-making agency is the old parole board kept around for this residual purpose, and it has denied 498 out of 500 cases based on the seriousness of the offense. Virginia is now considering setting up a separate board to handle geriatric release cases, since the parole board is evidently not willing to apply "evidence-based standards" to assess risk. Others commented that when parole boards base decisions on seriousness of the offense, as many do, they are not performing a useful second look function.

Ron Wright commented that if you combined a front-end and back-end guidelines system like the one in Pennsylvania with a package of executive clemency mechanisms, you could "scale it up" to start addressing the size of the incarceration problem in a way that clemency alone could not. On the other hand, if the second look is not a repeat of the first one, so that you would be inclined to get different answers on the second look than on the first look, why would you want the same body generating the rules for the first and second looks?

Wouldn't you want a different set of rule makers to create second look rules if you want them to give you a

different look? The first look is likely to be the most ambitious. It is the moment right after the crime when we're most upset about the crime and we are most likely to be most committed to a state response to the crime at that point. So the second look should be the more considered and possibly a more modest view of the role of state power here. And if that is so, perhaps parole boards with a lot of history in the state might not be the best place to turn for that second look if you're really aiming to get a second look that is less ambitious and more modest about the reach of state power than the first look was.

Al Alschuler also noted the advantage of having a routine second look mechanism at the back end:

The back end has a lot of advantages over front-end sentencing. It's not done in hot blood. We have Enron, white-collar crime becomes the crime du jour as we were talking about this morning. We pass new legislation and give executives, nonviolent first-time offenders, thirty-year sentences. Before they finish their thirty-year sentence, somebody ought to take a look at it. The back end agency is a jurisdiction-wide agency so it is in a much better position to eliminate disparities than sending it back to the sentencing judge. Dick Frase says sentencing is a judicial function, but it has never been an exclusively judicial function. The back end is better able to take account of institutional needs. While the sentencing commission can come up with prison impact statements and so forth, the back end can look at how crowded the prisons are now and if they are overcrowded can pick the most deserving offenders and the pity committee can let them go. And that is something that we somehow need to reinstitute in the criminal justice system.

Marc Miller noted that the Pennsylvania experiment is very important because it begins to address the different perceptions of sentencing commissions and their expertise versus parole boards.

It gives us a ground for talking in new and fresh terms about the systematic broad-scale second look function. I think there's a huge advantage to having the same institution thinking about the same data even if they have to think with different hats or talk about different purposes or assess the relevance over time of risk assessments too early or late. As scholars and judges and practitioners it is worth reminding ourselves that in 1973 when there was this sustained critique of the parole function, one that we still live with, that there were then 20,000 people in the state prison in California, and 20,000 in the federal prison system. Judge Frankel wrote his critique about indeterminacy and this fear of unequal sentences at a time when the level of imprisonment was much different. We also knew much less. It is not that we should ignore history at all—and I wonder what Marvin Frankel or Norval Morris would be saying about

our discussion of reviving a systematic parole function if they were here—but we didn't know as much about the varieties of discretion. We had much, much less knowledge about sentencing than we have today.

Doug Berman commented that “we shouldn't have that much faith in institutions to produce justice, because over time they develop a variety of co-option dynamics” that reinforce a tendency to minimize risk:

We don't fully appreciate how the pro-incarceration forces will always co-opt, how the fear of mistake will always lead to longer terms, and how the political dynamic will reinforce all of that timidity—whether it's the timidity of the sentencing commission doing reductive changes, or the timidity of a chief executive or a parole board or the Bureau of Prisons not wanting to make a release decision.

In the sentencing context we don't have the functional equivalent of a jury that “checks the institutional players who may all be tilted towards the infliction of state power on the individual, and then gets to go home.”

Bobby Vassar observed that the imperfections and inconsistencies at every stage of the criminal justice system are accounted for by having other actors come along at the next stage and make another decision, to try to correct the errors of the stages that preceded it. The parole board was one of many places to correct systemic errors. For some reason, we have decided that we can stop with the sentence, that no one needs to review it, and that the prisoner gets no chance to show that the sentence originally imposed was a mistake in some normative sense:

I'm convinced that the system I'd like to see is the one I'd like to be sentenced under and judged under. If I committed a crime and were convicted, I'd want a chance to show that I'm worth more than whatever a particular point in time suggests about an action I've taken, such as at sentencing. We're talking about individuals, so I don't know why we feel it so necessary to find some scientific basis for whatever we're trying to do. I'm just not that impressed by it. I'd rather concede that the system's imperfect, that people will sometimes make terrible decisions and abuse their discretion, and give myself a chance to show that I'm worthy of whatever that system should give. So rather than ask whether we should have routine access to second look consideration, I'd ask whether we should have routine access to a *better* look. I think there should be something we're trying to accomplish other than getting the sentence perfectly right to begin with, in the hope that we can walk away and say we're done.

Justice Kennedy had these final observations:

Systems must have mechanisms for change. And the corrections system must have the capacity to change through learning. It must learn about the dangers of

mandatory minimums. It must learn about the overemphasis placed on heavy sentencing for white-collar crimes. We must remember also that the prisoner learns. Ideally the prisoner learns who he is and becomes a different and better person. There is nothing wrong with giving some recognition in the retribution aspect of sentencing to a judgment that a crime deserves thirty years. But whether that should be the sentence imposed is quite a different matter.

#### **Recommendations from Roundtable Participants**

At the conclusion of the afternoon, Jeremy Travis asked roundtable participants to put down on paper recommendations they would each like to make to the new administration and to the new Congress, ideas they have for a criminal justice agenda in the states and in professional organizations, and suggestions for influencing the public conversation about these issues. Without attribution, and with the understanding that these are individual recommendations only, here is what the group came up with.

#### **Recommendations to the President**

##### **Clemency**

- Signal a change in attitude toward your pardoning responsibilities, that you expect pardoning to be an ongoing regular process, and that you expect to receive well-researched recommendations about the cases of ordinary people.
- Identify particular classes of cases that would be suitable for clemency, including crack sentences and immigration cases.
- Direct the attorney general to look carefully at the way the pardon process has been working of late to determine if it is serving the president (as opposed to prosecutors).
- Establish an independent body to develop criteria for commutations and pardons and to make recommendations on particular clemency cases, which should be insulated as much as possible from the influence of politics and prosecutors.
- Set an example for state governors in exercising the power of clemency, and help them understand that it is not soft on crime but a tool to control population costs and a number of other things.
- Direct the attorney general to make a careful assessment of the federal prison population to determine who might qualify for release under existing law without jeopardizing public safety, based on age or infirmity, or under the new sentencing guidelines relating to sentence reduction.

##### **Reentry**

- Create a position of “reentry czar” and appoint someone who has a criminal record to serve in that role.
- Direct a study of the harm that is done to our society by having such a large number of people in

prison, including the destruction of community and loss of people who could be productive if some investment were made in them. As long as we are talking about investing in transportation infrastructure, highways and bridges and transit, we could invest some of that money into human infrastructure.

- Direct the secretary of state to do an assessment of how our sentencing practices and the large number of people in prison harms us on the international stage.
- Direct the attorney general to consider how to use the bipartisan approach that was successful in the Second Chance Act to address second look issues; and to work with professional organizations at the state level like the National Governors Association, the National Association of Attorney Generals, and the National Conference of State Legislatures.

