ABA Standards for Criminal Justice
Sentencing
Third Edition
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ABA Criminal Justice Standards Committee

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INTRODUCTION

Important developments in the theory and practice of sentencing have occurred in the nearly fifteen years since the previous editions of the Standards on sentencing and appellate review of sentences were published.\(^1\) Increasingly, this phase of criminal justice is recognized as perhaps the most important aspect of law enforcement. Many would say that the heightened attention to sentences and sentencing is long overdue. From the inception of the American Bar Association’s Criminal Justice Standards Project, the fundamental importance of the law of sentencing led to the promulgation of Standards devoted to that subject. This third edition is intended to articulate modern Standards for this field.

Issues of crime and punishment have been high on the public agenda. The information base regarding crime rates, prosecutions, and sentences continues to expand. The FBI index of crimes known to the police indicates substantial and continuing increase in violent crimes. This is contradicted, however, by the National Crime Victimization Survey, which reports stable or descending rates of violent crime over the last two decades. Both indices show a decline in property or household crimes. Governments have declared “wars” on particular crimes, notably drug crimes. The effects of prosecution and sentencing for narcotics offenses have been considerable. By the early 1990s, more than half of all persons in federal prisons and more than one-fifth of the inmates in state prisons were sentenced for drug offenses.\(^2\)

The United States has become the world leader in rates of incarceration and in actual time served by persons confined through its criminal justice system. The total number of inmates sentenced to total confinement has surpassed 1,000,000. American prison populations have more than doubled since 1980 and more than tripled since 1975. At least forty states are operating prison and jail facilities under court order or consent decree to relieve unconstitutional overcrowding. For some jurisdictions, prison construction is the fastest growing major component of the state budget. The ranks of probationers have also

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1. See ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures (2d ed. 1979) (former Chapter 18 of the Standards); Appellate Review of Sentences (2d ed. 1980) (former Chapter 20). For this edition, the content of both former chapters is combined into a new, unitary Chapter 18.

2. An Appendix to this Introduction contains recent statistical information on trends in crime rates and the use of the sanction of total confinement.
expanded rapidly, at rates of growth even higher than those for the prison population.\(^3\)

Since the last edition of these Standards, a strong trend toward establishment of more determinate sentencing systems is evident. In recent years, the federal government and a number of states created sentencing guideline systems; others introduced various determinate sentencing systems. With the advent of more determinate sentencing has come more concern for the proper theory of sentencing.

One important result of these developments in law, practice, and theory is that sentencing is no longer viewed as merely the last phase of the trial court proceedings, but rather is seen as the central aspect of the system of criminal justice. The third edition of the Standards takes into account the systemic nature of sentencing and sentences. Like prior editions, it continues to be concerned that sentencing be done fairly and that sentences imposed be just. Thus, the third edition reiterates the principles that each sentence should be no more severe than necessary and that unwarranted and inequitable disparities in sentences should be avoided. The third edition proposes sentencing systems that will provide a proper balance between the goals of determinacy and individualization of sentences.

A. Sentencing as an Integrated System

Sentencing is the crux of the system of criminal justice. As sentences are imposed, the machinery of law enforcement transforms the substance of criminal codes into sanctions imposed on offenders. The third edition adopts the premise that sentencing must be viewed as an integrated system with purposes, structures, resource needs, processes, and consequences.

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3. An especially troubling aspect of America’s burgeoning correctional populations is the increasing overrepresentation of racial minorities among sentenced offenders. See Michael Tonry, *Racial Disproportion in U.S. Prisons*, 34 Brit. J. Criminology 97, 100-103 (1994) (per capita incarceration of blacks is 6.44 times the incarceration rate for whites, and disparity appears to be increasing); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743, 743-45 (1993). One 1990 study reported that, on any given day, 23% of black men in the age group of 20 to 29 are either in prison or jail, or on probation or parole. The equivalent figure for whites of the same age group is 6.2%. Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* 3 (The Sentencing Project, February 1990).
Consensus no longer exists on the purposes of criminal sanctions. Doubts have been raised about the efficacy of once widely accepted consequentialist goals of deterrence, incapacitation, and rehabilitation. Increasingly, sentences are considered to be punishments justified under retribution theories that measure appropriate sanctions according to the quality of criminal acts or the character of offenders. A fundamental question for every state is to choose the societal purpose or purposes to be served by sentencing. Under the Standards, this vital determination is designated as a legislative function.

