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## Article

# The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)

Kevin R. Reitz<sup>†</sup>

### INTRODUCTION

The project to produce a Model Penal Code (Second) of Sentencing is nearly finished. It is the first-ever revision of the Model Penal Code (MPC or Code), more than fifty years after the original Code was completed. The most recent Tentative Draft to win approval by the American Law Institute (ALI) (the third of four volumes for the project as a whole) addresses economic penalties, along with a number of other subjects relating to “offenders in the community.”<sup>1</sup>

Five interlocking provisions of Tentative Draft No. 3 are devoted to economic penalties, including sections on general principles, restitution, fines, asset forfeitures, and costs, fees, and assessments. They are the product of more than two years of study and debate, and respond to enormous changes in the landscape of financial penalties since the original Code was produced. On the whole, the ALI found the current state of American law on economic sanctions to be under-examined, unprincipled, and counterproductive to goals of public safety.<sup>2</sup>

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1. MODEL PENAL CODE: SENTENCING, at xix (Tentative Draft No. 3, 2014) (approved with amendments May 19, 2014). The draft also addressed pre-charge diversion from prosecution, deferred adjudication, probation, postrelease supervision, sentence revocation, and collateral consequences of conviction.

2. A small but important literature on economic penalties has been growing in academic and advocacy communities, especially in the last five years. See *generally* AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), available at [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf); ALICIA BANNON ET AL., BRENNAN CTR. FOR

The ALI's recommended statutory reforms would therefore significantly alter the criminal codes of every state.

It is well known that the United States is the most punitive society in the world in its use of incarceration,<sup>3</sup> and is in the upper tier in use of the death penalty.<sup>4</sup> Recently, awareness has been growing that the United States is also an outlier for

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JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (2014), available at [http://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf); RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS (2007), available at [http://csgjusticecenter.org/wp-content/uploads/2012/12/repaying\\_debts\\_full\\_report-2.pdf](http://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_full_report-2.pdf); Traci R. Burch, *Fixing the Broken System of Financial Sanctions*, 10 CRIMINOLOGY & PUB. POL'Y 539 (2011); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175; R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751 (2011); Breanne Pleggenkuhle, *The Effect of Legal Financial Obligations on Reentry Experiences* (July 2012) (unpublished Ph.D dissertation, University of Missouri–Saint Louis). In 2014, National Public Radio reported on a yearlong investigation into user fees imposed by courts and corrections agencies in a series of broadcasts called "Guilty and Charged." *Guilty and Charged* (National Public Radio broadcast May 23, 2014), available at <http://www.npr.org/series/313986316/guilty-and-charged>.

3. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 1* (Jeremy Travis et al. eds., 2014); Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 23, 23* (Joan Petersilia & Kevin R. Reitz eds., 2012). The United States prison rate peaked at year-end 2009 and has been in slight decline for the last several years. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 1 (2014). In 2010 national prison populations dropped by 0.3% (the first downturn since 1972), PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (2011), in 2011 they decreased 0.9%, E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 1 (2012), in 2012 by 1.8%, E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 23 (2013), and in 2013 they increased by 0.3%, CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, *supra*. Like prison populations, community-supervision populations have been in slight decline for the past several years. See ERIN J. HERBERMAN & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2013, at 1 (2014); LAURA M. MARUSCHAK & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2012, at 1 (2013) ("[T]he number of adults under community supervision declined for the fourth consecutive year.").

4. *Death Sentences and Executions*, AMNESTY INT'L (Mar. 26, 2014), <http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013>.

its high rates of probation and parole supervision.<sup>5</sup> America reached its exceptional position during a period of punitive expansionism that began in the early 1970s and continued for nearly forty years.<sup>6</sup> Although not widely appreciated, the nation's use of economic penalties surged in tandem with other punishments in the expansionist era.<sup>7</sup> Today's financial sanctions may be just as excessive by worldwide standards as American incarceration rates.

Since the Model Penal Code (First) was approved in 1962, there has been steady growth in fine amounts, asset forfeitures, and a congeries of costs, fees, and assessments levied against criminal offenders.<sup>8</sup> At the same time, there has been a wave of

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5. See MODEL PENAL CODE: SENTENCING § 6.03 note e (Tentative Draft No. 3, 2014) (analyzing United States, Council of Europe, Canadian, and Australian data; finding that average reported probation supervision rates among American states are roughly seven times the average rates among reporting European countries, four times the Canadian rate, approximately five times that in England and Wales, and seven times that in Australia); *id.* § 6.09 cmt. d (“[T]he national U.S. parole supervision rate for 2011 was five times that in Australia, seven times that in Denmark, and four times that in Austria.”); Dirk van Zyl Smit & Alessandro Corda, *American Exceptionalism in Parole Release and Supervision: A European Perspective*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT (Kevin R. Reitz ed., forthcoming 2015) (on file with author); Michelle S. Phelps, *The Paradox of Probation: Understanding the Expansion of an “Alternative” to Incarceration During the Prison Boom* 16 (Sept. 2013) (unpublished Ph.D. dissertation, Princeton University) (proposing and defining “the term ‘mass probation’ to describe the rapid build-up (and racial disproportionality) of probation supervision rates”).

6. See HENRY RUTH & KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 18–27, 67–72 (2003).

7. See Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 512 (2011) (“[L]egislatures have authorized many new fees and fines in recent years, and criminal justice agencies increasingly impose them. This trend coincides with the rapid expansion of the penal apparatus that began in the late 1970s . . . .”); Pleggenkuhle, *supra* note 2, at 8 (“Evidence suggests both the frequency and amount of legal financial obligation have increased in the past decades.”).

8. On the growing importance of economic sanctions in United States sentencing policy, see BANNON ET AL., *supra* note 2, at 1 (“Across the board, we found that states are introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution.”); REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES* 5 (2010) (“From 1996 through 2007, the Florida Legislature created or authorized more than 20 new categories of legal financial obligations (‘LFOs’) – surcharges, fees, and other monetary obligations – related to criminal cases and violations. Many of these surcharges and fees have been increased during the last two years.”); Beckett & Harris, *supra* note 7, at 512; Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1712, 1715 (2015) (“[S]ince the 2008 recession, forty-eight states

statutory and constitutional provisions that authorize or mandate victim restitution as part of criminal sentences.<sup>9</sup> The impulses toward growth have included the generalized thrust toward greater severity in sanctioning, the resurgence of crime victims as quasi-parties to criminal proceedings,<sup>10</sup> and sustained budgetary shortfalls that have caused public and private entities to look to offenders as new sources of revenue.

The cumulative totals of monetary penalties must be considered rather than the discrete amount of each payment that is ordered.<sup>11</sup> Studies of criminal justice debt in individual states have found average obligations in the thousands of dollars, often supplemented by child support obligations (which often continue to accrue during periods of incarceration).<sup>12</sup> In many cases, offenders' total debt burdens overwhelm their abilities to pay while establishing minimally secure financial lives for themselves and their families.<sup>13</sup> The widespread practice in

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have increased the fees to offenders in criminal court. . . . [A]mong the services that were once provided for free and are now charged for are supervision costs, drug test costs, and treatment costs. Offenders at least in some jurisdictions pay for their arrest warrants, DNA samples, and GPS monitoring costs.”); Ruback & Clark, *supra* note 2, at 752–53 (“[I]n the past two decades, economic sanctions have become increasingly more common, being imposed on sixty-six percent of prisoners in 2004, up from twenty-five percent in 1991. Moreover . . . these sanctions are likely to be used more frequently in the future.”); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2054 (2006) (asserting that application fee laws have exploded in use: the number of jurisdictions using them increased by thirty percent from 1994 to 2004); Pleggenkuhle, *supra* note 2, at 8.

9. See MODEL PENAL CODE: SENTENCING § 6.04A cmt. e (Preliminary Draft No. 10, 2014); PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 155–57 (2d ed. 2010).

10. See TOBOLOWSKY, *supra* note 9, at 234.

11. See Pleggenkuhle, *supra* note 2, at 5–6 (“Although each fee is typically described as a nominal amount, evidence indicates small fees can accumulate quickly. Research suggests offenders can be responsible for up to 17 different types of financial obligation at various points throughout their sentence, including defense attorney fees, drug testing, court costs, mandatory classes or therapy, and supervision fees.”).

12. See MCLEAN & THOMPSON, *supra* note 2, at 7 (reporting average restitution awards of \$3,500 in one jurisdiction); ALAN ROSENTHAL & MARSHA WEISSMAN, CTR. FOR CMTY. ALT. JUSTICE STRATEGIES, SENTENCING FOR DOLLARS: THE FINANCIAL CONSEQUENCES OF A CRIMINAL CONVICTION 3, 17–18 (2007) (reporting a total of over \$7,000 in financial penalties for a single DWI conviction in New York state; illustrating the growth of child support arrears during incarceration); Harris et al., *supra* note 2, at 1771 (finding that in Washington state the average amount owed for supervision fees, court costs, and other fees was approximately \$2,500).

13. See AM. CIVIL LIBERTIES UNION, *supra* note 2, at 5–6; BANNON ET AL., *supra* note 2, at 1–2; MCLEAN & THOMPSON, *supra* note 2, at 7–8; Burch, *su-*

American law is to impose economic penalties with uncertain chances of collection and with insufficient concern for their long-term impact on offender reintegration, recidivism, and public safety.<sup>14</sup> The new MPC accordingly calls for an across-the-board rethinking of such penalties and significant reductions in their use.<sup>15</sup>

## I. ECONOMIC SANCTIONS AND THE GOALS OF THE SENTENCING SYSTEM

Part I of this Article will examine how much value economic sanctions provide when measured by mainstream criminal justice policies such as retribution, rehabilitation, deterrence, and incapacitation. In effect, Part I will prepare a scorecard of the costs and benefits of economic penalties. One “scoring” rule is that benefits will not be counted unless they advance recognized goals of the sentencing system.

### A. PROPORTIONALITY AND ECONOMIC SANCTIONS

One function of criminal sentences is to punish offenders—and some people believe this should be the sole or overriding goal of a just sentencing system.<sup>16</sup> In present-day American cul-

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*pra* note 2, at 539.

14. As with probation and parole, there is evidence that America’s use of collateral consequences of conviction is also more extensive than in other countries. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 457 (2010) (comparing the use of collateral sanctions in the United States, England, Canada, and South Africa).

15. The new Code’s approach is roughly continuous with the policy of the Model Penal Code (First). See MODEL PENAL CODE AND COMMENTARIES, PART I §§ 6.01–7.09 (1985). The official Comment to original section 7.02 began with the clear statement that “[t]his section articulates the policy of the Model Code to discourage use of fines as a routine or even frequent punishment for the commission of crime.” *Id.* § 7.02 cmt. 1. The new Code also shares concerns and goals expressed by the 1973 National Advisory Commission on Criminal Justice Standards. See NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS 162–63 (1973) (commenting that fines “based on the financial means of the defendant can have disparate and destructive results, particularly for the poor. In many jurisdictions, the fine is a revenue device unrelated in practice to concepts of corrections or crime reduction.”).

16. See, e.g., ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING 12–33 (2005); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 65 CAMBRIDGE L.J. 145, 160–61 (2008) (contrasting Robinson’s preferred program, in which desert specifies the particular amount of punishment that should be imposed on offenders, with the approach of the revised Model Penal Code).

ture, however, economic sanctions are not worth very much on the retributive scale. A sentencing judge's pronouncement of a large fine delivers little in retributive satisfaction. Americans do not experience catharsis when reading a headline such as, "Violent Felon Fined \$10,000!" Serious crimes warrant significant penalties under most theories of just deserts, retribution, or proportionality in sentencing—and, over the past several decades, the metric of "serious" punishment in American law and culture has been prison time. That this is regrettable does not change the fact that it is a reality. Measured in public perception, the economic sanctions most offenders are capable of paying are of scant punitive value when compared with incarceration.