#### **Recommendations to the Attorney General**

- Appoint a forward-looking director of the Bureau of Prisons.
- Direct BOP to fully implement the ameliorative statutes that already exist to significantly reduce the federal prison population overnight.
- Redefine the role of the prosecutor. Rescind directive to always ask for maximum sentence, insist on pleading to the top count of the indictment. Stop practice of appeal waivers.
- Direct prosecutors to consider reentry issues in charging decisions and sentencing recommendations.
- Facilitate repatriation of the 27 percent of federal prisoners who are non-U.S. nationals, through treaty transfer and 8 U.S.C. § 1231(a)(4)(B).
- Convene a three-branch conference like the one AG Reno convened, including organizations like the National Governors Association.
- Reestablish the attorney general's working group of representatives of professional organizations convened by Attorney General Meese, the American Bar Association criminal justice section, and NAAG, to discuss how to allocate federal and state responsibility, how to cooperate, and what is good and bad about what is going on.
- Support sentencing and corrections research in the states with a real focus on evidence-based practices.
- Commission a study on effects of incarceration on family and community.

#### **Recommendations to Congress**

- Repeal mandatory minimum sentences and revisit the abolition of parole and earned good time.
- Restore the former system of good-time allowances toward the satisfaction of federal prison terms to permit federal prisoners to receive good-time credit for full-time employment in prison.
- Fund the Second Chance Act and restore Pell grants to prisoners.

- Consider whether BOP should remain as gatekeeper for the extraordinary sentence reduction provision, and whether prisoners who have been incarcerated for a certain number of years should be permitted to file their own motion.
- Put a defender representative on the Sentencing Commission with the same stature as the Department of Justice ex-officio.
- Eliminate the so-called 25 percent rule in the SRA that compels the large number of levels of the Guidelines, which would free the Commission to create a Guideline system with broader ranges that would work more like those in the states.
- Direct the Department of Justice and the Sentencing Commission to publish prison impact statements.
- Give the attorney general the same authority to deport noncitizen prisoners under 8 U.S.C. § 1213(a)(4)(B) as is available to the states, by broadening the list of eligible offenses.
- Identify five NGOs that would make a grant proposal for reentry programs that are staffed in large part by service sector people that do not know much about the criminal justice system. This would build a constituency nationwide for people who take an interest in the justice system and are learning about its failures and its deficiencies.

#### **Recommendations to the Judiciary**

- Encourage judges to look at the sentencing process not just in terms of the in/out decision but also in terms of the reentry decision.
- Establish reentry courts to avoid returns to prison.

#### **Recommendations to the Sentencing Commission**

- Develop evidence-based practices and determine what works and what doesn't to reduce risk of recidivism.
- Expand opportunities for probation sentences.
- Determine what the public wants in sentencing and use this information to guide Guidelines decisions (twenty-year sentences for crack offenders or for nonviolent drug offenders).

#### **Recommendations to the American Law Institute**

- Take a second look at the rejection of discretionary parole in the MPC draft.
- Review five second look mechanisms to assign specific functions, reconsider one-shot nature of fifteen-year review provision, facilitate reduction of sentences for changed circumstances, and reconsider gatekeeper role for corrections.
- Extend provision on retroactive guidelines changes to apply to changes in the law.
- Provide for earned good time in addition to statutory "bad time."

## Recommendation to the National Governors Association

- The National Governors Association should undertake to educate governors in the various ways the pardon power can be used as an instrument of government.

## IV. Participants in the Roundtable

Moderator:

Jeremy Travis, President, John Jay College

Presenters:

Rachel E. Barkow, Professor, NYU Law School

Mark H. Bergstrom, Executive Director, Pennsylvania Sentencing Commission

Douglas A. Berman, Professor, Ohio State Law School

Nora V. Demleitner, Dean, Hofstra Law School

Richard S. Frase, Professor, University of Minnesota Law School

Daniel T. Kobil, Professor, Capital Law School

Margaret Colgate Love, Director, ABA Commission on Effective Criminal Sanctions

Mary Price, Vice President and General Counsel, FAMM

Sylvia Royce, private practitioner

Stephen R. Sady, Deputy Federal Defender, District of Oregon

Commentators:

Lynn Adelman, U.S. District Judge, WDVI

Albert W. Alschuler, Professor, Northwestern Law School

Mark Earley, President, Prison Fellowship

Paul L. Friedman, U.S. District Judge, DDC

Nancy Gertner, U.S. District Judge, DMA

John Gleeson, U.S. District Judge, EDNY

Garland R. Hunt, Member, Georgia Board of Pardons and Parole

Rick Kern, Executive Director, Virginia Sentencing Commission

Theodore McKee, U.S. Circuit Judge, 3rd Cir.

Marc Miller, Professor, University of Arizona Law School

Cranston Mitchell, Member, U.S. Parole Commission

Jorge Montes, Chair, Illinois Prisoner Review Board

Mark Noel, Director for Executive Clemency, Colorado

Stephen A. Saltzburg, Professor, George Washington University Law

Dora Schriro, Director, AZ Department of Corrections

John Steer, Allenbaugh Samini, LLP

Carol Steiker, Professor, Harvard Law School

Kate Stith-Cabranes, Professor, Yale Law School

Patricia M. Wald, U.S. Circuit Judge, D.C. Cir. (ret).

Reggie B. Walton, U.S. District Judge, DDC

Reggie Wilkinson, former Director, Ohio Department of Correction

Ronald Wright, Professor, Wake Forest Law School

## Notes

<sup>1</sup> According to Bureau of Prisons statistics in February 2009, 84,000 individuals (42 percent of the federal prison population) are serving federal prison terms of ten years or longer.

Twenty-four thousand individuals are serving terms longer than twenty years, of whom 6,000 are serving life with no possibility of release. Data from the United States Sentencing Commission indicates that federal prison sentences are on average getting longer, notwithstanding a substantial return of discretion to sentencing judges.

<sup>2</sup> In 1984 the average prison term served was twenty-six months, and nearly 40 percent of federal offenders did not go to prison at all. United States Sentencing Commission, *Fifteen Years of Guideline Sentencing* 46 (2004). Twenty-five years later, in 2004 the corresponding figures were seventy-five months and 7.7 percent (8.4 percent for U.S. citizens). United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* 5 (2009). During this same period the federal prison population increased by a factor of six, after thirty years of relative stability. See John W. Roberts, *Introduction*, in *ESCAPING PRISON MYTHS* 15-16 (John W. Roberts ed., 1994).

<sup>3</sup> Neither the pardon power nor the judicial sentence reduction mechanism in 18 U.S.C. 3582(c)(1)(A)(i) have been used with any degree of frequency or regularity in the past twenty-five years. Indeed, in the past eight years there have been numerically fewer early releases under both authorities than in the previous eight-year period. Between 2001 and 2008 BOP filed 168 sentence reduction motions; between 1993 and 2000 it filed 185 such motions. Sixty-one prison sentences were commuted by President Clinton, and eleven by President Bush.

<sup>4</sup> The conference papers are published in Volume 22, Issue \_\_ of the *Federal Sentencing Reporter* and are available for downloading at the Commission's Web site, <http://www.abanet.org/cecs>.

