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Richard Frase
University of Minnesota Law School, frase001@umn.edu

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Second Look Provisions in the Proposed Model Penal Code Revisions



RICHARD S. FRASE

Benjamin N. Berger
Professor of
Criminal Law,
University of
Minnesota

The Model Penal Code Sentencing project proposes a model based on three decades of successful state sentencing guidelines reforms.¹ The latest installment in this project, Council Draft No. 2,² recommends elimination of parole-release discretion, as more than half of the guidelines states have done.³ 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 procedures⁴ 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,⁵ but the third provision has almost none.⁶

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 2007.⁷

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.⁸ 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.⁹ 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.¹⁰ 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.¹¹

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.¹²

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.¹³ 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.¹⁴

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 305.7.¹⁵ 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).¹⁶ 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)."¹⁷ 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."¹⁸ Within that range, sentences must be "no more severe than necessary to achieve the applicable purposes"¹⁹ of the sentence (under the limiting retributive model above). The latter concept is sometimes referred to as sentencing "parsimony."²⁰

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.²¹ 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 process²² 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.²³ 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.²⁴

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),²⁵ 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 305.7.²⁶

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,²⁷ 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.²⁸ 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.²⁹

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 provisions³⁰ 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."³¹ 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.³² 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;³³ 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.³⁴

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).³⁵ 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.³⁶

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?³⁷ 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.³⁸ 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),³⁹ 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.⁴⁰ 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

¹ 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").

² 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.

³ 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).

⁴ 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.

⁵ CD-2 § 305.7, Comment b.

⁶ CD-2 § 305.6, Comment a.

⁷ TD-1, Section 6B.11(3).

⁸ 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.

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

¹⁰ 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).

¹¹ 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.

- ¹² CD-2 § 305.1, Comments b, c.
- ¹³ CD-2 § 305.1, Reporter's Note b.
- ¹⁴ Violent Crime Control and Law Enforcement Act of 1994, Sec. 20102.
- ¹⁵ 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*.
- ¹⁶ CD-2 § 305.6, Comments e, f.
- ¹⁷ CD-2 § 305.6(5), 305.7(5).
- ¹⁸ TD-1 § 1.02(2)(a)(i). 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).
- ¹⁹ TD-1 § 1.02(2)(a)(iii).
- ²⁰ The parsimony concept is further discussed in Frase *Sentencing Principles*, *supra* note 18, and Frase, *Limiting Retributivism*, *supra* note 18.
- ²¹ CD-2 § 305.7, Comment c.
- ²² See *supra* note 8, and accompanying text.
- ²³ 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).
- ²⁴ CD-2 § 305.6, Comment h. See also CD-2 § 6.10A, Comment b.
- ²⁵ CD-2 § 305.6, Comment c.
- ²⁶ See *supra* notes 8 and 22, and accompanying text.
- ²⁷ CD-2 § 305.7, Comment b and Reporter's Note b(1).
- ²⁸ 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).
- ²⁹ 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).
- ³⁰ See Frase, *Sentencing Guidelines in Minnesota*, *supra* note 28, at 164.
- ³¹ CD-2 § 305.6, Comment a.
- ³² CD-2 § 305.6, Comment h.
- ³³ This example is specifically mentioned in U.S. Sentencing Guidelines Manual § 1B1.13, Application Note 1(A)(iii).
- ³⁴ TD-1 § 6B.11(3).
- ³⁵ CD-2 § 305.6, Comments e,f.
- ³⁶ 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).
- ³⁷ 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?"
- ³⁸ See generally Frase, *Sentencing Guidelines in Minnesota*, *supra* note 28. See also April 2003 Report at 46-127.
- ³⁹ CD-2 § 6.06, Comment b(2) and Reporter's Note b(2).
- ⁴⁰ 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.