Because of the low retributive valuation of economic sanctions, American legal systems have not found it possible to use them as substitutes for jail or prison terms—and it is likely they do not function as substitutes for probationary sentences either. Instead, in American legal culture, fines, restitution, fees, and surcharges are add-ons, rarely viewed as condign sentences in themselves. This is not the case worldwide. In at least some European countries, fines are now the modal punishment for most crimes. In Germany, the widespread use of financial penalties was part of a successful effort to dramatically reduce the use of short prison terms.<sup>17</sup> Some Scandinavian countries use "day fine" systems that assess proportionate monetary punishments according to the wealth and earning power of each defendant.<sup>18</sup> When similar programs were attempted in pilot sites in the United States, however, they did not gain traction.<sup>19</sup>

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17. Fines are the mainstay of criminal sentencing policy in Germany. See FED. MINISTRY OF JUSTICE, SECOND PERIODICAL REPORT ON CRIME AND CRIME CONTROL IN GERMANY, ABRIDGED VERSION 81 (2007) ("In 2004, the sanctions given to 94% of all persons convicted under general criminal law were either fines (80.6%) or suspended prison sentences (13.7%).").

18. See NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 143–44 (1990) (discussing the use of day fines in Scandinavia). In contrast, see Ruback & Clark, *supra* note 2, at 754 ("[F]ines in the United States tend to be used primarily in courts of limited jurisdiction, particularly traffic courts. Fines are also used in lower courts for minor offenses, such as shoplifting, especially for first-time offenders who have enough money to pay the fine.").

19. On the comparative failure of the United States to make use of fines as alternatives to imprisonment, see Pat O'Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL'Y 547, 547, 549 (2011) ("[M]ost common-law countries and many in Europe use discretionary fines along the lines of those available in the United States, and although these have problems, as do all sanctions, they are almost everywhere [outside the United States] the pre-

The failure of economic penalties to register on the retributive scale in American culture has many effects. One is that economic sanctions are assessed in small or great amounts, and are allowed to compound, with little regard for their effects on proportionality in punishment.<sup>20</sup> Nor does anyone pay much attention to the retributive value of principled uniformity of punishments imposed. The amounts assessed against individual offenders can vary wildly from county to county within a state, and vary even among persons with similar offenses and criminal histories.<sup>21</sup>

In sum, economic penalties—as they are administered in United States criminal justice systems—yield small retributive benefits, and have not been held to retributive strictures of proportionality, fairness, and reasonable uniformity in punishment.

## B. UTILITARIAN ANALYSES OF ECONOMIC SANCTIONS

The utilitarian scorecard for economic penalties yields weak or mixed results. This section will discuss rehabilitation, deterrence, and incapacitation in turn.

### 1. Rehabilitation

Rehabilitation does not play a major role in the design and administration of financial penalties. That is not to say that the rehabilitative potential of economic sanctions is zero. One plau-

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dominant sentencing option. . . . Although, in Europe, this substitution of fines for at least some short terms of imprisonment appeared at the end of the 19th century, the same thing did not occur in the United States.”).

20. See Beckett & Harris, *supra* note 7, at 520 (“Because monetary penalties in the United States are supplements to penalties that already are comparatively severe, directly and adversely impact the partners as well as children of the criminally convicted . . . and typically remain in effect long after all other elements of criminal sentences are completed, the imposition of substantial and supplementary monetary penalties is disproportionate to the offense and, hence, approaches vengeance rather than retribution.”).

21. See Ruback & Clark, *supra* note 2, at 767–70. In this study, the array of economic sanctions in use varied strikingly from county to county, as did the mean and median dollar amounts of sanctions imposed on individual offenders. As Ruback and Clark explained, “[a]cross the sixty-seven counties in Pennsylvania, the number of different economic sanctions imposed varied from forty to one hundred forty-seven . . . . Most of the variation between counties in the number of different economic sanctions imposed came from sanctions unique to each county.” *Id.* at 767. See also Pleggenkuhle, *supra* note 2, at 9–10 (“Despite existing legislation that mandates certain financial penalties for all offenders, studies continue to demonstrate offender characteristics matter in regard to who receives economic sanctions . . . . Most research suggests nonviolent offenders, particularly those with drug offenses, had increased amounts of fees and fines associated with their sentence.”).



sible narrative could be grounded in specific deterrence. Such a theory would posit that the pain of paying financial sanctions might teach offenders not to repeat the experience—and would add to other incentives (like the threat of imprisonment) to avoid reoffending.<sup>22</sup> The presence of criminal justice debt might also focus the minds of some offenders as a positive stressor, making them bear down to find a job and be responsible with money in order to dig themselves out of the hole.<sup>23</sup> Financial obligations may cause offenders to lean more heavily on the support of their families, thus strengthening family ties.<sup>24</sup> There is also a line of thought that payment of restitution to crime victims may be therapeutic, if the offender believes he has made amends for his actions and has taken a meaningful step toward regaining acceptance in the community.<sup>25</sup>

The rehabilitative hopes we might attach to financial penalties are not fantastical, but there is not much evidence in their favor. The effectiveness of deterrence is probably greatest for certain types of crimes (more on deterrence in a moment),

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22. By Professor Ruback's reading of the literature, there is "some evidence" that, compared with incarceration, fines are "about as effective in deterring future crime." R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 CRIMINOLOGY & PUB. POL'Y 569, 570 (2011); see also Pleggenkuhle, *supra* note 2, at 3–4.

23. See Pleggenkuhle, *supra* note 2, at 121–30 (finding this to be the case among some ex-offenders, although others reported the presence of criminal justice debt as a negative stressor that could lead to discouragement, depression, exacerbation of other mental illnesses, and return to drug use).

24. See MORRIS & TONRY, *supra* note 18, at 114 ("[I]ronically, imposition of fines on at least some impecunious offenders may serve preventive ends by catalyzing family and social support.").

25. See CYNTHIA A. KEMPINEN, PA. COMM'N ON SENTENCING, PAYMENT OF RESTITUTION AND RECIDIVISM 3–4 (2002) ("Individuals who paid a higher percentage of their ordered restitution were less likely to commit a new crime. Moreover, the payment of fines was not found to have the same effect of lowering recidivism. This suggests that it is the act of reparation that is important, not merely the act of payment itself."). This theory is recognized in current Model Penal Code drafting. See MODEL PENAL CODE: SENTENCING § 6.04A cmt. g (Preliminary Draft No. 10, 2014) ("A secondary purpose of victim compensation is to promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims."). The Supreme Court has recognized rehabilitation among the purposes of criminal restitution provisions. See *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) (noting that restitution is "an effective rehabilitative penalty"). In his article in this issue of the *Minnesota Law Review*, Professor Ruback discusses studies finding that, under the right circumstances, paying restitution can be associated with lower recidivism rates. However, he also notes the limited empirical value of these studies due to small sample sizes, omitted variable bias, and the possibility of reverse causality. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1812 (2015).

and these do not include many of the violent, sexual, and impulsive crimes the public is most concerned about. And the behavior-changing satisfaction of making restitution can occur only among offenders who are able to make such payments *and* are emotionally receptive to the idea that payment is a self-healing act—ultimately a small subset of the total. The potential of financial obligations to act as positive stressors must be viewed in light of their counteracting and deleterious effects, which are surveyed in the next several paragraphs.

Economic penalties have rehabilitation-defeating propensities. One of the most famous statements of the President's Crime Commission in 1967 was that "[w]arring on poverty . . . is warring on crime."<sup>26</sup> In the intervening fifty years, there has been much study and debate of the poverty-crime connection.<sup>27</sup> Yet there are few who would say that the *exacerbation* of poverty is sensible crime-control policy. The new MPC rests on the belief that pushing ex-offenders more deeply into poverty is criminogenic—and that, in doing so, we are "warring on reintegration" rather than warring on crime.

I should disclose that there is little hard data to prove that worsening poverty produces more crime than it prevents. There are no experimental studies of matched groups of offenders with higher and lower criminal justice debt burdens to see how their recidivism rates compare. Instead, there is much inferential evidence that burdensome economic sanctions are at odds with the goals of rehabilitation, offender reintegration, crime-reduction, and public safety.

Falling behind in payments often leads to further sanctions that deepen the hole for offenders, including suspension of driver's licenses, extended periods of community supervision, arrest warrants, and sentence revocation. Unrealistic or heavy financial obligations interfere with offenders' abilities to obtain credit, pay for transportation (often essential to employment), pursue educational opportunities, and sustain family ties.<sup>28</sup>

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26. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 6 (1967).

27. For the most famous criticism of the view that poverty causes crime, see JAMES Q. WILSON, *THINKING ABOUT CRIME*, at xiii–xiv, 46–47, 74–75, 202–203 (1975). For another perspective, see generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

28. See Beckett & Harris, *supra* note 7, at 517–18 ("[L]egal debt itself is damaging despite whether payments are made. Like other types of debt, legal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation."). For a detailed

Damaged credit can make it hard to find housing or land a job.<sup>29</sup> Processes for the collection of criminal justice debt can also disrupt employment relationships—as when garnishment of wages is used—or may simply reduce the incentives of ex-offenders to earn in the legitimate economy.<sup>30</sup> If the effect of financial penalties is to reduce a relatively low-wage job to a tiny net income, it becomes tempting—and perhaps rational—for an offender to look for larger gains in the illegal economy. Also, if the burdens of criminal justice debt make it impossible for a husband or father to contribute his share to household expenses, or even his own living expenses, the sentencing system places strain on the bonds of stable family life.<sup>31</sup> One study concluded that:

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summary of the ways in which criminal justice debt, and collection and enforcement practices, damage offenders' chances of successful reintegration, see BANNON ET AL., *supra* note 2, at 24, 27–29 (noting the criminogenic effects of suspending driver's licenses for nonpayment of economic penalties; discussing the effect of criminal justice debt on housing and employment prospects, qualification for public benefits, and the ability to pay child support and vote); see also REBEKAH DILLER ET AL., BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY 1 (2009) (finding that economic sanctions interfered with offenders' abilities to secure employment and housing); Ruback, *supra* note 25, at 1811–12 (“The imposition of economic sanctions can be burdensome and may make it more difficult for offenders to avoid recidivism, particularly when offenders have other expenses (e.g., child support, alimony, housing, food, transportation).”); Pleggenkuhle, *supra* note 2, at 182–86 (finding that the primary consequences of economic penalties were prolonged entanglement in the criminal justice system through extended supervision terms and heightened risk of technical violations); cf. David Weisburd et al., *The Miracle of the Cells: An Experimental Study of Interventions To Increase Payment of Court-Ordered Financial Obligations*, 7 CRIMINOLOGY & PUB. POL'Y 9, 27 (2008) (finding that the threat of incarceration was the most effective incentive to persuade delinquent probationers to pay economic penalties).

29. BANNON ET AL., *supra* note 2, at 27.

30. See Beckett & Harris, *supra* note 7, at 517–18 (“[B]ecause the wages of the convicted (and their spouses) are subject to garnishment, legal debt creates a disincentive to find work. In our interviews, several interviewees indicated that finding employment was not worth it because their earnings would be so diminished by garnishment. Several clerks also reported that employers generally dislike hiring those whose wages are garnished because of the cumbersome bureaucratic processes this entails.”); Pleggenkuhle, *supra* note 2, at 123 (“High risk of garnishment and recognition that a substantial portion of the paycheck would go to paying for legal financial obligations acted as a disincentive to obtain employment. This discouragement is problematic, as it diminishes the ability to pay legal financial obligations as well as reduces the likelihood of experiencing positive effects of employment.”).