The third edition of the Standards addresses more fully than prior editions the law-making role of the executive and legislative branches of government. Beyond defining the goals of the sentencing systems, the legislative function includes basic public policy choices about sentencing structure, resource appropriations, and fundamental procedures. This edition posits standards for the legislative framework of a modern sentencing system.

The most important structural change in the third edition is the emphasis on what these Standards refer to as the "intermediate function." Under the Standards, a legislature must establish or designate an agency to transform broad legislative policy choices into more specific provisions that guide sentencing courts. The agency charged with the intermediate function is responsible to the legislature and serves the needs of sentencing courts. The agency is the nerve center of the sentencing system, providing the legislature with data needed for setting basic policies and guiding sentencing courts with information needed for determination of sentences. To function adequately, the agency must have the information-gathering capacity to monitor the sentencing system in operation and to report its findings to the legislature and the courts.

This edition of the Standards continues to stress the importance of criminal sanctions other than total confinement in prisons and jails or probation. While progress has been made in use of what are sometimes called "alternative sanctions," developments of this kind have not been adequate. This edition expands particularly on economic sanctions, community-based sanctions, and sanctions of intermittent confinement. The objective is systemic decrease in reliance upon the total confinement sanction. This is important, not only because institutional overcrowding must be resolved, but also to create criminal justice systems that are more flexible, responsible, and effective.
B. Individual Sentences and Principles of Justice

The third edition is drafted to deal with the principal issues of justice in sentencing that arise in every jurisdiction. These issues or themes cut across sentencing systems and affect each element of those systems in its own way.

1. *Disparity.* When the first edition was prepared, most states had systems with indeterminate sentencing. Criminal codes, patterned on the Model Penal Code, classified all offenses as to gravity into a few groups and permitted sentencing courts discretion to fix individual sentences within wide parameters. An overriding problem of that period was the existence of great disparities of sentencing severity among judges of the same jurisdiction, even of the same court. The first edition sought, in several ways, to preclude arbitrariness of sentence imposition. The problem of unwarranted and inequitable disparity has not been solved and remains a pervasive issue in the third edition.

2. *Determinacy.* When the second edition was prepared, the idea of sentencing guidelines was evolving but no jurisdiction had yet adopted guidelines. The period before the second edition was also a time when legislatures increasingly acted to mandate sentences, sometimes in the form of mandatory minima, but also in the more directory form of specifying the precise term of imprisonment that sentencing courts were required to impose. In these and other ways, a discernible trend toward more determinate sentencing was manifest. The third edition gives strong endorsement to the intermediate function as a proper step toward greater determinacy while continuing to oppose legislative minima and legislatively mandated sentences.

3. *Severity.* A timeless problem that crosses the period of all three editions is the proper or optimum level of severity of criminal sanctions. This is at the heart of the growing problem of prison overcrowding that faces virtually every jurisdiction in the United States. The third edition calls generally for examination of levels of severity in light of the societal objectives of criminal law enforcement and calls specifically for the greater utilization of criminal sanctions other than total confinement.

Today, among the states there are considerable differences in the sentencing systems in place. Many states have changed their systems relatively recently to incorporate sentencing guidelines, and others are
studying this possibility. Many states have moved toward more determinate sentencing systems in other ways. Every jurisdiction needs further reform of its sentencing laws and practices. This edition of the Standards is designed to speak to all states regardless of their present sentencing system. The Standards are intended to provide a useful basis to indicate the direction of reform and to provide standards against which to measure proposed changes.

C. Guided Sentencing Discretion

Since 1979, a number of jurisdictions have conducted substantial experiments to bring greater levels of rationality and uniformity to the sentencing process. Determinate sentencing was a new, largely untried idea in 1979. After additional experience, it is clear that some determinate schemes have performed poorly (prompting comments that the "cure" can be worse than the "disease"), but that other approaches have achieved important successes and have demonstrated considerable promise for the future.