<sup>5</sup> Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, \_\_ FED. SENT. REP. \_\_; Daniel Kobil, *Resuscitating the Clemency Authority to Achieve Federal Sentencing Reform*, \_\_ FED. SENT. REP. \_\_.

<sup>6</sup> The composition of a pardon board should be diverse and balanced:

This need for diversity means that clemency boards should not be mere arms of law enforcement interests, for that could skew them too far in the opposite direction, against issuing any grants at all. The pardon process at the Department of Justice, for instance, has become dominated by prosecutors, which helps explain the anemic role pardons plays at the federal level. Instead, clemency boards should mimic the most successful state sentencing commissions, which are careful to mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from each other and increase the likelihood that sound conclusions will be reached and less subject to political attack later.

<sup>7</sup> Pardon played a paroling function in the federal system until well into the twentieth century, but there are institutional as well as political reasons why pardon cannot reclaim a territory that has been occupied by Congress.

<sup>8</sup> Ironically, this authority was originally sought by BOP in the mid-1970s to expedite situations that theretofore had required an application for executive clemency to be submitted to the president through the Office of the Pardon Attorney. See 18 U.S.C. § 4205(g), discussed in *U.S. v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977)(statement of director of BOP explaining that the new procedure offered the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978).

<sup>9</sup> Mary Price, *A Case for Compassion*, \_\_ FED. SENT. REP. \_\_.

<sup>10</sup> Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, \_\_ FED. SENT. REP. \_\_.

<sup>11</sup> Sady states that BOP's rules on sentence computation create de facto consecutive sentences despite state judgments

providing that the time should run concurrently, fail to provide good time against the concurrent part of sentences where the time was served before the imposition of sentence, and institute dead time by refusing to credit time in administrative detention in immigration cases, all resulting in longer prison sentences and greater expense to the government.

<sup>12</sup> Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, \_\_ FED. SENT. REP. \_\_\_\_.

<sup>13</sup> Douglas A. Berman, *Exploring the Theory, Policy, and Practice of Fixing Broken Sentencing Guidelines*, \_\_ FED. SENT. REP. \_\_\_\_.

<sup>14</sup> Sylvia Royce, *International Prisoner Transfer*, \_\_ FED. SENT. REP. \_\_\_\_.

<sup>15</sup> Richard S. Frase, *The Proposed Model Penal Code Revisions* \_\_ FED. SENT. REP. \_\_\_\_.

<sup>16</sup> Mark Bergstrom & Stephen Chanenson, *The Next Era of Sentencing Reform Revisited*, \_\_ FED. SENT. REP. \_\_\_\_.



# Second Look Provisions in the Proposed Model Penal Code Revisions



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The Model Penal Code Sentencing project proposes a model based on three decades of successful state sentencing guidelines reforms.<sup>1</sup> The latest installment in this project, Council Draft No. 2,<sup>2</sup> recommends elimination of parole-release discretion, as more than half of the guidelines states have done.<sup>3</sup> But the draft recognizes the need for such a determinate system to allow various “second looks” and other postsentencing modifications of a prison sentence, particularly in the case of very long sentences. The draft further concludes that pardon and commutation powers cannot provide adequate second look authority.

Council Draft No. 2 proposes three procedures<sup>4</sup> for postsentencing modifications:

1. “good conduct” sentence reductions (Section 305.1);
2. sentence reduction based on advanced age or infirmity (Section 305.7); and
3. sentence reduction based on other changed circumstances of the offense or offender, after the sentence was imposed (Section 305.6).

The first of these, like similar existing state and federal provisions, is administered entirely by correctional authorities, whereas the second and third would involve, in essence, a request for resentencing by the court. The second (age-infirmity) provision has many existing counterparts in state laws,<sup>5</sup> but the third provision has almost none.<sup>6</sup>

All three provisions focus on the offender’s acts and/or changed circumstances postsentencing. The apparent intent is not to give the correctional authorities and the sentencing judge (or more often, a different judge) broad power to revisit the wisdom of the original sentence; nor are these provisions intended as a general attack on very long prison terms (that problem is addressed by other features of the revised Code, in particular: the use of an independent commission to draft recommended sentences; sentencing policy formulation that is informed by fiscal and demographic impact assessments; adoption of an overall sentencing philosophy that emphasizes the importance of avoiding disproportionately or unnecessarily severe penalties; and provision for appellate review of sentences). It is also

important to note that Council Draft No. 2 does not address general retroactivity issues arising when guidelines are revised to lower sentence severity; that matter was already addressed in a set of revised Code provisions approved in 2007.<sup>7</sup>

At the time of this writing it appears that some of the second look provisions in Council Draft No. 2 may be deleted or substantially modified before they are submitted to the membership for approval. The ALI Council, at its meeting on December 4, 2008, decided not to submit this Draft to the membership at the May 2009 annual meeting. The consensus on the Council seemed to be that, although some sort of general second look provision for very long sentences is warranted, Section 305.6 needs further drafting and should include a series of options rather than a single proposal; as discussed more fully below, several changes in Section 305.7 are also contemplated.<sup>8</sup> But whatever the fate of these particular provisions, the underlying policy issues and trade-offs will remain. The specific proposals contained in Council Draft No. 2 provide as good a vehicle as any for identifying and discussing these important issues and trade-offs.

This essay begins by summarizing the three second look provisions noted above, in the context of the Draft’s overall rejection of parole release discretion. Part II of the essay examines the substantive sentence-reduction rationales that underlie one or more of the three second look provisions. Part III looks at the Draft’s proposed second look procedures. Part IV focuses on the third provision (other changed circumstances), which seems to be the most controversial, and examines various arguments against having any such provision. The essay concludes that, despite these arguments and the problems of substance and procedure examined earlier, the two most important policy recommendations in Council Draft No. 2 are sound—routine parole release discretion must be abolished, but several second look options must be available, including *some* sort of general second look provision (*beyond* pardon and commutation, good-conduct reductions, age-infirmity release, and retroactive application of reductions in guidelines severity). At a minimum, such a general provision is needed in the case of life sentences.

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## **I. Summary of Second Look Proposals in Council Draft No. 2**

The three second look proposals in this Draft will be examined after a brief look at their broader context—the Draft’s proposal to abandon parole-release discretion and its conclusion that the void left by parole abolition cannot be filled by existing or foreseeable executive pardon and commutation powers. The author and advisors of the Draft believe that state and federal experience inspires little confidence that either parole discretion or pardon-commutation procedures can make second look decisions with consistency, transparency, and legitimacy.

### **A. Rejection of General Parole Release Discretion and Traditional Clemency Procedures**

Parole release discretion assumes that a parole board or similar body can accurately assess a particular inmate’s progress toward rehabilitation and risk of postrelease recidivism, based primarily on the inmate’s conduct in prison and the evaluations made by prison staff. But prison environments bear little resemblance to life on the street; some offenders are model prisoners yet quickly return to crime once released; other inmates adapt poorly to prison life but misbehave much less after release than they did in prison. Moreover, inmates (and perhaps some staff) have a strong incentive to deceive the parole board. It is thus no surprise that research finds parole assessments to be very unreliable (and probably also very inconsistent) unless they are based on the offender’s current and prior convictions.<sup>9</sup> But these factors are already known when the offender enters prison; sentencing judges can assess such factors with greater transparency and legitimacy.