31. See Pleggenkuhle, *supra* note 2, at 152 (“[T]he inability to financially provide for the family caused negative feelings and essentially challenged [offenders'] masculinity. This inability to be a real ‘family man’ may limit mechanisms of cognitive change and limit desistance processes.”).

[L]egal financial obligations appear to impede or negatively affect mechanisms essential to the desistance process such as personal relationships, cognitive change towards a non-criminal self, and set up additional employment difficulties. Notably, legal financial obligations contribute to keeping offenders in a perpetual cycle of debt with little chance of improving their economic or social circumstances.<sup>32</sup>

The bulk of social science research indicates that decent housing, strong families, and satisfying work are among the most important protective factors associated with desistance from crime.<sup>33</sup> Criminal justice policies that block or dilute these protective factors would appear to be profoundly misconceived. When unrealistic economic penalties are visited on offenders, they can inspire feelings of despair or futility, or perceptions of courts' sentences as illegitimate.<sup>34</sup> None of these are desirable outcomes.

Criminal justice policy must be formulated on the best evidence we have at any given time, and the provisional conclusions that can be drawn from that evidence. On balance, for offenders near or below the poverty line, the MPC views the

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32. *Id.* at 195.

33. Strong work ties and job stability correlate with lower rates of reoffending. ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 140–41, 178 (1993). The acquisition of a “satisfying job,” not just any job, may have an even greater correlation with desistance. See NEAL SHOVER, *GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES* 127 (1996). A recent study found the employment effect greatest for men over the age of twenty-seven, with no measurable effect for younger participants. Christopher Uggen, *Work As a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 529 (2000). On housing, see NAT'L RESEARCH COUNCIL, *PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION* 54–55 (2007) (“Released prisoners who do not have stable housing arrangements are more likely to return to prison.”). One widely-cited study found that being married was associated with a thirty-five percent reduction in risk of reoffending. Robert J. Sampson et al., *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 CRIMINOLOGY 465, 465 (2006). Other research has discovered similar but smaller effects. See Julie Horney et al., *Criminal Careers in the Short-Term: Intra-Individual Variability in Crime and Its Relation to Local Life Circumstances*, 60 AM. SOC. REV. 655, 665 (1995) (finding that, while marriage is associated with reduced recidivism, cohabitation is associated with an increased risk); Alex R. Piquero et al., *Race, Local Life Circumstances, and Criminal Activity*, 83 SOC. SCI. Q. 654, 654 (2002). On the importance of family ties more generally, see NAT'L RESEARCH COUNCIL, *supra*, at 44 (“Greater contact with family during incarceration (by mail, phone, or in-person visits) is associated with lower recidivism rates. Prisoners with close family ties have lower recidivism rates than those without such attachments.”).

34. A growing body of literature suggests that offenders' perceptions of legitimacy or illegitimacy of the criminal justice system affect their future willingness to comply with the law. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283, 283 (2003).

rehabilitation “scorecard” of financial penalties to be in the negative numbers.

## 2. General Deterrence

Classical economic theory would hold that, with every dollar threatened as criminal punishment for a given crime, the “cost” of the crime would go up and the incidence of such offending would go down.<sup>35</sup> In criminology, however, there is no credible evidence that marginal increases in punishment severity can reduce crime rates.<sup>36</sup> If we are most concerned with serious crimes, which already are subject to stiff punishments in the United States, increases or decreases in severity through economic penalties probably make little difference.

This is not to say that economic sanctions can never be effective crime deterrents. At the level of misdemeanors and petty offenses—traffic offenses like speeding come to mind—economic sanctions may be the *only* penalties that are threatened, and are sufficient to create some level of deterrent effect. For serious economic crimes, perhaps especially white-collar crimes, financial penalties could plausibly operate as a general deterrent. We are now picturing defendants who plan their lives according to financial projections. For serious white-collar offenses, however, prison is also threatened, so we would be required to believe that financial exposure in addition to the risk of imprisonment has an incremental deterrent effect. Even among white-collar offenders, therefore, the scorecard for the deterrence benefits of economic sanctions would be inconclusive.

The use of economic penalties to deter crime within corporations or other business organizations is a coherent goal. Although organizations cannot go to jail, the wellbeing of owners, managers, employees, and other constituents requires good financial health. There is experience to suggest that the threat of devastating monetary penalties can encourage organizations to adopt compliance programs for the training and discipline of employees. While some in-house compliance systems may be run with a wink and a nod, many of them probably do a great

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35. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 27–33 (Gary S. Becker & William M. Landes eds., 1974), available at <http://www.nber.org/chapters/c3625.pdf>.

36. See Cheryl Marie Webster & Anthony N. Doob, *Searching for Sasquatch: Deterrence of Crime Through Sentence Severity*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS*, *supra* note 3 at 174–75.

deal of good.<sup>37</sup>

In other circumstances, where serious criminal conduct has already occurred within a business organization, the deterrent force of economic penalties may cause the business to mount a genuine internal investigation, focusing its energies on finding the guilty individuals. The struggle for survival may even lead a business to repudiate corporate leadership as Drexel Burnham Lambert did when it turned on Michael Milken.<sup>38</sup> In short, a system of financial penalties may be a mainstay of organizational sentencing—but this is outside the present MPC project, which only deals with the sentencing of individuals.<sup>39</sup>

Returning to the utilitarian scorecard of economic sanctions, if we are talking about individual human beings rather than corporate entities, the weight of criminological knowledge suggests that the increases in financial punishments that have occurred in the past several decades have not themselves produced much reduction in crime—and future increases in financial penalties should not be expected to have such an effect either.<sup>40</sup>

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37. See, e.g., Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 144 (1997) (“Corporations can design compliance programs and consciously send the subtle, important signals that they take compliance seriously (even making compliance matters part of annual reviews and something factored into compensation decisions).”); Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 44 (1997); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 698–99 (2002); Andrew Weissman, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1322 (2007) (“[C]orporate management will be greatly incentivized to protect the corporation from criminal liability by creating a strong and effective compliance program.”). But see Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 367, 367 (2002).

38. See William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 652 (2002) (“Corporate and retained counsel have a distinct incentive to align themselves with prosecutors by opening internal investigative files and, most disturbingly, turning culpable employees over to the government (a practice known as ‘flipping’) in deals orchestrated to win favor.”). For the Michael Milken story, see JAMES B. STEWART, DEN OF THIEVES (1991).

39. See MODEL PENAL CODE: SENTENCING § 6.02 (Tentative Draft No. 3, 2014).

40. I am unaware of any scholar who has argued that increases in the use and amounts of financial sanctions over the past several decades contributed to the national “crime drop” that began in the early 1990s.

### 3. Incapacitation

In most cases, economic sanctions have no incapacitation value. Impecuniosity is more likely to be criminogenic than crime-precluding.

In some settings, however, economic penalties can be a form of incapacitation, when capital investment or cash-on-hand is necessary for the criminal behavior at issue. Large sums of money may be required for a functioning criminal enterprise or an otherwise legitimate business that is operated in a criminal manner. Bernie Madoff needed good suits, expensive jewelry, and a nicely-decorated office to convince people to invest money with him.<sup>41</sup> A drug kingpin must have funds for the purchase of inventory and payment of workers. Most bid-rigging offenses would be pointless without a business to cash in on an ill-won contract. Forfeiture of assets and instrumentalities of crime can play a legitimate disabling role in such cases.<sup>42</sup>

Unfortunately, most criminals do not have much overhead, and most criminal careers begin with little money, so the incapacitative value of economic sanctions for most crimes is negligible.

### C. REVENUE GENERATION

An additional sometimes-stated purpose of economic sanctions is revenue generation, most often in the context of asset forfeiture and costs, fees, and assessments. Law enforcement and corrections officials candidly—sometimes proudly—admit that user fees or assets collected from suspects or convicted offenders are important sources of revenue. It is not uncommon to hear that major shares of agencies' operating budgets are funded by offenders' payments.<sup>43</sup> Here we are not talking about

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41. See generally DIANA B. HENRIQUES, *THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST* (2012); *Bernie Madoff's Life of Luxury*, ABC NEWS, <http://abcnews.go.com/Blotter/photos/bernie-madoffs-life-luxury-11929194/image-11929310> (last visited Apr. 3, 2015) (showing pictures of some of Bernie Madoff's expensive belongings).

42. See MODEL PENAL CODE: SENTENCING § 6.04C(2) (Tentative Draft No. 3, 2014) (one purpose of asset forfeiture is "to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission").

43. See DALE PARENT, NAT'L INST. OF JUSTICE, *RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES* 5 (1990) ("Among all probation and parole agencies responding [across seventeen states], fee receipts averaged 23.6 percent of their total operating budgets."); CARL REYNOLDS ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., *A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES: INTERIM REPORT 1* (2009),

traditional criminal justice purposes, but goals like making payroll, purchasing equipment otherwise not budgeted for, or contributing to general funds unrelated to criminal justice.<sup>44</sup> On principle, the MPC regards revenue generation as an illegitimate purpose of the sentencing process.<sup>45</sup>

While criminal offenders are attractive targets for special taxation because of their culpable acts and political unpopularity, they usually lack the means to make outsized contributions to government programming when compared to ordinary taxpayers.<sup>46</sup> A working justice system and corrections system is the

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available at <http://csgjusticecenter.org/wp-content/uploads/2013/07/2009-CSG-TXOCA-report.pdf> (“[I]n 2006 probation fees made up 46 percent of the Travis County (Texas) Community Supervision and Corrections Department’s \$18.3 million budget.”); Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 FED. PROBATION 40, 42 (2012) (“[I]n 2008 Jefferson County, Texas . . . reported collecting the equivalent of half of their budget from fees (over 3.6 million dollars)”); also noting that probation officers’ records of fee collection were heavily weighted in their performance evaluations); see also David E. Olson & Gerard F. Ramker, *Crime Does Not Pay, but Criminals May: Factors Influencing the Imposition and Collection of Probation Fees*, 22 JUST. SYS. J. 29, 30 (2001); Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 171–73 (1997).

44. See BANNON ET AL., *supra* note 2, at 30 (reporting that in a study of fifteen states, at least eleven of the states “use some criminal fees, fines, or penalties to support general revenue funds, treasuries, or funds unrelated to the administration of criminal law—effectively turning courts, clerks, and probation officers into general tax collectors”).

45. See MODEL PENAL CODE: SENTENCING § 6.04 cmt. b (Tentative Draft No. 3, 2014); *id.* § 6.04C(2).

46. *Id.* § 6.04 cmt. b. On the poverty of most defendants, see BRENNAN CTR. FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL 4 (2008), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf> (stating that most criminal defendants qualify as indigent for purposes of appointment of counsel); PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY (2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/CollateralCosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf); cf. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 108–30 (2006) (concluding that incarceration deepens poverty by reducing future employment prospects and earnings). Typical offenders’ economic circumstances are painted in detail by Alicia Bannon, Mitali Nagrecha, and Rebekah Diller:

Fees and other criminal justice debt are typically levied on a population uniquely unable to make payments. Criminal defendants are overwhelmingly poor. It is estimated that 80–90 percent of those charged with criminal offenses qualify for indigent defense. Nearly 65 percent of those incarcerated in the U.S. did not receive a high school diploma; 70 percent of prisoners function at the lowest literacy levels. African-Americans face a particularly severe burden: Nationally, African-Americans comprise 13 percent of the population but 28 percent of those arrested and 40 percent of those incarcerated, and African-Americans are almost five times more likely than white defendants to



responsibility of all citizens, and should be funded accordingly.<sup>47</sup>

If revenue generation were treated as a desirable goal of the sentencing system, we could ask further whether the money gained through economic sanctioning is greater than the expenses of its collection—plus the cost of enforcement when payments are not made. In many instances, this would be a difficult call. It is sometimes reported that systems for collection of fines or restitution barely break even.<sup>48</sup> Dysfunctional arrangements exist in which the entity collecting the money from offenders does not bear the full cost of enforcement—as when counties or private providers benefit from user fees, but the state pays the cost of sentence revocations for nonpayment.<sup>49</sup> If one concludes that revenue generation is not an affirmative justification of economic penalties as criminal sentences, however, such an assessment of net profitability is unnecessary.