The third edition attempts to select and endorse the best features from the best determinate plans. In this effort, the drafters have relied heavily upon the system of presumptive/ordinary offender sentencing pioneered, in a guidelines system, in Minnesota. This model has dominated recent sentencing reform at the state level. In contrast, the drafters have borrowed little from the "statutory" determinate plans

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enacted by a few states in the 1970s, or from the mechanical sentencing guidelines system in effect in the federal system since 1987.

The third edition proposes an intermediate function that, for each crime, directs sentencing judges to a presumptive disposition for an "ordinary" offense by an "ordinary" offender. Through this simple but fundamentally important device, courts are provided a meaningful starting point based upon a systemwide judgment of the appropriate sentence for a typical burglary, robbery, assault, etc. This is an essential reform of traditional, indeterminate sentencing, which requires the judge to derive an ordinary sanction by working backward from the statutory maximum.

Not all cases are ordinary, of course, and the sentencing court is not bound to impose the presumptive sentence in every case. Instead, the judge may depart from that sentence when the judge finds and articulates "substantial reasons" for doing so. In exercising this discretion, the court must refer to mitigating factors and aggravating factors, and may reduce (but not increase) a sentence based upon certain personal characteristics of the defendant. Significantly, the third edition does not place specific weights upon the grounds for departure. Thus it is up to the judge, having determined that the case is not "ordinary," to decide upon and explain the extent of the appropriate deviation from the presumptive sentence.


8. See Standards 18-3.1, 18-4.4(b)(iv), and 18-6.3. The departure standard in use in Minnesota, Washington, and Oregon is somewhat more confining, and requires "substantial and compelling reasons" to support deviation from the guideline sanction. See Standard 18-4.4 and Commentary.

9. See Standard 18-3.2. In addition to taking into account mitigating factors under Standard 18-3.2, the sentencing court may also reduce a sentence in consideration of a guilty plea, Standard 18-3.9, or the defendant's cooperation with the prosecution, Standard 18-3.10.

10. See Standard 18-3.3.

11. See Standard 18-3.4. In this respect, the third edition differs from the state guideline systems, which do not allow consideration of such factors on the theory that they will import unwanted racial disparities into the sentencing process. See id. and Commentary.
Although judges retain substantial power to deviate from presumptive sentences in jurisdictions that have created sentencing guidelines, the experience of the states has been that the power is used in less than 10 to 20 percent of all cases. Thus, the systemwide judgments of sentencing commissions have exerted influence upon the great majority of cases without placing undue restrictions upon judicial discretion.

Presumptive/ordinary offender sentencing permits states to predict and control the size of their prison and jail populations with considerable accuracy. All of the states that have followed the Minnesota model have projected in advance how their guidelines, and each set of amendments to the guidelines, would impact future prison populations. Such foreknowledge has sometimes caused the states to back away from punitive changes in their guidelines. This predictive power also permits the state to set priorities for its use of incarceration. For example, a state may decide to increase terms of imprisonment for one category of crime while shortening terms for other offenses—without creating the need for new prison construction.

The increased ability to exert control over sentencing practices has also allowed sentencing commissions to address the pernicious prob-

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12. Minnesota, the state with longest experience, has had total departure rates of close to 20% since 1981. Of these, mitigated departures have outnumbered aggravated departures two to one. See Minnesota Sentencing Guidelines Commission, Sentencing Practices: Highlights and Statistical Tables, Felony Offenders Sentenced in 1992 33, 40 (January 1994) (in 1992, “dispositional departures” occurred in 11.2% of all cases and “durational departures” in 10.3% of all cases). In Washington, total departure rates have been 10% or less, with mitigated departures outnumbering aggravated departures three to one. See Washington Sentencing Guidelines Commission, A Statistical Summary of Adult Felony Sentencing, Fiscal Year 1992, at 21 (December 1992) (reporting total departure rate of 10% for 1992). During the first three years of guideline sentencing in Oregon, the overall departure rate has been 10% or less. Oregon Criminal Justice Council, Third Year Report on Implementation of Sentencing Guidelines—1992, at 41 (May 1993) (Oregon’s overall departure rate was 10% in 1992, 9% in 1991, and 6% in 1990).