It might be argued that the problems above can be remedied. Parole board decisions could be made more consistent, transparent, and legitimate if they were structured by releasing guidelines and accompanied by statements of reasons; the risk assessments underlying those decisions could be made more reliable if they incorporated the latest research on factors associated with higher and lower risk. But in the view of the author and advisors of Council Draft No. 2, this alternative model is a theoretical one; its workability is unknown and untested, whereas there has been considerable experience and success with the parole-abolition, sentencing guidelines model proposed in the Draft. Given the widespread dissatisfaction with parole release systems (except on the part of paroling authorities themselves), the burden is on those who support that model to identify systems that have already been proven to work and enjoy widespread support. And if supporters of the “improved parole” model point to new, “evidence-based” risk-assessment tools, they should be prepared to demonstrate that these tools and their practical application have been validated empirically, and that the best prediction factors cannot be known and applied by courts at the time of initial sentencing.

Parole release discretion, at least when exercised by a single, statewide body using some sort of offense/prior

record guidelines, can still be helpful in systems that give sentencing judges unchecked discretion.<sup>10</sup> But when judges use sentencing guidelines subject to appellate review their decisions are likely to be at least as consistent as the parole board’s. Finally, broad parole release discretion causes serious problems of dishonesty and poor resource management. The public and especially crime victims lose respect for a system in which a lengthy prison sentence imposed in court turns into a far shorter term actually served. On the other hand, parole boards are increasingly risk averse, so the option of early release is often an illusion, disappointing inmates and their families, and escalating correctional costs. Contrary to the assumption that parole release discretion helps to control prison growth and overcrowding, data show prison populations growing less in states with guidelines combined with parole abolition.<sup>11</sup>

As for pardon and commutation, the author and advisors of Council Draft No. 2 were apparently of the view that these powers have been used so sparingly, and with so little consistency and transparency, that they have not and can not serve as adequate second look procedures. Nor are such procedures a legitimate way to provide what is, or should be, essentially a resentencing based on changed sentencing facts. Judges should sentence, not governors and presidents.

### **B. The Draft’s Proposed Good-Conduct Reductions**

Section 305.1 of the Draft provides that an inmate is presumptively entitled to a reduction in his or her court-ordered determinate sentence unless the Department of Corrections determines that the inmate has “committed a criminal offense or a serious violation” of institutional rules and/or “has failed to participate satisfactorily in work, education, or other rehabilitation programs” as ordered by the court or the Department. The Draft recommends a minimum credit of 15 percent and suggests that some states might wish to use a higher figure and/or might provide that credits earned in a year or other time period would “vest” and not be subject to withdrawal for later misconduct.<sup>12</sup>

The Draft seeks to strike a balance between narrower and broader alternatives. It rejects arguments that participation in prison programs should be entirely voluntary and have no effect on “good time” reductions; on the other hand, the Draft also rejects arguments that the minimum credit should be much higher than 15 percent, to give inmates a stronger incentive to participate in programming. And consistent with its rejection of broad parole release discretion, the Draft only requires “satisfactory” program “participation” and does not appear to contemplate that corrections officials will attempt to assess and base the award of credits on actual change in the offender, in particular, the offender’s successful rehabilitation or progress toward that goal.

The balance struck by the Draft is debatable on several points. In particular, the minimum 15 percent credit is

arguably too low, and too few states may take seriously the Draft's suggestion to consider a higher figure. Minnesota, for example, has used a 33 percent good time credit since 1980, and some guidelines states allow as much as 50 percent.<sup>13</sup> The 15 percent figure does not do much to curtail very long sentences, and it may not provide sufficient incentives for in-prison program participation. Nor is there any particular wisdom embodied in this number; it lacks empirical support and originated in a 1994 tough-on-crime bill linking federal funding for state prison construction to the adoption of "truth in sentencing" laws under which prisoners would have to serve at least 85 percent of their sentences.<sup>14</sup>

### C. The Draft's Two "Back-to-Court" Second Look Provisions

Section 610A of the Draft provides two procedures permitting judicial modification of a sentence based on changed circumstances. The more specific of these, Section 610A(2), allows the court to reduce a prison sentence at any time based on advanced age or physical or mental infirmity, provided the Department of Corrections recommends the change and pursuant to the further provisions of Section 305.7.<sup>15</sup> A more open-ended, but also more time-limited, provision, Section 610A(1), allows for a single petition for sentence reduction based on "changed circumstances," to be made with or without Department recommendation after the inmate has served at least fifteen years in prison, and subject to the further provisions of Section 305.6.

Under both procedures, if a hearing is held, the court may appoint counsel for indigent inmates (however, under Section 305.6 the Draft Commentary indicates that counsel will normally not be appointed unless a hearing is held, and that most petitions are expected to be denied without a hearing).<sup>16</sup> The prosecution and crime victims or representatives may participate in such hearings; the court must then decide "within a reasonable time," stating reasons; either side may then petition for discretionary appellate review; the modified sentence may be no more severe than the remaining sentence was before the hearing; it may be less severe than any applicable mandatory minimum term; and the Sentencing Commission is directed to promulgate and periodically revise guidelines for courts to use when considering whether to grant either type of sentence modification.

Although the specific substantive grounds for sentence modification differ under the two procedures, they have a common normative frame of reference—the court is directed to consider whether the specific grounds (age-infirmity; other changed circumstances) "justif[ies] a different sentence in light of the purposes of sentencing in § 1.02(2)."<sup>17</sup> The latter provision states the revised Code's overall "limiting retributive" model: crime-control, restorative, and reintegrative purposes operate "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offend-

ers."<sup>18</sup> Within that range, sentences must be "no more severe than necessary to achieve the applicable purposes"<sup>19</sup> of the sentence (under the limiting retributive model above). The latter concept is sometimes referred to as sentencing "parsimony."<sup>20</sup>

**1. Advanced Age or Physical or Mental Infirmity (Sections 610A(2) and 305.7)** The Comment to Section 305.7 implies that, in light of the purposes in Section 1.02(2), advanced age or serious infirmity would justify early release if, inter alia, the offender is so feeble as to no longer be dangerous.<sup>21</sup> An alternative rationale would be that incarceration is much more onerous for such an offender, making continued custody disproportionate or even cruel. As noted above, the Section 305.7 procedure may be invoked at any time during an inmate's prison term, and may be invoked more than once; but as also noted, such invocation requires a favorable motion by the Department of Corrections.

Although the grounds for modification under Section 305.7 as currently drafted are quite narrow, it appears that in the ALI-Council requested redrafting process<sup>22</sup> this provision will be expanded to also include any "extraordinary and compelling circumstances" justifying modification (again, in light of the purposes in Section 1.02(2)). This modification standard is similar to the one found in the current federal second look provision, 18 U.S.C. § 3582(c)(1)(A)(i). The latter provision, like Section 305.7, requires approval by the director of the Bureau of Prisons and, perhaps for that reason, seems to be very rarely invoked.<sup>23</sup> Nevertheless, expansion of Section 305.7 seems appropriate as a supplement to Section 305.6 (below), given the limited scope of that provision (applicable only after fifteen years, and only once).