## II. HIGHLIGHTS OF THE CODE'S RECOMMENDATIONS

### A. PRESERVING A FLOOR OF REASONABLE FINANCIAL SUBSISTENCE

The single most important economic sanctions provision in the Model Penal Code (Second) states that “[n]o economic sanction . . . may be imposed unless the offender would retain suffi-

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rely on indigent defense counsel.

Individuals emerging from prison often face significant challenges meeting basic needs. Many are unable to find stable housing—it is estimated that 15 to 27 percent of prisoners expect to go to homeless shelters upon their release. Many used drugs or alcohol regularly before going to prison and may need treatment upon release.

Employment rates for those coming out of prison are also notoriously low—up to 60 percent of former inmates are unemployed one year after release. Obstacles to finding a job are even greater now, as the unemployment rate in the general population hovers at just under 10 percent, and is as high as 16 percent for industries such as construction that have traditionally been sources of jobs for persons with criminal convictions.

BANNON ET AL., *supra* note 2, at 4.

47. MODEL PENAL CODE: SENTENCING § 6.04 cmt. b (Tentative Draft No. 3, 2014). *See* Beckett & Harris, *supra* note 7, at 511 (arguing that the fiscal cost associated with criminal penalties “is an important check on government power”); Logan & Wright, *supra* note 2, at 1178 (“[R]equiring offenders to internalize the costs associated with their wrongdoing . . . weakens one of the key moderating influences in public safety politics.”).

48. *See* Beckett & Harris, *supra* note 7, at 527–28 (cautioning that systems for collection of correctional fees and fines do not necessarily realize a net financial gain).

49. *See* HUMAN RIGHTS WATCH, *supra* note 2.

cient means for reasonable living expenses and family obligations after compliance with the sanction.”<sup>50</sup> The MPC advocates a new concept of “reasonable financial subsistence” (RFS) that limits governments’ abilities to impose and collect financial tariffs.<sup>51</sup> This is an across-the-board prohibition that applies to all economic sanctions, including victim restitution.<sup>52</sup>

The RFS principle is required not because criminals deserve society’s munificence, but because it is believed to be a route to increased public safety. As discussed in Part I, the best available evidence suggests that economic sanctions have negative effects on offender rehabilitation and reintegration when they disrupt the fundamentals of stable work, housing, and family life—or provide incentives to seek earnings in the illegal economy.<sup>53</sup> Much like bankruptcy law, a primary goal of the sentencing system should be to reposition ex-offenders so they may become productive and successful participants in the law-abiding economy.<sup>54</sup>

The Code’s RFS principle calls for significant changes in the laws of all American jurisdictions. While federal constitutional law in theory cuts off the collectability of economic sanctions with reference to offenders’ “ability to pay” under *Bearden v. Georgia*,<sup>55</sup> this sets too low a floor for public-policy purposes.<sup>56</sup>

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50. MODEL PENAL CODE: SENTENCING § 6.04(6) (Tentative Draft No. 3, 2014). Subsection (7) of the same provision goes on to say that “[i]f the court refrains from imposing an economic sanction because of the limitation in subsection (6), the court may not substitute a prison sanction for the unavailable economic sanction.” *Id.* § 6.04(7).

51. *Id.* § 6.04 cmt. b (introducing the terminology and explaining that “economic sanctions are not viable for indigent or near-indigent offenders, and should not be imposed when they would choke off an offender’s ability to provide reasonable necessities of life for himself and his dependents”).

52. See MODEL PENAL CODE: SENTENCING § 6.04A cmt. c (Tentative Draft No. 3, 2014).

53. See *supra* note 46 and accompanying text.

54. See MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007) (stating that one general purpose of the sentencing system is the “reintegration of offenders into the law-abiding community”).

55. The Supreme Court stated in *Bearden*:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has

The RFS standard differs from *Bearden* in both its underpinnings and implementation. RFS is based on grounds of public policy, not minimum requirements of Due Process. It is intended to further offenders' chances to achieve financial stability and independence—a consideration that plays no role in constitutional analysis. There will be many instances in which an economic sanction cannot permissibly be imposed under subsection (6) even though the offender has the raw “ability to pay” the sanction, if doing so would leave the offender unable to meet the reasonable and minimal expenses of his own life and those of his dependents. Also, because constitutional ability-to-pay considerations usually do not arise until enforcement proceedings,<sup>57</sup> they do not act as a brake on the imposition of ex-

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made sufficient bona fide efforts to pay. . . .

. . . .

. . . By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

*Bearden v. Georgia*, 461 U.S. 660, 672, 674 (1983).

56. By many accounts, the *Bearden* principle has not been applied conscientiously by the courts. See AM. CIVIL LIBERTIES UNION, *supra* note 2, at 5 (“Today, courts across the United States routinely disregard the protections and principles the Supreme Court established in *Bearden v. Georgia* over twenty years ago. . . . [D]ay after day, indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them.”); BANNON ET AL., *supra* note 2, at 20 (“[Despite] constitutional protections, Brennan Center interviews with defenders and court personnel revealed that some jurisdictions ignore the requirement that courts inquire into ability to pay before utilizing debtors’ prison, while many others skirt the edges of the law by failing to evaluate a defendant’s ability to pay until after he or she has been arrested, or even jailed, for criminal justice debt, or by allowing defendants to ‘volunteer’ to be incarcerated.”); Beckett & Harris, *supra* note 7, at 524–25 (“[L]egal debtors continue to be arrested and incarcerated as a result of nonpayment with some regularity. Authorities have circumvented the constraint proffered in *Bearden v. Georgia* (1983) in several ways. . . . [I]t seems that ‘willful’ is a highly elastic concept, one that fails to create a meaningful barrier to the incarceration of indigent debtors. For example, one community corrections officer told us that in his view, ‘all nonpayment is willful’ because felons ‘can always go out and get a day job.’ Judges sometimes accept this reasoning. . . . In some jurisdictions, debtors are presented with the ‘option’ of paying off their debt by going to jail. In Washington State, this is called the ‘pay or stay’ option and is authorized by state statute.”); Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL’Y 555, 565 (2011) (“[E]ven the strongly articulated ‘ability-to-pay’ ruling developed in the Supreme Court’s decision in *Bearden v. Georgia* (1983) has been substantially diluted.”).

57. In most jurisdictions, judges are not required to assess offenders’ ability to pay before imposing economic sanctions. Instead, the consideration

cessively severe economic sanctions in the first instance—and the damage to an offender’s rehabilitative prospects may be done far in advance of a formal violations hearing.<sup>58</sup> Under the Code’s scheme, RFS must be adjudicated at the sentencing hearing itself.

The RFS provision supplements other limits on sentence severity in the MPC. The Code states separately that penalties may never be unjustly disproportionate. This is a statutory “subconstitutional” proportionality ceiling intended to regulate sentence severity more closely than the Supreme Court’s current Eighth Amendment jurisprudence.<sup>59</sup> In contemporary America, economic sanctions—alone or in combination—have been known to cross this line with regularity.<sup>60</sup>

Proportionality is an aggregate and gestalt concept in the MPC. When judging the economic effects of a criminal sentence, courts are directed to consider all the ways in which an

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comes up in the enforcement setting, and only when the enforcement authority (typically a judge or parole board) contemplates the use of imprisonment as a sanction for nonpayment. *See* AM. CIVIL LIBERTIES UNION, *supra* note 2, at 31; BANNON ET AL., *supra* note 2, at 13, 20; R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 260 (2006) (“When they impose fines, judges in many states’ systems rarely have information about the offender’s ability to pay.”).

58. The Brennan Center advocates for ability-to-pay determinations at sentencing, not in later proceedings. *See* BANNON ET AL., *supra* note 2, at (“Such determinations are necessary because once individuals are sentenced to pay criminal justice debt, they are immediately at risk of sanctions for nonpayment such as probation revocation and the loss of driving privileges, as well as other harms such as damaged credit and a loss of public benefits.”); *see also* AM. CIVIL LIBERTIES UNION, *supra* note 2, at 79 (“Judges should be required to determine defendants’ ability to pay at sentencing based on enumerated factors, including the defendants’ employment history and status, their financial situation at the time of sentencing, and their realistic prospects of being able to pay their legal debt.”).

59. *See* MODEL PENAL CODE: SENTENCING § 7.09(5)(b) (Preliminary Draft No. 10, 2014) (“Notwithstanding any other provision of the Code, the appellate courts may reverse or modify any sentence, including a sentence imposed under a mandatory penalty provision, on the ground that it is not proportionate to the gravity of the offense, the harms done to the crime victim, and the blameworthiness of the offender. The appellate court shall use its independent judgment when applying this provision.”); *id.* § 7.09(5)(b) cmt. f (“The [ALI] recommends creation of a subconstitutional power of proportionality review to reach miscarriages of penalty that would survive scrutiny under the Cruel and Unusual Punishment Clause.”).

60. One of the MPC’s fundamental purposes of sentencing is “to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.” MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

offender's economic standing has been affected by the legal system. In addition to direct monetary tariffs, numerous collateral consequences of conviction limit offenders' future employment prospects—and in some cases these add up to serious disadvantages. The Code states that, “[i]n evaluating the total [proportionality] of punishment . . . the court should consider the effects of collateral sanctions likely to be applied to the offender under state and federal law, to the extent these can reasonably be determined.”<sup>61</sup>

There is a serious administrative difficulty with the Code's RFS recommendation. It is doubtful that busy and under-resourced courts can make effective inquiries into an offender's assets and income in every case—especially in rapid-fire misdemeanor proceedings that begin and end in several minutes. A process of meaningful investigation, if one could be designed, might not be worth its costs. It is fair to ask whether there are workable solutions in sight.<sup>62</sup>

One approach would be to presume that offenders do not meet the financial threshold unless the government can prove otherwise. Available data suggest that eighty to ninety percent of criminal offenders in some jurisdictions qualify as indigent for purposes of the appointment of counsel.<sup>63</sup> A presumption of poverty is strongest for African American defendants, who by one estimate make use of appointed counsel nearly five times

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61. MODEL PENAL CODE: SENTENCING § 6.02(4) (Tentative Draft No. 3, 2014).

62. See Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1839 (2015) (noting that, although the revised MPC “takes pivotal steps to improve economic sanctions,” it “avoids tackling one of the key problems with economic sanctions in the states: defining ability-to-pay determinations”). The MPC's official Comment makes one suggestion on this score:

Some jurisdictions may choose to adopt particularized rules to help implement the broad principal stated in subsection (6). One provision of this kind was considered when drafting the revised Code. Although too specific to be included in § 6.04, the following language would be consistent with the spirit of subsection (6):

No economic sanction may be imposed on an indigent offender as defined by the state's eligibility rules for appointment of counsel in a criminal case. Qualification for or receipt of any of the following public benefits shall serve as evidence that the offender would not retain sufficient means for reasonable living expenses and family obligations after compliance with one or more economic sanctions.