**2. Other Changed Circumstances, Postsentencing (Sections 610A(1) and 305.6)** Section 305.6 directs the court to consider whether there is "a change of circumstances since the original sentencing that justifies a different sentence in light of the purposes of sentencing in § 1.02(2)" (under the "limiting retributive" model summarized above). The open-ended "change of circumstances" language is given more specific content in the Draft Comment, which gives a number of examples of sentences that, although not excessive when first imposed, have become so over time due to such things as changed societal assessments of offense gravity; new technologies of risk assessment or treatment; or major changes in the offender, the offender's family circumstances, the crime victim(s), or the community.<sup>24</sup>

In procedural terms, this provision is both broader and narrower than Section 305.7 (the advanced age or infirmity provision, discussed above). Section 305.6 "change of circumstances" petitions do not require a supporting motion by the Department of Corrections; on the other hand, they may only be filed after the inmate has served at least fifteen years (which, with a 15 percent good-conduct credit,

effectively requires an original sentence of at least eighteen years),<sup>25</sup> and such a petition may only be filed once, no matter how long the sentence.

Prior to the December 2008 ALI Council meeting there was apparently some support on the Council to delete Section 305.6 entirely because it has almost no existing state or federal counterpart and could prove very burdensome to courts (see further discussion below). But instead the Council proposed to redraft Section 305.6, while also expanding Section 305.7.<sup>26</sup>

## II. Assessing the Substantive Rationales and Standards of the Draft's Second Look Provisions

The second look sentence reduction provisions in Council Draft No. 2 assume that some offenders merit sentence reduction, in light of governing sentencing purposes, based on facts that could not be known at the time of the original sentencing. These standards and rationales seem to fall into at least four categories, discussed below: (1) changes in the offender; (2) the offender's meritorious postsentencing acts; (3) changes in other people (the offender's family, the victim, the community); and (4) changes in how society views the offender's crime or specific relevant sentencing factors. The rationales in the first category help to justify two of the Draft's second look provisions: age-infirmity and changed-circumstances. The rationales in the second category are relevant to the Draft's good-time and changed-circumstances provisions; the third and fourth categories seem to apply only to the changed-circumstances provision. All four rationales would apply under the proposed catchall "extraordinary and compelling circumstances" expected to be added to Section 305.7.

The details of these substantive rationales would have to be filled in by the courts, with guidance from the sentencing commission. But it is necessary to consider, even if somewhat abstractly, the various types of changed-circumstances cases that might arise under one or more second look provisions, in order to decide on whether and when to even allow such second looks.

One overall question, which arises under each of the four categories, is whether the recognition of a given sentence-reduction rationale is consistent with the reasons (summarized above) behind the Draft's rejection of routine parole release discretion—if we don't trust parole boards to consider such factors in highly individualized offender assessments, why should such factors and assessments affect good-time and resentencing?

### A. Change in the Offender or in Our Assessment of the Offender

Various changes in the offender since the time of the original sentence could make that sentence excessive in light of one or more relevant sentencing purposes, thus justifying or perhaps even requiring a sentence reduction.

**1. Effects of Age and/or Infirmity (Section 305.7)** Such effects are arguably more "objective" than other offender-

change variables, but their relationship to risk or sentence disproportionality are not easily measured. Nevertheless, the widespread adoption of such "compassionate" release procedures,<sup>27</sup> and the economic incentive prisons have to invoke them (given the high cost of providing medical care to such inmates), suggest that age and infirmity are important and viable second look criteria.

**2. Treatment Effects (Section 305.6)** If this rationale involves assessment of the offender's progress toward rehabilitation, it suffers from the same critique the Draft levels against traditional parole. The Draft gives these decisions to courts, rather than an administrative board, but it is not clear that courts are any better suited to make these difficult assessments. On the other hand, the traditional parole system required such assessments in all cases, whereas the Draft views them as exceptional. Some state guidelines reforms seem to have made a similar distinction between routine versus exceptional (grounds-for-departure) assessments of risk and amenability to treatment.<sup>28</sup> It should also be noted that, under current federal law, the defendant's post-sentence rehabilitation cannot, by itself, be an "extraordinary and compelling reason" justifying a sentence reduction.<sup>29</sup>

**3. Failure to Satisfactorily Participate in Treatment (Section 305.1)** Arguably, this criterion is easier to assess reliably and consistently than treatment progress, although the requirement of "satisfactory" participation brings back many of the problems of traditional parole assessments. And these good-time-related assessments under Section 305.1 apply to most offenders, not just exceptional cases. But the fact that some guidelines states have included program participation in good-time provisions<sup>30</sup> suggests that such assessments are a workable basis for second look sentence modification.

**4. Religious or Other Conversion (Section 305.6)** It is not clear if the Draft endorses this rationale, although the Comment mentions "the possibility of transformation in an offender's character."<sup>31</sup> Even in exceptional cases, however, such changes would seem to be extraordinarily difficult for a court to assess reliably and consistently.

**5. New Technologies of Treatment and for Assessing Risk and Progress in Treatment** If the original prison term was enhanced based on predicted risk and/or a finding of unamenability to treatment, major subsequent improvements in risk assessment or treatment technology, combined with the overall parsimony principle described above (no more severe than necessary), justify and indeed require resentencing. But to avoid a mass of claims, many with battling experts, such technology improvements and their application to the inmate's case must be clear. For these kinds of claims it might be particularly appropriate to seek the recommendation or at least the advice of correctional authorities (see further discussion of "gatekeeping" issues, below).

### **B. Meritorious Postsentencing Behavior**

The criteria in this category do not necessarily presuppose any change in the offender him- or herself. Instead, such sentence reductions provide incentives for desired behavior and are also viewed as meriting a reward for its own sake. Similar important practical and moral considerations underlie plea bargaining concessions and charge or sentence reductions given in return for helpful testimony or other cooperation with law enforcement.

The Draft expressly recognizes only one form of meritorious inmate conduct—his or her compliance with criminal laws, institutional rules, and requirements to participate in programs. Each of these bears on how much “good-time” credit the inmate will receive under Draft Section 305.1. But there are other kinds of postsentencing meritorious conduct that might warrant sentence reduction. Section 305.1 of the original Model Penal Code provided that inmates could earn an additional six-days-per-month sentence reduction (in addition to the basic six-day good-conduct credit) for “especially meritorious behavior or exceptional performance of his duties.” The first half of this provision seemed to contemplate things like saving a guard or inmate’s life, assisting in preventing riot or assault, and preventing escape or assisting in recapture. The second half of the provision allowed parole authorities to distinguish superior versus merely adequate performance of institutional duties. The Draft implicitly handles such cases under the general changed-circumstances provision (Section 305.6), but perhaps they belong in an expanded Section 305.1 (especially if, as was recommended above, that provision is amended to propose or more strongly encourage adoption of good-time credits greater than 15 percent). These cases could, of course, also be handled under the “extraordinary and compelling circumstances” provision expected to be added to Section 305.7.