MODEL PENAL CODE: SENTENCING § 6.04 cmt. h (Tentative Draft No. 3, 2014).

63. See BANNON ET AL., *supra* note 2, at 4.

as often as white defendants.<sup>64</sup> Generally, future earning power among those with criminal convictions is extremely low.<sup>65</sup> Offenders tend to come from disadvantaged neighborhoods, where they return after contact with the criminal justice system.<sup>66</sup> Among people released from incarceration, studies suggest that the average offender's earnings are below the poverty line for a single individual and well below the poverty line for a small family.<sup>67</sup>

An alternative approach would be to rely on offenders' sworn testimony concerning their assets and income in the absence of other evidence. There will be understandable skepticism about the reliability of such testimony—despite the fact that defendants expose themselves to prosecution for perjury if they testify falsely. Offenders' testimony may still be the best evidence readily at hand. Many will not perjure themselves, either because they do not have to (i.e., they really qualify for the RFS bar) or because they feel a moral and legal obligation to tell the truth. We cannot assume that everyone will lie at an economic sanctions hearing just as we should not assume that most police officers "testilie" at suppression hearings.<sup>68</sup> Nonetheless, a substantial number of errors will slip through when

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64. *See id.*

65. *See* WESTERN, *supra* note 46, at 108–30 (describing how incarceration deepens poverty by reducing future employment prospects and earnings).

66. *See generally* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007) (detailing the effects of mass incarceration on poor communities); ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT (2012) (exploring neighborhood inequality and the enduring importance of place and community in relation to social phenomena such as crime); W. J. WILSON, *supra* note 27 (examining urban poverty in the United States and suggesting a comprehensive way to address it).

67. A recent study estimated that formerly incarcerated white men had an average yearly income of \$11,140 and black men \$8,012. Harris et al., *supra* note 2, at 1776 tbl.7. A national study of self-report data from 2004 found that, after incarceration, the average white offender had annual earnings of only \$9,760, with the average black offender earning only \$7,020. WESTERN, *supra* note 46, at 116 tbl.5.2. For 2014, federal guidelines placed the poverty line for a single individual at an income of \$11,670 per year. For a family of two the poverty line was \$15,730; for a family of three it was \$19,790. 2014 Poverty Guidelines, 79 Fed. Reg. 3593, 3593 (Jan. 22, 2014); *see also* Corbett, *supra* note 8, at 1720–21 (collecting financial data from a state in the northeastern United States showing that "at the time of arraignment across three of the busier jurisdictions, 63% of the defendants had been determined to be indigent. In terms of employment across the state as a whole, of those placed under active supervision, 48% were unemployed at the time or arrest and 55% reported that they were currently experiencing financial problems.").

68. *See* Kevin R. Reitz, *Testilying As a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1062–64 (1996).

perjury goes undetected. In cases where the government strongly suspects it is being bamboozled, it is not completely helpless—although an investment of time and effort would be required to meet its burden of persuasion that the defendant is lying.

At the end of the day, solutions like these may be the “least worst” of available options. Given what we know of offenders’ financial standing in general, the playing field would at least be tilted in the direction of reality. The “worst worst” scenario, on the other hand, may be exactly what we have today, when many courts sanction offenders for nonpayment of financial penalties without credible inquiry into their ability to pay.<sup>69</sup>

We should not be too hard on the MPC for failing to solve the fact-finding conundrum of defendants’ true financial means. Nor should the RFS proposal be set aside because of its necessary crudeness of implementation. The administrative difficulty of determining offenders’ financial status is not a weakness unique to the Code’s RFS proposal. Some such inquiry is mandated by constitutional law in any system of economic penalties where incarceration is used as a backup sanction. *Bearden v. Georgia* is itself an unadministrable constitutional command—or one incapable of reasonable precision—just as we find RFS to be. In application, *Bearden*’s ability-to-pay standard has proven a weak instrument, and is frequently disregarded under a veil of ignorance and generalized suspicions that offenders have assets they are concealing from the authorities or private collectors.

Poor information is the elephant in the room in any regime of financial penalties. No one has yet found a successful answer to the problem; and yet we must aspire to the most satisfactory system we can design.

#### B. ABOLITION OF COSTS, FEES, AND ASSESSMENTS

While the RFS provision speaks to economic sanctions across the board, the Model Penal Code (Second) contains a number of important recommendations that apply to specific types of financial penalties. Most significantly, it recommends two alternative provisions on the subject of costs, fees, and assessments, defined as follows: “Costs, fees, and assessments . . . include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with

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69. See *supra* notes 55–58 and accompanying text.

the investigation and prosecution of the offender or correctional services provided to the offender.”<sup>70</sup>

In its first alternative provision on costs, fees, and assessments, the MPC states categorically that “[n]o convicted offender . . . shall be held responsible for the payment of costs, fees, and assessments.”<sup>71</sup> This policy is the clear first preference of the ALI. In a second alternative provision, the Code would reluctantly tolerate the existence of costs, fees, and assessments, subject to a host of substantive and procedural limitations.<sup>72</sup>

User fees and related costs and surcharges have grown enormously in numbers, varieties, and amounts since the time of the original Code, and they continue to proliferate.<sup>73</sup> They are often assessed at different levels of government within a state,<sup>74</sup> and no state maintains adequate jurisdiction-wide records of their use.<sup>75</sup> There is evidence that these assessments are imposed with little uniformity,<sup>76</sup> and with no thought given to their effects on proportionality of sentences or the offenders’ efforts to rebuild a life in the free community. Other countries do

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70. MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(1) (Tentative Draft No. 3, 2014).

71. *Id.* § 6.04D(1) (ban on costs, fees, and assessments also extending to deferred prosecutions and adjudications). Professor Ruback, writing for this issue of the *Minnesota Law Review*, reaches the same conclusion as the new MPC. See Ruback, *supra* note 25, at 1782 (“Costs and fees are the least defensible sanction, and I argue that they should be prohibited.”).

72. MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(2)–(4) (Tentative Draft No. 3, 2014).

73. See *supra* note 7.

74. A study of economic sanctions imposed on convicted felony and misdemeanor offenders in Pennsylvania during 2006–2007 found a staggering total of 2,629 different types of economic sanctions in use across the state, at different levels of government. Ruback & Clark, *supra* note 2, at 761; see also Beckett & Harris, *supra* note 7, at 514 (observing that the assessment of fines and fees can vary enormously from county to county within the same state).

75. States maintain little data on the assessment and collection of costs and fees, and are often reluctant to make the information they have publicly available. See AM. CIVIL LIBERTIES UNION, *supra* note 2, at 9, 11 (recommending that “[a]ll jurisdictions should collect and publish data regarding the assessment and collection of LFOs [legal financial obligations], the costs of collections (including the cost of incarceration), and how collected funds are distributed, broken down by race, type of crime, geographical location, and type of court”).

76. One study reported that the total amount of fines and fees does not bear recognizable relationship to the seriousness of offenders’ crimes. For example, drug offenders—especially Latino drug offenders—were assessed greater monetary sanctions than violent offenders. Alexes Harris et al., *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 253–54 (2011).



not appear to tax offenders with criminal justice costs and fees to the same extent as the United States.<sup>77</sup>

The MPC may have been mistaken to include alternative provisions on this subject rather than a single, forceful message—but there was a rationale for doing so. Alternative recommendations find their way into the MPC for many reasons. Sometimes the Code sees two approaches as equally meritorious and recommends that a state follow either fork in the road, whichever best fits local needs.<sup>78</sup> In other instances, the Code offers alternative provisions while stating a strong preference for one over the other.<sup>79</sup> The most important example of this is the MPC's stance on mandatory minimum sentences. The ALI's primary position is that state legislatures should enact no mandatory criminal sentences and should repeal all that have been enacted.<sup>80</sup> Some people argue that the ALI should stop there and speak no further on the subject. Part of their argument is that the Code may appear to be conceding the validity of mandatory sentences if it acknowledges their existence.

There is another viewpoint, however, that it would be irresponsible to stand on principle and ignore the mandatory punishment laws that have been enacted in every American jurisdiction; if there are useful policy suggestions that fall short of total abolition, an influential organization like the ALI should be creating and promoting them. In the new MPC, the latter perspective prevailed.<sup>81</sup> Thus, the Code includes numerous pro-

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77. On the rarity of the use of criminal justice costs and fees outside the United States, see O'Malley, *supra* note 19, at 547–48 (“Fees . . . are much less prominent outside the United States, almost never being levied for imprisonment and only in recent years being levied in some jurisdictions for victim compensation and costs of fine enforcement.”).

78. For example, the MPC includes two recommended provisions on the composition of a sentencing commission. See MODEL PENAL CODE: SENTENCING § 6A.02, Alternative § 6A.02 (Tentative Draft No. 1, 2007) (alternative plans for “Membership of Sentencing Commission”); *id.* § 6A.02, Alternative § 6A.02 cmt. a (“The alternative provisions here supply workable illustrations for state legislators. Individual jurisdictions are encouraged to adapt these templates to fit their own circumstances.”).

79. For example, the new MPC recommends that every state adopt a system of presumptive sentencing guidelines, but includes backup recommendations in favor of the promulgation of advisory guidelines as a second-best sentencing structure. See *id.* § 1.02(2) cmt. p.

80. See MODEL PENAL CODE: SENTENCING § 6.06(3) (Tentative Draft No. 2, 2011) (“The [sentencing] court is not required to impose a minimum term of imprisonment for any offense under this Code. This provision supersedes any contrary provision in the Code.”); *id.* § 6.06(3) cmt. a (“In jurisdictions that have enacted mandatory penalties, subsection (3) makes clear that the intent of the legislature is to supersede all such preexisting laws.”).

81. See *id.* § 6.06 cmt. d (“Taking the world of American criminal justice

visions that soften the impact of mandatory sentencing laws wherever they exist.<sup>82</sup> These fall-back mechanisms are not meant to subtract from the ALI's general prohibitory stance—although there is a risk they will be seen that way. Instead, they are second-order recommendations and concessions to reality—resting on the familiar bromide that the perfect should not be the enemy of the good.

Similarly with respect to costs, fees, and assessments, the Code takes a categorical abolitionist position, but recognizes that most state and local governments will not instantly adhere to this pronouncement. The prospects of mass abrogation of revenue-raising user fees and other surcharges are probably about the same as for a nationwide repeal of mandatory penalties.<sup>83</sup> Realistically, in the short- or middle-term, the best-case

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as it is, and as it is likely to remain for some time, the [ALI] concluded that it would be irresponsible to rest upon a categorical policy of condemnation of mandatory sentences, without also offering second-order recommendations for significant incremental change.”).