### **C. Change in Offender Family Circumstances, the Victim, and/or the Community (Section 305.6)**

These sorts of changes are briefly mentioned in the Draft Comment.<sup>32</sup> Although one can easily imagine postsentencing changes in family, victim, or community circumstances that would appropriately bear on one or more purposes or limits of punishment (e.g., the death of the only suitable caregiver to the offender’s small children;<sup>33</sup> successful victim-offender mediation), the potential number and diversity of such claims could swamp courts with petitions that are impossible to distinguish without a hearing. Thus, such claims are probably best handled by a general “extraordinary and compelling circumstances” provision, applicable any time during a prison term.

### **D. Change in Societal View of the Inmate’s Crime (Section 305.6)**

Sometimes certain criminal acts come to be widely viewed as less serious than previously thought, or perhaps as not even worthy of being criminally punished. Such change in

societal views might relate to a particular crime as a whole, certain aspects of the crime or of the offender’s role in it, or any other offense-related sentencing factor. However, this category should probably be deemed to include only such societal changes as have not yet manifested themselves in the enactment of reduced penalties or outright decriminalization. When such penalty reductions or decriminalization have been enacted, the case should be governed by the Code’s retroactivity provisions.<sup>34</sup>

But when reduced penalties or decriminalization have not yet been enacted, how are courts to determine whether and to what extent a more lenient societal consensus has emerged? The Draft Comment cites, as examples, changing views about battered victims who kill their batterer; euthanasia or assisted suicide; and certain substance abuse crimes such as those involving alcohol, marijuana, and crack cocaine. Major change has surely occurred in how society views these crimes, but at what point was such change sufficiently clear and substantial to justify sentence modifications? And how can courts avoid appearing to invade the legislature’s domain? This seems like an area much more appropriate for legislative or sentencing commission policy making and retroactivity, which courts would then apply—with greater consistency and legitimacy—to entire groups of offenders.

## **III. Assessing the Draft’s Second Look Procedures**

Several of the substantive second look issues catalogued above also raised important procedural problems or alternative solutions. The discussion below examines a longer (though still not exhaustive) list of procedural issues. As with the substantive rationales and standards examined in Part II, procedural details would have to be worked out by the legislature, sentencing commission, and courts in each jurisdiction. But it is worthwhile considering these issues in general terms, in order to decide whether and under what circumstances to authorize various second look mechanisms.

### **A. Who Decides?**

The Draft’s three second look provisions take different approaches to this question: good-time credits are decided entirely by correctional authorities, whereas courts decide whether to reduce a sentence based on age-infirmity or other changed conditions. Since good-time is so central to maintaining prison security, and “unsatisfactory” program participation is so much of a judgment call, there is probably no way for courts to play a useful role in these decisions. The age-infirmity cases, and most of the other-changed-conditions cases, seem better suited to judicial control—indeed, these are essentially “resentencing” issues, which courts *should* control. But as was suggested in Part II.D, claims about changed societal views involve quasi-legislative issues that apply to whole groups of offenders; decisions about whether such a change has occurred, and to what extent, should therefore be left to the legislature or the sentencing commission.

The two decision makers contemplated in Council Draft No. 2 are not, of course, the only possibilities. At the December 2008 ALI Council meeting other suggestions included panels of retired judges; administrative law judges; the sentencing commission; or an improved parole board.

**1. The Need for a Gatekeeper** Even for those second look claims which are suitable for judicial or other non-corrections-department adjudication, there is a separate issue of whether the corrections department or some other gatekeeper is needed to screen these claims or assist courts in screening them. The current federal statute, 18 U.S.C. § 3582(c)(1)(A)(I), gives the Bureau of Prisons a claim-barring role that arguably goes too far—corrections officials are not professional sentencers, and in some cases staff animosities or favoritism might distort the corrections position as to sentence reduction. On the other hand, corrections officials have more information than anyone else about the inmate, have a useful comparative perspective (claims or potential claims of other inmates), and are at least as expert as courts are on some matters related to sentencing such as risk and amenability assessment. It has already been noted that changed-conditions claims involving supposed new technologies are particularly suited for correctional gatekeeping. Perhaps age-infirmity claims are another example, but it still seems that Section 305.7 goes too far and that corrections officials should only state their views, not act as a true gatekeeper. Indeed, perhaps corrections officials should be expected to state their views in all cases. But for most types of age-infirmity and other-changed-conditions cases, it should be made clear that the ultimate decision is for the court, and that courts must not reflexively rubber-stamp corrections recommendations.

Based on discussions at the ALI Council meeting in December 2008 it appears that in future drafts of the MPC second look provisions any recommendation of a gatekeeper role for the Department of Corrections will be bracketed (that is, an optional element of the proposed model), and that jurisdictions will be encouraged to consider other agencies or officials who might be given the gatekeeper role, including the sentencing commission.

## **B. Other Procedural Barriers to Relief**

**1. The Fifteen-Year Rule** The Section 305.6 changed-circumstances procedure can only be invoked after the inmate has served at least fifteen years. The rationale for this limitation seems to be both substantive and practical. Most types of changed circumstances (surveyed in Part II) become more likely to apply over a lengthy period of time. And if there is no gatekeeper for these petitions, it is necessary to use some sort of arbitrary time-served measure to limit the burdens such petitions place on the courts. Still, many circumstances meriting sentence modification will arise before fifteen years have been served. One compromise solution to this problem would be to add a

narrower, “extraordinary and compelling circumstances” provision that can be applied at any time. As noted above, it appears that such a provision will be added to Section 305.7, and that the requirement of corrections department support in that section will be bracketed (made optional).

**2. Only One Shot** The changed circumstances procedure provided in Section 305.6 can only be invoked once. This obviously can pose extremely difficult choices for inmates—apply early, to maximize the potential size of the sentence reduction; or apply later, to present stronger arguments for changed circumstances after the original sentencing. The inmate’s choice would be somewhat less difficult if there were a backup procedure other than through the age-infirmity provisions of Section 305.7. Again, the expected addition of an “extraordinary and compelling circumstances” provision to that section will lessen these problems.

## **C. Right to Counsel and Other Assistance**

Counsel can be appointed under either of the back-to-court provisions, but counsel’s assistance seems unlikely to be available very often; either the corrections department will decline to make an age-infirmity motion (Section 305.7), or the Court will deny the inmate’s petition without a hearing and without appointing counsel (Section 305.6; the Comment indicates that most petitions will be denied without a hearing, and that counsel would usually only be appointed if a hearing is granted).<sup>35</sup> Given the potential volume of such petitions, and the already-overstretched resources of public defense programs, this sparing grant of appointed counsel rights may be necessary. Still, inmates will need help in preparing their pro se petitions (and in deciding how soon to file them), so it seems appropriate to require the Department of Corrections to provide lay advisors (and sometimes access to free legal advice) to inmates who have become eligible to file a petition under Section 305.6.

## **D. The Ban on Increasing the Severity of Modified Sentences**

The provisions based on age-infirmity (Section 305.7) and general changed-circumstances (Section 305.6) both provide that a modified sentence may be no more severe than the sentence already being served. Such an asymmetric down-but-not-up rule is required by double-jeopardy principles. But it is not always self-evident what counts as a “more severe” sentence, if the old and new sentences are not directly commensurate, for instance, when a prison term is lowered but much more onerous release conditions are added. To make the no-more-severe rule work in such cases it will be necessary to devise equivalency scales covering different sentence types.<sup>36</sup>

## **IV. Arguments against Including Any General Changed-Circumstances Resentencing Provision**

Beyond the substantive and procedural issues noted above (and the inevitable devils-in-the-details problems with any

proposal), various arguments can be made against having a second look provision akin to Section 305.6, or even the narrow “extraordinary and compelling circumstances” provision proposed to be added to Section 305.7. None of these arguments is fully persuasive, but they have considerable weight in the aggregate. However, the most likely alternatives to such a Code provision, pardon and commutation (and in some jurisdictions, parole release discretion), must also be kept in mind—do they avoid all of these problems, and other problems?

#### **A. Will Even a Narrow Second Look Option Unduly Burden Courts and Counsel Resources?**

Since Section 305.6 includes no corrections or other gatekeeper role (unlike the age-infirmity provisions of Section 305.7), it can be assumed that virtually all inmates will file a petition at some point after they have served fifteen years. It is hard to estimate the probable volume of these petitions, or the smaller volume of hearings that will be held, counsel appointed, and so on. Jurisdictions that adopt the Code’s full model (including an independent and adequately financed commission, fiscal- and demographic-impact assessments, the overarching proportionality and parsimony principles, appellate review) should not have a high volume of very long sentences. But no one can know how thoroughly the Code’s recommendations will be applied; this will undoubtedly vary considerably across jurisdictions. On the other hand, the need for a vigorous second look procedure becomes even stronger if, in fact, there are a large number of very long sentences.

The ultimate issue is a familiar one in the law and particularly in criminal justice; to paraphrase the question the lawyer puts to his client in a well-known *New Yorker* cartoon—how much justice can we afford?<sup>37</sup> And how much injustice? In particular, how can we ensure that the injustices remedied by effective second look procedures do not further impoverish already-strained appointed counsel resources, thus creating new injustices? At least in jurisdictions where appointed second look counsel are funded from the same budget as direct-appeal and/or trial counsel, it will be necessary to increase those budgets; this can be supported not only by the importance of ensuring effective counsel at all levels but also by the argument that effective counsel—especially second look counsel—will reduce correctional costs.

#### **B. Would a Narrow Second Look Provision Prove Illusory or Freakish in Practice?**

Even if hearings are granted with some frequency (and especially if they are not), will inmates rarely see much (or any) reduction in their sentences? Here too, it is very hard to predict how courts will apply a procedure that lacks any direct counterpart in current practice. If relief is highly sporadic, inmates will be (further) disillusioned, unjustified lengthy sentences will remain in force, and the rare instances of relief will introduce a new form of disparity.

On the other hand, the most likely alternative second look procedures, pardon and commutation, face the same problems. Even in jurisdictions that seek to provide second looks by means of parole release discretion, the promise of release may be illusory or its application freakish if paroling authorities are politicized, are highly risk averse, or render decisions without guidelines or other controls.

#### **C. Do Even Narrow Provisions Undermine Front-End Impact Assessments and Accountability?**

One of the greatest practical benefits of commission-based, parole-abolition guidelines is their proven ability to generate accurate resource-impact predictions, which in turn have allowed the states using this approach to avoid prison overcrowding and court intervention, and set appropriate priorities in the use of scarce and expensive prison space.<sup>38</sup> A related benefit of determinate sentencing is the greater honesty and accountability it imposes on policy making and adjudication. When offenders actually serve most of the sentence imposed, legislators, prosecutors, and judges cannot act “tough on crime” while claiming that back-end discretion will avoid excessive punishment, spiraling costs, and overcrowding. State experience with parole-abolition guidelines suggests that when front-end decision makers have to take responsibility for these consequences, they tend to legislate, charge, and impose fewer very severe penalties.

Do these problems reappear when a second look, back-door release mechanism is reintroduced? To some extent that depends how often the procedure is used. Even if it is rarely used, legislators, prosecutors, and judges will know that any given law, charge, or sentence *could* be “adjusted” later and this knowledge encourages dishonest and irresponsible use of severe measures. And if second look sentence reductions are not rare, their unpredictability at least partially diminishes the accuracy of resource-impact projections. But again, what are the realistic second look alternatives? If they are so rarely invoked as to be effectively nonexistent, the benefits of resource management and accountability are purchased at the cost of injustice; the system openly tolerates very long sentences that have become unjustified due to changed circumstances.

#### **V. Conclusion**

Whether a general changed-circumstances provision is invoked rarely or with greater regularity, the arguments above, along with the difficult issues of substance and procedure discussed earlier, might suggest that even a narrow provision should be a bracketed (that is, optional) Code provision. But again, do the most likely alternatives, pardon and commutation, avoid these and other problems?

And what about life sentences? The Draft takes a strong position against life without parole (other than as an alternative to capital punishment),<sup>39</sup> yet a life sentence without a regularly invoked second look provision is, in effect, life without parole. The alternative of completely abolishing life sentences seems unrealistic, given

the frequent use and long history of this penalty. Another alternative would be to retain traditional parole release solely for life sentences, as Minnesota did when it adopted sentencing guidelines. But Minnesota's experience suggests that a narrow exception to parole abolition may not remain narrow; the Minnesota legislature has been unable to resist making more and more crimes subject to life with parole.<sup>40</sup> And even a limited version of traditional parole release discretion is highly problematic, for the reasons summarized earlier. Thus, some sort of nonoptional, regularly used, judicial second look provision must be provided for life sentences (along with at least an age-infirmity provision for any offenders subject to life without parole).

For nonlife prison sentences, perhaps the Code's general changed-circumstances provisions (Section 305.6, and the "extraordinary and compelling circumstances" provision expected to be added to Section 305.7) should be kept quite narrow, to avoid the problems discussed in Part IV. But the numerous, valid grounds for sentence modification must be accommodated, to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender. Determinacy and indeterminacy each have great value, and each has major drawbacks. An appropriate balance between them must be found, although the answers may not be the same in all jurisdictions.

In striking this balance, it is particularly important to distinguish between jurisdictions that have adopted most of the Code's severity-restraining, state-guidelines-inspired model, and other jurisdictions that cannot or will not go that far. Jurisdictions in the latter category will tend to have a much higher volume of very long sentences. These jurisdictions will thus require much broader and more vigorous second look provisions; indeed, they may be better advised to retain parole release discretion, despite the many problems with that approach.

It may be that the federal system is, and will remain, one of those "non-Code" jurisdictions. The two features of state criminal justice which have encouraged many states to adopt the Code's parsimonious model—the need to balance annual budgets, and the high proportion that prison costs represent in those budgets—do not apply at the federal level; the federal government can simply "print money" rather than balance the budget, and even runaway corrections expenses remain a tiny portion of the total national budget. Further increases in that tiny federal corrections fraction may seem worthwhile to Congress, especially given the political imperative to appear "tough on crime" (or at least, not "weak"). These fiscal and political realities of federal criminal justice are unlikely to change, despite the current budget crisis and reform atmosphere in Washington.

## Notes

<sup>1</sup> The American Law Institute (ALI) Model Penal Code: Sentencing project will revise the sentencing and corrections provisions of the Code to reflect the many changes in American sentencing theory, law, and practice which have occurred

since the original Code was approved in 1962. Professor Kevin Reitz of the University of Minnesota Law School serves as Reporter for this project. The first set of provisions to be approved by the ALI Council and membership are contained in Tentative Draft No. 1 (April 9, 2007) (approved at the May 2007 ALI annual meeting) ("TD-1"). For further background on this project, see American Law Institute, Model Penal Code: Sentencing, Report (April 11, 2003) ("April 2003 Report").