82. See MODEL PENAL CODE: SENTENCING § 7.XX(3)(b) (Tentative Draft No. 1, 2007) (giving sentencing judges a “departure” power to deviate from the terms of mandatory-penalty provisions); *id.* § 6B.03(6) (prohibiting sentencing commissions from formulating guidelines based on the severity levels of mandatory-punishment statutes); MODEL PENAL CODE: SENTENCING § 6B.09(3) (Tentative Draft No. 2, 2011) (authorizing judges to deviate from a mandatory-minimum sentence when an offender otherwise subject to the mandatory penalty is identified through actuarial risk assessment to pose an unusually low risk of recidivism); *id.* § 6.11A(f) (providing that, under a new provision for the sentencing of offenders under the age of eighteen at the time of their offenses, judges are not bound by otherwise applicable mandatory sentences); *id.* § 305.1(3) (providing that good-time credits are always to be subtracted from the minimum term of a mandated prison sentence); *id.* § 305.6(1), (5) (showing a new sentence-modification power (the so-called “second-look provision”), which engages after a prisoner has served fifteen years, expressly supersedes any mandatory-minimum penalty); *id.* § 305.7(8) (providing that compassionate release provision for aged and infirm inmates, or for extraordinary and compelling circumstances, expressly supersedes any mandatory-minimum penalty); MODEL PENAL CODE: SENTENCING § 6x.01(3) (Tentative Draft No. 3, 2014) (granting sentencing courts the power to relieve mandatory effect of certain collateral consequences of conviction, rendering their application discretionary); MODEL PENAL CODE: SENTENCING § 6.02B(3) (Preliminary Draft No. 10, 2014) (giving trial courts authority to “defer adjudication for an offense that carries a mandatory minimum term of imprisonment if the court finds that the mandatory penalty would not best serve the purposes of sentencing”); *id.* § 6.04A(1) (providing that imposition of victim restitution order should not be mandatory, but should be discretionary with the sentencing court); *id.* § 7.09(5)(b) (granting appellate courts authority to reverse or modify a mandatory penalty if it “is not proportionate to the gravity of the offense, the harms done to the crime victim, and the blameworthiness of the offender”).

83. See Burch, *supra* note 2, at 539 (“[T]he few studies that are available suggest that the public overwhelmingly supports the notion that offenders, particularly prisoners, should help pay for the cost of their punishment.”).

scenario is that a small number of jurisdictions will follow the MPC approach, but most will not.<sup>84</sup> The Code therefore offers a series of second-best recommendations addressed to states that do not implement a blanket prohibition. As with mandatory minimums, the ALI concluded it would be irresponsible to say nothing about a serious problem that will almost certainly persist in most jurisdictions for years to come. In the long run, every incremental step toward reducing criminal justice systems' reliance on costs, fees, and assessments makes their eventual abolition more practicable.

The Code's preferred position—that costs, fees, and assessments should be abolished—rests chiefly on the premise that such financial encumbrances do not serve the goals of the sentencing system, but are imposed for the side purpose of revenue generation. The self-interest of courts, correctional agencies, and service providers is at the forefront; other public goals are ignored or sacrificed. This creates serious conflicts of interest that should not be tolerated in a system that aspires to the even-handed administration of criminal law.<sup>85</sup>

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84. For example, New York state currently allows for probation supervision fees only in drunk driving cases. The New York Attorney General has issued an opinion stating that, in the absence of legislative authorization, other types of correctional fees may not be imposed by local jurisdictions. See N.Y. EXEC. LAW § 257-c(1), (4) (2014); Informal Op. N.Y. Att'y Gen. No. 2003-4 (2003), available at <http://www.ag.ny.gov/sites/default/files/opinion/I%202003-4%20pw.pdf>; KELLY LYN MITCHELL ET AL., ROBINA INSTIT. OF CRIMINAL LAW & CRIMINAL JUSTICE, PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES, at 59 (2014), available at <http://www.robinainstitute.org/wp-content/uploads/Robina-Report-2015-WEB.pdf>.

85. On the problem of conflicts of interest surrounding criminal justice costs and fees, see BANNON ET AL., *supra* note 2, at 2 (“Overdependence on fee revenue compromises the traditional functions of courts and correctional agencies. When courts are pressured to act, in essence, as collection arms of the state, their traditional independence suffers. When probation and parole officers must devote time to fee collection instead of public safety and rehabilitation, they too compromise their roles.”). Evidence that conflict-of-interest problems worsened during the Great Recession is reported in AM. CIVIL LIBERTIES UNION, *supra* note 2, at 8 (“Imprisoning those who fail to pay fines and court costs is a relatively recent and growing phenomenon: States and counties, hard-pressed to find revenue to shore up failing budgets, see a ready source of funds in defendants who can be assessed LFOs [legal financial obligations] that must be repaid on pain of imprisonment, and have grown more aggressive in their collection efforts. Courts nationwide have assessed LFOs in ways that clearly reflect their increasing reliance on funding from some of the poorest defendants who appear before them. . . . Because many court and criminal justice systems are inadequately funded, judges view LFOs as a critical revenue stream.”). The Council of State Governments recommended that states “[c]urb the extent to which the operations of criminal justice agencies rely on the collection of fines, fees, and surcharges from people released from prisons and jails.” MCLEAN & THOMPSON, *supra* note 2, at 34. The National Center for

Agencies and private providers have perverse incentive to collect fees even if it damages offenders' chances of rehabilitation and reintegration. Supervision can become primarily an exercise in fee collection rather than the provision of services. It is common practice to extend probation terms for nonpayment of financial penalties, even if all other probation conditions have been met—and it may be to an agency's advantage to keep “paying customers” on probation or parole even if early termination would otherwise be warranted. In addition, offenders are often barred from participating in needed treatment programs when they are unable to pay required program fees.<sup>86</sup>

It used to be said that probation officers struggled with the necessity of “wearing two hats” in the performance of their jobs: that of the cop and of the social worker. Now there is a third hat: the bill collector, conjuring images of a Dickensian Mr. Pancks.<sup>87</sup> Some probation agencies have reported that they re-

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State Courts has admonished that the concept of self-supporting courts “is not consistent with judicial ethics or the demands of due process.” ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, *FUNDING THE STATE COURTS: ISSUES AND APPROACHES* 50 (1996). The American Bar Association has recommended that courts should have “a predictable general funding stream that is not tied to fee generation.” AM. BAR ASS'N, *BLACK LETTER RECOMMENDATIONS OF THE ABA COMMISSION ON STATE COURT FUNDING* 7 (2004). One essential reform is to ensure that the agency of government that imposes and collects costs and fees not be the agency that benefits from those monies. *See* AM. CIVIL LIBERTIES UNION, *supra* note 2, at 28 (“[T]o eliminate judicial incentives to assess high fines and fees against defendants . . . revenue should be paid into the city's general budget, not earmarked for the courts.”). The species of conflict of interest noted here may be especially problematic when payment obligations are imposed and administered by private service providers rather than governmental entities, such as private prisons and jails, and private correctional-treatment contractors. *See id.* at 64.

86. *See* AM. CIVIL LIBERTIES UNION, *supra* note 2, at 35 (reporting that “courts frequently extend individuals' probation on the ground of nonpayment of these fees or costs, even though no state statutes specifically authorize courts to extend probation on this ground”); BANNON ET AL., *supra* note 2, at 25 (finding that thirteen of fifteen states studied allowed probation terms to be extended for failure to pay off criminal justice debt).

87. The allusion is to CHARLES DICKENS, *LITTLE DORRIT* 797 (Oxford Univ. Press 1970) (1857). The “Patriarch” Mr. Casby repeatedly told his rent collector in Bleeding Heart Yard, a deeply impoverished London neighborhood: “You are made for nothing else, Mr. Pancks. . . . You are paid to squeeze and you must squeeze to pay.” *Id.* For a description of the bill-collector function of community supervision officers, see BANNON ET AL., *supra* note 2, at 31 (“Collection-related tasks include monitoring payments, setting up payment plans, dunning persons under supervision, and taking punitive actions such as reporting failures to pay. Even when jurisdictions do not typically seek probation revocation solely on the basis of nonpayment, many interviewees reported that supervision officers will threaten revocation in an effort to encourage payments. . . . These enforcement responsibilities can be a distraction from the more important duties that probation and parole officers have. In particular,

ceive as much as fifty percent of their budgets through the collection of user fees—and many private probation contractors subsist entirely on monies wrung out of supervised offenders.<sup>88</sup> There are reports of agencies collecting fees in excess of their actual expenditures on particular offenders—and protections against such practices are virtually nonexistent. In some cases, institutional priorities to collect self-sustaining user fees can cut the chances that victims will receive full restitution. By anecdotal report, these dynamics can add up to excruciating discomfort among conscientious probation and parole officers and administrators—they know the user-fee system is counterproductive and unfair, but they also know their agencies cannot survive without it.<sup>89</sup>

It is often said that, without the support of supervision fees and reimbursements, important services and rehabilitative programs would not be available to probationers and parolees.<sup>90</sup> This mobilizes the treacherous argument that user fees are actually for offenders' "own good." American criminal justice policymakers have good historical reason to beware of this trope.<sup>91</sup> We should pause to reflect on how strange an argument this is as it plays out in the lives of offenders.

As a group, convicted offenders still under the jurisdiction of the criminal courts may be the worst candidates in America

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given their often crushing caseloads, their highest priority is to promote public safety and monitor individuals at risk of re-offending. Supervision officers are aware of these consequences and some find debt collection to be at odds with their main purpose: to serve society by ensuring that individuals do not commit new offenses."); *see also* Corbett, *supra* note 8, at 1712 (quoting former Texas Probation Director Dan Beto as saying "with [the] introduction of these financial conditions of probation, the role of the probation officer changed; no longer are they agents of change, but rather they have assumed the job of collection agent. I am aware of some probation departments where more emphasis is placed on probation officer collection rates than probation success rates.").

88. *See* Petersilia, *supra* note 43, at 171.

89. The original Code hinted at a similar view of the conflict-of-interest problem—although it was a significantly smaller problem in 1962 than it is today. As explained in the official Comment to original section 7.02: "The use of a fine also has distinctly negative value for the administration of penal law when its real rationale is the financial advantage of the agency levying the fine." MODEL PENAL CODE AND COMMENTARIES PART I §§ 6.01–7.09, 7.02 cmt. 1 (1985).

90. *See supra* note 54.

91. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESS OF AMERICA (2002) (giving an account of the excesses of indeterminate sentencing and the uncritical attitude often taken toward repressive measures that could be prettified as being in offenders' best interests).

to be designated as special taxpayers to make up shortfalls in legislative appropriations for correctional programming. They by and large come from the lowest rungs of the economic ladder and are struggling with the stark employment-market disadvantages that come along with criminal convictions. State and federal laws bar them from many jobs or job-related licenses. Much more powerfully, private employers are reluctant to hire persons with criminal records—an effect that appears to especially disadvantage African Americans.<sup>92</sup> To require offenders to pay for government interventions that are forced upon them is regressive taxation taken to an extreme.

The situation might be better if we had confidence that the surveillance, control, and services performed by correctional agencies were beneficial to their subjects. It is surprisingly difficult, however, to show reliable improvements in people's lives because they have undergone sentences of prison, jail, probation, or parole. Professionals within the criminal justice system assume too readily the worth of their own interventions, while having limited exposure to the life circumstances of their clientele. Ron Corbett has written (for this issue of the *Minnesota Law Review*) that must recognize forget that many offenders are “flat broke.”<sup>93</sup> The majority of offenders consider the imposition of fees to be unfair—and these perceptions of injustice work against the process of rehabilitation.<sup>94</sup> Considering the hardship imposed on broke offenders when correctional fees are assessed and vigorously collected, and the uncertain benefits offenders receive, they are not getting their money's worth.

The Code includes a number of second-order recommendations for jurisdictions that cannot wholly discontinue their systems of user fees. Together, they make up a muscular program. First, under the Code's RFS standard, no costs or fees may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after their payment.<sup>95</sup> This will eliminate the imposition of many costs,

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92. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

93. See Corbett, *supra* note 8, at 1713. (“[I]f you're on probation in the large urban areas, where most probationers reside, you're often flat broke.”).

94. Pleggenkuhle, *supra* note 2, at 126–27.

95. MODEL PENAL CODE: SENTENCING § 6.04(6) (Tentative Draft No. 3, 2014). In addition, alternative section 6.04D(2) provides: “The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correc-

fees, and surcharges in the first instance. Second, the new Code provides that all costs and fees must be approved in advance by sentencing courts, and may not be levied, increased, or supplemented with surcharges at a later time. In a related provision, sentencing courts are required to set a total dollar ceiling upon all financial sanctions that may be collected from an individual defendant. Third, no costs, fees, or assessments may be imposed in excess of actual expenditures in the offender's case.<sup>96</sup> Fourth, the agencies or entities charged with collection of the fees are barred from retaining the monies collected, and collection surcharges or penalties may not be added to the amounts owed.<sup>97</sup> Fifth, the imposition of costs, fees, and assessments

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tional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community." *Id.* § 6.04D, Alternative § 6.04D(2).

96. *Id.* § 6.04D, Alternative § 6.04D(3) ("No costs, fees, or assessments may be imposed by any agency or entity in the absence of approval by the sentencing court.").

97. MODEL PENAL CODE: SENTENCING § 6.04(8) cmt. j (Tentative Draft No. 3, 2014) ("§ 6.04(8) states that, 'The agencies or entities charged with collection of economic sanctions may not be the recipients of monies collected and may not impose fees on offenders for delinquent payments or services rendered.' Subsection (8) also makes specific reference to the problem of late fees, payment-plan fees, and interest charges against offenders who are unable to make immediate payment of costs, fees, and assessments. These so-called 'poverty penalties' can add up to appreciable sums. For example, among current state laws, 30 to 40 percent surcharges for delinquent payments are common, while some states or collections agencies impose late fees ranging from \$10 to \$300 per missed payment. Some states also charge offenders fees for entering into payment plans, without exemption for poverty." See BANNON ET AL., *supra* note 2, at 17–18 ("In thirteen states [of the fifteen states in the study], individuals can be charged interest or late fees if they fall behind on payments—even if they lack any resources to make the payments or have conflicting obligations such as child support. The added debt can be significant . . ."). For examples of "poverty penalties" in the form of late fees, see ALA. CODE § 12-17-225.4 (2012); ARIZ. REV. STAT. § 12-116.03 (2015); CAL. PENAL CODE § 1214.1(a) (West 2014); FLA. STAT. § 28.246(6) (2014); 70 ILL. COMP. STAT. 5/5-9-3(e) (2014); N.C. GEN. STAT. § 7A-321(b)(1) (2011); OHIO REV. CODE ANN. § 2335.19(B) (West 2002); 42 PA. CONS. STAT. § 9730.1(b)(2) (2012); TEX. CODE CRIM. PROC. art. 103.0031(b) (West 2005). For examples of payment-plan fees, see FLA. STAT. § 28.24(26)(b)–(c) (2014); VA. CODE ANN. § 19.2-354(A) (2012).

The principle in section 6.04(8) is also reflected in specific provisions relating to asset forfeitures and criminal justice costs, fees, and assessments. See MODEL PENAL CODE: SENTENCING § 6.04C(2) (Tentative Draft No. 3, 2014) ("The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies."); *id.* § 6.04C(5) ("A state or local law-enforcement agency that has seized forfeitable assets may not retain the assets, or proceeds from the assets, for its own use."); *id.* § 6.04D(1), First Alternative § 6.04D(1) ("No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B,

cannot violate statutory principles of sentence proportionality, under which all economic sanctions must be aggregated with other sentence provisions and may not in total be disproportionate to the seriousness of the underlying offense.<sup>98</sup> Sixth, the Code provides that economic sanctions other than victim restitution may not be made formal “conditions” of probation or postrelease supervision—meaning that nonpayment cannot be a basis for sentence revocation.<sup>99</sup>

In most jurisdictions, this combination of safeguards would work a major improvement in the administration of costs, fees, and assessments, even assuming the Code’s first-order recommendation of total abolition has been rejected or postponed.

### CONCLUSION

Unlike many other parts of the Model Penal Code (Second), the new economic sanctions provisions are not inspired by innovations or reforms that have been tried in a number of states, whose successes and failures can be evaluated with confidence. There is no stock of “best practices” to be the foundation for model legislation. Nor is the new MPC based on solid empirical research into the effects of financial penalties on offenders and recidivism rates, because no such knowledge exists. Instead, the Code has relied on the emerging literature on the pell-mell growth of economic sanctions and their *practical* effects on the lives of offenders—including their work lives, families, and abilities to keep their heads above water in a struggling economy when burdened by a criminal record. Jessica Eaglin and Barry Ruback, also contributors to this issue of the *Minnesota Law Review*, are among the few researchers who have drawn attention to these issues. Alexes Harris has also been a leading voice, along with Katherine Beckett and others represented in the footnotes to this Article. We are fortunate that the existing studies, if small in quantity, have been of high

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shall be held responsible for the payment of costs, fees, and assessments.”); *id.* § 6.04D cmt. d (“In current law, the agencies that impose costs, fees, and assessments are frequently the beneficiaries of any funds received. The Code treats this as a conflict of interest . . .”).

98. MODEL PENAL CODE: SENTENCING § 6.02(4) (Tentative Draft No. 3, 2014); MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

99. See MODEL PENAL CODE: SENTENCING § 6.03(8)(i) (Tentative Draft No. 3, 2014) (stating that permissible conditions of probation include “[g]ood-faith efforts to make payment of victim compensation under § 6.04A, but compliance with any other economic sanction shall not be a permissible condition of probation”); *id.* § 6.09(8)(i) (representing the parallel provision for postrelease supervision).



quality. Now joined by the MPC, they make the case that America's economic sanctioning policies deserve a share of the attention that is usually given to other forms of punishment.

## APPENDIX A

## MODEL PENAL CODE: SENTENCING

Approved & Recommended Economic Sanctions Provisions  
(Current through Feb. 2015)

*Economic sanctions provisions from Tentative Draft No. 3 (Apr. 24, 2014) (approved with amendments at the American Law Institute 2014 Annual Meeting, May 19, 2014); and revised section 6.04A from Preliminary Draft No. 10 (Sept. 3, 2014) (Reporters' recommendations, not yet approved by the American Law Institute)*

§ 6.04. Economic Sanctions; General Provisions.<sup>100</sup>

(1) The court may impose a sentence that includes one or more economic sanctions under §§ 6.04A through 6.04D for any felony or misdemeanor.

(2) The court shall fix the total amount of all economic sanctions that may be imposed on an offender, and no agency or entity may assess or collect economic sanctions in excess of the amount approved by the court.

(3) The court may require immediate payment of an economic sanction when the offender has sufficient means to do so, or may order payment in installments.

(4) The time period for enforcement of an economic sanction [other than victim restitution]<sup>101</sup> shall not exceed three years from the date sentence is imposed or the offender is released from incarceration, whichever is later. If an economic sanction has not been paid as required, it may be reduced to the form of a civil judgment.

(5) When imposing economic sanctions, the court shall apply any relevant sentencing guidelines.

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100. This Section was approved as amended by vote of the ALI membership at the 2014 Annual Meeting. Before amendment, subsection (6) provided as follows: "(6) No economic sanction [other than victim compensation] may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction."

101. A note on terminology is needed here. Tentative Draft No. 3 contained numerous references to "victim compensation" when referring to payments made by offenders to victims as part of sentencing proceedings. This language has been changed throughout this Appendix. In current drafting, the term "victim compensation" has been replaced by the more familiar term "victim restitution"—except where the draft refers to victim compensation funds administered by state agencies outside the court system. The Reporters received nearly unanimous feedback that the use of the word "compensation" to mean "restitution" by offenders was confusing and contrary to familiar usage. See MODEL PENAL CODE: SENTENCING § 6.04A and Comment (Preliminary Draft No. 10, 2014).

(6) No economic sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.

(7) If the court refrains from imposing an economic sanction because of the limitation in subsection (6), the court may not substitute a prison sanction for the unavailable economic sanction.

(8) The agencies or entities charged with collection of economic sanctions may not be the recipients of monies collected and may not impose fees on offenders for delinquent payments or services rendered.

(9) The courts are encouraged to offer incentives to offenders who meet identified goals toward satisfaction of economic sanctions, such as payment of installments within a designated time period. Incentives contemplated by this subsection include shortening of a probation or postrelease-supervision term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim restitution].

(10) If the court imposes multiple economic sanctions including victim restitution, the court shall order that payment of victim restitution take priority over the other economic sanctions.

(11) The court may modify or remove an economic sanction at any time. The court shall modify an economic sanction found to be inconsistent with this Section.

§ 6.04A. Victim Restitution.<sup>102</sup>

(1) The sentencing court may order that the offender make restitution to the victim for economic losses suffered as a direct result of the offense of conviction, provided the amount of restitution can be calculated with reasonable accuracy.

(2) The purposes of victim restitution are to compensate victims for injuries suffered as a direct result of criminal conduct and promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims. Victim restitution may not be imposed for the purpose of punishment.

(3) For purposes of this Section, a "victim" is any person who has suffered direct physical, emotional, or financial harm as the result of the commission or attempted commission of a criminal offense. If dead or incapacitated, the victim may be represented by the victim's estate, spouse, parent, legal guardian, natural or adopted child, sibling, grandparent, significant other, or other lawful representative, as determined by the sentencing court.

(4) "Economic losses" under this Section include the cost of

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102. This Section has been revised since Tentative Draft No. 3 (an earlier version of section 6.04A approved with one amendment, May 19, 2014) and has not itself been approved. The revised section 6.04A was first presented in Preliminary Draft No. 10 (Sept. 3, 2014). None of the changes suggested by the Reporters in the newly-revised section 6.04A subtracts from the substance of the provision that was approved at the 2014 Annual Meeting, but the revised provision contains much new material. The black-letter text will no doubt be revised substantially before being formally approved. All of the revisions proposed in Preliminary Draft No. 10 contain implementation detail urged upon the Reporters by many members in their comments from the floor at the Annual Meeting. The pre-meeting draft of the provision read as follows:

§ 6.04A. Victim Compensation [terminology later changed to "Victim Restitution"].

(1) The court shall order victim compensation when a crime victim has suffered injuries that would support an award of compensatory damages under state law, if the amount of compensation can be calculated with reasonable accuracy.

(2) The purposes of victim compensation are to compensate crime victims for injuries suffered as a result of criminal conduct and promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims.

(3) When an offender has caused losses that would be compensable under this Section, but there is no identifiable victim in the case, the offender may be ordered to make an equivalent payment into a victims' compensation fund.

MODEL PENAL CODE: SENTENCING § 6.04A (Tentative Draft No. 3, 2014). By vote of the membership at the 2014 Annual Meeting, imposition of victim restitution was made discretionary rather than mandatory. Thus, the word "shall" in subsection (1) above was changed to "may."

replacing or repairing property, reasonable expenses related to medical care, dental care, mental-health care, and rehabilitation, loss of income, and reasonable funeral expenses.

(5) “Economic losses” under this Section do not include general, exemplary, or punitive damages, losses that require estimation of consequential damages, such as pain and suffering or lost profits, or losses attributable to victims’ failure to take reasonable steps to mitigate their losses.

(6) The sentencing court shall take the financial circumstances of the defendant into consideration when deciding whether to order victim restitution under this Section and the amount of the order; and, if necessary to comply with § 6.04(6), the sentencing court shall order partial restitution to the victim or shall refrain from awarding restitution.

(7) When more than one victim has suffered economic losses as a direct result of the offense of conviction, the court shall determine priority among the victims on the basis of the seriousness of the losses each victim has suffered, their economic circumstances, and other equitable considerations.

(8) When the criminal conduct of more than one person has caused a victim’s economic losses under this Section, including persons not before the court, the court shall set the amount of restitution owed by an individual offender to reflect his or her relative role in the causal process that brought about the victim’s losses. In exercising its discretion under this subsection, the sentencing court should consider the following factors:

(a) The number of persons believed to have contributed to the victim’s total economic losses.