<sup>2</sup> American Law Institute, Model Penal Code: Sentencing, Council Draft No. 2 (September 12, 2008) ("CD-2"). See also *infra* note 8, describing a more recent MPC draft which became available as this essay went to press.

<sup>3</sup> State guidelines systems as of January 2005 are summarized in Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

<sup>4</sup> As noted below, a fourth Code provision dealing with postsentencing modifications is the retroactivity provision contained in Tentative Draft No. 1. In addition, Council Draft No. 2 appears to assume that a jurisdiction adopting the new Code provisions may also retain traditional clemency (pardon and commutation) procedures. CD-2 § 6.10A, Comment a.

<sup>5</sup> CD-2 § 305.7, Comment b.

<sup>6</sup> CD-2 § 305.6, Comment a.

<sup>7</sup> TD-1, Section 6B.11(3).

<sup>8</sup> Personal communications to the author on December 5, 2008 and March 9, 2009 from Kevin Reitz, Reporter, Model Penal Code: Sentencing. The March 9th communication, received as this essay went to press, included the proposed text of a new document, Discussion Draft No. 2, which will be discussed but not voted on at the ALI Annual Meeting in May 2009. As expected, and as explained more fully in text, this document makes several important changes in the second look provisions that had been proposed in CD-2. Two changes were made in MPC Sec. 305.7 (the age-infirmity provision): 1) a third grounds for sentence modification was added—"extraordinary and compelling reasons"; and 2) for all three grounds, the requirement of a favorable recommendation by the department of corrections was bracketed (i.e., made optional). Proposed Sec. 305.6 (applicable to other changed circumstances since sentencing) was completely rewritten, setting out general "principles of legislation" rather than specific proposed statutory language. These general principles are the same as those that underlay the more specific proposals of CD-2, with three exceptions: 1) inmates would not be limited to a single sentence-modification application under Sec. 305.6; 2) states are invited to consider having an independent agency screen prisoners' applications (see *infra*, "The Need for a Gatekeeper"); and 3) a provision has been added, confirming what was only implicit in CD-2—that these "second looks" are to be based on changed circumstances, not reassessment of the wisdom of the original sentence at the time it was pronounced.

<sup>9</sup> CD-2, "Reporter's Study: The Question of Parole Release Authority," p. 9.

<sup>10</sup> These and other covert functions of parole are discussed in FRANKLIN ZIMRING, *MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMER'S GUIDE TO SENTENCING REFORM* (1977).

<sup>11</sup> CD-2, "Reporter's Study: The Question of Parole Release Authority," pp. 13-30. The two most important reasons why prison populations grow more slowly in parole-abolition guidelines states are, first, that such a system facilitates better front-end resource management, and second, that in such systems legislatures, prosecutors, and courts must confront and take moral as well as fiscal responsibility for severe prison sentences. These points are discussed further in text below.

- <sup>12</sup> CD-2 § 305.1, Comments b, c.
- <sup>13</sup> CD-2 § 305.1, Reporter's Note b.
- <sup>14</sup> Violent Crime Control and Law Enforcement Act of 1994, Sec. 20102.
- <sup>15</sup> This provision will be re-written, following the December 2008 ALI Council meeting, *supra* note 8 and accompanying text. The department of corrections role will be bracketed (that is, made optional), with suggestions to consider other possible gate-keepers, and a catch-all, "extraordinary and compelling circumstances" provision will be added. See further discussion, *infra*.
- <sup>16</sup> CD-2 § 305.6, Comments e, f.
- <sup>17</sup> CD-2 § 305.6(5), 305.7(5).
- <sup>18</sup> TD-1 § 1.02(2)(a)(l). The Code's Limiting Retributive Model, drawn from the writings of the late Professor Norval Morris, is discussed in April 2003 Report at 36-41. Morris's theory is further discussed and elaborated in Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUSTICE: A REVIEW OF RESEARCH (Michael Tonry, ed.) 363 (1997) and Richard S. Frase, *Limiting Retributivism, in: THE FUTURE OF IMPRISONMENT* (Michael Tonry, ed., 2004).
- <sup>19</sup> TD-1 § 1.02(2)(a)(iii).
- <sup>20</sup> The parsimony concept is further discussed in Frase *Sentencing Principles, supra* note 18, and Frase, *Limiting Retributivism, supra* note 18.
- <sup>21</sup> CD-2 § 305.7, Comment c.
- <sup>22</sup> See *supra* note 8, and accompanying text.
- <sup>23</sup> For a general discussion of this provision, see Stephen R. Sady and Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) As An Example of Bureau of Prisons Policies That Result in Over-Incarceration*, 21 FED. SENT. R. (in this issue).
- <sup>24</sup> CD-2 § 305.6, Comment h. See also CD-2 § 6.10A, Comment b.
- <sup>25</sup> CD-2 § 305.6, Comment c.
- <sup>26</sup> See *supra* notes 8 and 22, and accompanying text.
- <sup>27</sup> CD-2 § 305.7, Comment b and Reporter's Note b(1).
- <sup>28</sup> The "amenability" departure cases under Minnesota's Sentencing Guidelines are discussed in Frase, *Sentencing Principles, supra* note 18, at 399-403. See also Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME AND JUSTICE: A REVIEW OF RESEARCH 131, 155 (Michael Tonry, ed., 2005).
- <sup>29</sup> 28 U.S.C. § 994(t); see also 18 U.S.C. § 3582(c)(1)(A) and U.S. Sentencing Guidelines Manual § 1B1.13, Application Note 1(B).
- <sup>30</sup> See Frase, *Sentencing Guidelines in Minnesota, supra* note 28, at 164.
- <sup>31</sup> CD-2 § 305.6, Comment a.
- <sup>32</sup> CD-2 § 305.6, Comment h.
- <sup>33</sup> This example is specifically mentioned in U.S. Sentencing Guidelines Manual § 1B1.13, Application Note 1(A)(iii).
- <sup>34</sup> TD-1 § 6B.11(3).
- <sup>35</sup> CD-2 § 305.6, Comments e,f.
- <sup>36</sup> The concept of equivalency scales is discussed in NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 75-81, 90-92 (1990).
- <sup>37</sup> See THE NEW YORKER BOOK OF LAWYER CARTOONS 73 (1993). The lawyer says: "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"
- <sup>38</sup> See generally Frase, *Sentencing Guidelines in Minnesota, supra* note 28. See also April 2003 Report at 46-127.
- <sup>39</sup> CD-2 § 6.06, Comment b(2) and Reporter's Note b(2).
- <sup>40</sup> For many years the only authorized life sentences in Minnesota were for premeditated murder and felony murder during a forcible rape; then various other felony murder cases were added, along with murders of police officers and prison guards or during child abuse, domestic abuse, or a crime in furtherance of terrorism. See MINN. STAT. § 609.185. In 2005 the legislature made a number of sex crimes punishable with life or life without parole. 2005 MINNESOTA LAWS CHAP. 136, art. 2.