(b) The degree to which the offender played a direct or major role, relative to other persons, in bringing about the victim’s total economic losses.

(c) Any other facts relevant to the defendant’s relative causal role in bringing about the victim’s economic losses.

(9) The sentencing court shall determine the amount of losses payable by the defendant in the instant case by a preponderance of the evidence.

(10) A restitution order under this Section shall not preclude the victim from proceeding in a civil action to recover damages from the offender. Any amount paid to a victim under this Section shall be set off against any amount later recovered as compensatory damages by the victim in a civil proceeding. If the victim has recovered economic losses as defined in this Section prior to sentencing, the court shall give credit for that recovery when calculating the amount of restitution to be ordered

at sentencing.

(11) When an offender has caused economic losses that would be payable as restitution under this Section, but there is no identifiable victim in the case, the sentencing court may order the offender to make an equivalent payment into the state's victims' compensation fund.

§ 6.04B. Fines.<sup>103</sup>

(1) A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

- (a) [\$200,000] in the case of a felony of the first degree;
- (b) [\$100,000] in the case of a felony of the second degree;
- (c) [\$50,000] in the case of a felony of the third degree;
- (d) [\$25,000] in the case of a felony of the fourth degree;
- (e) [\$10,000] in the case of a felony of the fifth degree;

*[The number and gradations of maximum authorized fine amounts will depend on the number of felony grades created in § 6.01.]*

- (f) [\$5,000] in the case of a misdemeanor; and
- (g) [\$1,000] in the case of a petty misdemeanor.
- (h) An amount up to [three times] the pecuniary gain derived from the offense by the offender or [three times] the loss or damage suffered by crime victims as a result of the offense of conviction.

(2) The purposes of fines are to exact proportionate punishments and further the goals of general deterrence and offender rehabilitation without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

(3) The [sentencing commission] [state supreme court] is authorized to promulgate a means-based fine plan. Means-based fines, for purposes of this Section, are fines that are adjusted in amount in relation to the wealth and/or income of defendants, so that the punitive force of financial penalties will be comparable for offenders of varying economic means. One example of a means-based fine contemplated in this Section is the

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103. This Section was approved as amended by vote of the ALI membership at the 2014 Annual Meeting. Subsection (1)(h) was amended to reduce the multipliers stated in brackets from five to three. The pre-meeting draft of subsection (1)(h) provided for maximum fines in "[a]n amount up to [five times] the pecuniary gain derived from the offense by the offender or [five times] the loss or damage suffered by crime victims as a result of the offense of conviction." MODEL PENAL CODE: SENTENCING § 6.04B(1)(h) (Tentative Draft No. 3, 2014).

“day fine,” which assigns fine amounts with reference to units of an offender’s daily net income.

(4) Means-based fine amounts shall be calculated with reference to:

(a) the purposes in subsection (2); and

(b) the net income of the defendant, adjusted for the number of dependents supported by the defendant, or other criteria reasonably calculated to measure the wealth, income, and family obligations of the defendant.

(5) Means-based fines under the plan may exceed the maximum fine amounts in subsection (1).

(6) The means-based fine plan must include procedures to provide the courts with reasonably accurate information about the defendant’s financial circumstances as needed for the calculation of means-based fine amounts.

(7) A means-based fine shall function as a substitute for a fine that could otherwise have been imposed under subsection (1), and may not be imposed in addition to such a fine.

§ 6.04C. Asset Forfeitures.<sup>104</sup>

(1) The sentencing court may order that assets be forfeited following an offender’s conviction for a felony offense. [This Section sets out the exclusive process for asset forfeitures in the state and supersedes other provisions in state or local law, except that civil and administrative processes for the forfeiture of stolen property and contraband are not affected by this Section.]

(2) The purposes of asset forfeitures are to incapacitate offenders from criminal conduct that requires the forfeited assets for its commission, and to deter offenses by reducing their rewards and increasing their costs. The legitimate purposes of asset forfeitures do not include the generation of revenue for law-enforcement agencies.

(3) Assets subject to forfeiture include:

(a) proceeds and property derived from the commission of the offense;

(b) proceeds and property directly traceable to proceeds and property derived from the commission of the offense; and

(c) instrumentalities used by the defendant or the defendant’s accomplices or co-conspirators in the commission of the offense.

(4) Assets subject to forfeiture under subsection (3)(c), in

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104. This Section was approved at the 2014 Annual Meeting without amendment.

which third parties are partial or joint owners, may not be forfeited unless the third parties have been convicted of offenses for which forfeiture of the assets is an authorized sanction.

(5) Forfeited assets, and proceeds from those assets, shall be deposited into [the victims-compensation fund]. A state or local law-enforcement agency that has seized forfeitable assets may not retain the assets, or proceeds from the assets, for its own use. If a state or local law-enforcement agency receives forfeited assets, or proceeds from those assets, from any other governmental agency or department, including any federal agency or department, such assets or proceeds shall be deposited into [the victims-compensation fund] and may not be retained by the receiving state or local law-enforcement agency.

§ 6.04D. Costs, Fees, and Assessments.<sup>105</sup>

(1) No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B, shall be held responsible for the payment of costs, fees, and assessments.

(2) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

Alternative § 6.04D. Costs, Fees, and Assessments.

(1) Costs, fees, and assessments, within the meaning of this Section, include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.

(2) The purposes of costs, fees, and assessments are to defray the expenses incurred by the state as a result of the defendant's criminal conduct or incurred to provide correctional services to offenders, without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

(3) No costs, fees, or assessments may be imposed by any agency or entity in the absence of approval by the sentencing court.

(4) No costs, fees, or assessments may be imposed in excess

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105. This Section was approved at the 2014 Annual Meeting without amendment.



of actual expenditures in the offender's case.

## APPENDIX B

## LEGISLATIVE HISTORY OF MODEL PENAL CODE ECONOMIC SANCTIONS PROVISIONS

The drafting history of the Model Penal Code's five economic sanctions provisions (see Appendix A) is no more complex than any other subject area of the revised Code, which is to say it is quite convoluted. This Appendix explains how the provisions arrived at their current shape, and what remains to be done before they are finalized.

This Appendix is also meant to guide the unwary reader through recent drafting—with instructions on which drafts have been approved or changed. Completists who want to be up-to-date on every word of black-letter drafting *and commentary* relating to economic sanctions must look at three documents:

This Article, Appendix A (for all current black-letter drafting); MODEL PENAL CODE: SENTENCING §§ 6.04—6.04D (Tentative Draft No. 3, 2014); and MODEL PENAL CODE: SENTENCING § 6.04C (Preliminary Draft No. 10, 2014) with accompanying Comments and Reporters' Notes.<sup>106</sup>

## I. WHAT TO READ, WHAT TO IGNORE

## A. BLACK-LETTER PROVISIONS

For all of the current black-letter drafting for the Code's new economic sanctions provisions, there is one-stop shopping. See Appendix A to this Article. Every provision in the appendix has been approved and represents official American Law Institute policy except section 6.04A on victim restitution, which

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106. Because Preliminary Draft No. 10 will soon be updated and revised, the important principle is to locate the latest document in the drafting cycle that will conclude with Tentative Draft No. 4 (probable approval 2016). As of this writing, the most current document is Preliminary Draft No. 10 (Sept. 3, 2014) (the first document or the Reporters' "opening bid" in the Tentative Draft No. 4 drafting cycle). There are likely to be two or three interim drafts between Preliminary Draft No. 10 and the finalized Tentative Draft No. 4.

Because readers may encounter this Article months or years in the future, the recommended procedure for bringing oneself up to date is this: (1) If the MODEL PENAL CODE: SENTENCING project has been completed, the multi-volume hardback set with the full revised Code is obviously the authoritative source. If the hardback volumes do not yet exist: (2) look for a final, approved Tentative Draft No. 4 (probably May 2016). If no such final document yet exists: (3) look for the most recent of the new drafts on the ALI website's project page. The most recent draft may be called a Preliminary Draft, a Council Draft, or a Discussion Draft—all of these are the [ALI's] denominations of work-in-progress drafts leading up to a Tentative Draft.

remains a work-in-progress. Appendix A contains no commentary, just black-letter recommended statutory language.

#### B. COMMENTARY

For background commentary and research, Tentative Draft No. 3 is the best starting place, but caveat lector. Three of the economic sanctions sections in that draft were amended by vote of the membership at the ALI's 2014 Annual Meeting—and two of the amendments were important policy reversals. In addition, the former victim restitution provision in Tentative Draft No. 3 (called “victim compensation” in that draft) has since been entirely rewritten. As a result of these changes, some of the commentary in Tentative Draft No. 3 is not authoritative and supports sub-provisions that have been changed—in two cases—by one hundred eighty degrees.

For the most recent commentary on where the drafting stands—and an explanation of all the changes since Tentative Draft No. 3, see MODEL PENAL CODE: SENTENCING § 6.04A (Preliminary Draft No. 10, 2014) and Comment and Reporters' Note.<sup>107</sup>

## II. WHAT WAS CHANGED AND WHEN

A full set of economic sanctions provisions was submitted for approval in May 2014 in Tentative Draft No. 3, and most of this content was approved. There were several drafts leading up to Tentative Draft No. 3, with changes introduced in each successive draft.<sup>108</sup>

Most of the economic sanctions provisions in Tentative Draft No. 3 were formally approved on May 19, 2014, exactly as they appear in that draft. Three amendments to the economic sanctions sections were approved by vote of the membership at the 2014 Annual Meeting, amounting to official amendments of

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107. See the preceding footnote on how to search out updates following Preliminary Draft No. 10.

108. For example, the Reporters initially proposed that sentencing courts should not be authorized to impose the sanction of victim restitution “unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.” See MODEL PENAL CODE: SENTENCING § 6.04 (Preliminary Draft No. 8, 2013). This provision was later changed to add language that would require a restitution award even if the offender's financial circumstances did not meet the reasonable-living-expenses threshold. The change was made in response to feedback from the Advisers, the Members' Consultative Group, and the ALI Council. But then victim restitution was changed back to a discretionary sanction by vote of the membership at the 2014 Annual Meeting.

Tentative Draft No. 3. The changes were in sections 6.04(6), 6.04A(1), and 6.04B(1)(h). The post-amendment language of each of these subsections is included in Appendix A with footnotes that rehearse the pre-amendment language.

In addition, although there was no formal vote of the membership requiring the Reporters to do so, we have completely rewritten section 6.04A on victim restitution, with the Reporters' recommendation that it replace the version of that section contained in Tentative Draft No. 3. At the 2014 Annual Meeting, ALI members raised many questions about implementation of the restitution provision that the Reporters were unable to answer.<sup>109</sup> The rewrite of that section does not represent a change in policy—but is the Reporters' response to many suggestions that the provision should give additional guidance to state legislatures on issues such as the definition of recoverable losses, joint and several liability, and the relationship between a restitution award in criminal court and civil proceedings brought against offenders by victims.

The reworked section 6.04A has not yet been approved by the ALI and will no doubt be amended en route to final adoption. The Reporters' suggestions do not unsettle the core policy decisions at the 2014 Annual Meeting (to approve restitution as a criminal sanction, to have it be a discretionary sanction, and to have it subject to the reasonable financial subsistence limitation).

In sum, all economic sanctions provisions have been approved and represent official ALI policy except the new language of section 6.04A.

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109. The economic sanctions provisions have been my responsibility, so none of the blame for the original inadequacy of the restitution provision should be placed on my Associate Reporter Cecelia Klingele.