13. Minnesota was able to do this in a set of guideline amendments following two notorious rape/murders in the state. The commission responded to the public outcry for stiffer penalties for crimes of sex and violence, while offsetting some of the impact of these changes by making adjustments elsewhere in the guidelines to produce lower sentences for nonviolent crimes. See Richard S. Frase, The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines, 28 Wake Forest L. Rev. 345, 359–60 (1993). See also Debra L. Dailey, Minnesota: Sentencing Guidelines in a Politically Volatile Environment, 6 Fed. Sent. Rptr. 144 (November/December 1993).
lem of racial discrimination in sentencing.\textsuperscript{14} The data from Minnesota, Washington, and Oregon reveal that guidelines have diminished somewhat the importance of race as a factor. Where a presumptive sentence is imposed (80 to 90 percent of all cases), race of offender all but disappears as an active variable. Unfortunately, clear patterns of racial discrimination continue to occur in the exercise of discretionary departure decisions by sentencing judges.\textsuperscript{15} In addition, the factor of prior criminal history, heavily weighted in the guideline states, correlates with race and has continued to produce high rates of incarceration for blacks.

Despite these difficult problems, the change from indeterminate to determinate sentencing appears to carry an ameliorative effect all by itself.\textsuperscript{16} In addition, the guideline states have been able to reduce racial distortions through close control of the offender characteristics that sentencing courts may consider as grounds for departure.\textsuperscript{17} Most important, the manipulability of guideline sentencing suggests that,

\begin{itemize}
  \item \textsuperscript{14} Alongside prison overcrowding, this was one major selling point of guideline sentencing in Kansas. (Conversation with Ben Coates, Former Director, Kansas Sentencing Commission, May 7, 1991.) \textit{See also} David J. Gottlieb, \textit{Kansas Adopts Sentencing Guidelines}, \textit{6 Fed. Sent. Rptr.} 158, 158 (November/December 1993).
  \item \textsuperscript{15} Recent data from Minnesota reveal that among those with a presumptive sentence of incarceration, blacks received downward "dispositional" departures (to nonprison sentences) at less than half the rate of whites. \textit{See} Debra L. Dailey, \textit{Prison and Race in Minnesota}, \textit{64 U. Colo. L. Rev.} 761, 776 (1993). A study in Washington State found no evidence of racial disparities in sentencing within the guideline range, which then accounted for 87% of all cases, but substantial racial disparities for departure sentences. \textit{Washington Sentencing Guidelines Commission, Sentencing Practices Under the Sentencing Reform Act 59–70} (Fiscal Year 1987). Oregon has also observed racial disparities in departure sentences. \textit{See} \textit{Oregon Criminal Justice Council, Third Year Report on Implementation of Sentencing Guidelines} 59–63 (May 1993).
  \item \textsuperscript{16} Stephen Klein, Joan Petersilia, & Susan Turner, \textit{Race and Imprisonment Decisions in California}, \textit{247 Science} 812, 813 (February 16, 1990) ("some tentative support for reduced racial disparity after implementation of determinate sentencing is suggested by the present study"); Michael Tonry, \textit{Sentencing Commissions and Their Guidelines 171, in 17 Crime and Justice: A Review of Research} (Michael Tonry ed., 1993) ("The available evidence thus shows that guidelines have ameliorated but not eliminated racial and gender disparities in sentencing . . . .").
  \item \textsuperscript{17} Minnesota observed early in its use of guidelines that social, economic, and personal characteristics, when permitted to play a part in sentencing decisions, produced an adverse impact upon minority groups. \textit{See Minnesota Sentencing Guidelines Commission, The Impact of the Minnesota Sentencing Guidelines: Three Year Evaluation 61–68} (September 1984). Following Minnesota's lead, all guideline jurisdictions have prohibited consideration of such factors as grounds for departure.
\end{itemize}
over time, the commissions will be able to improve upon a promising record in this area.

D. The Federal Guidelines Distinguished

Because the federal guidelines are the most familiar—and unpopular—determinate sentencing structure on the national scene, it is useful to point out the major differences between the federal scheme and the model endorsed by these Standards.

First, the federal guidelines do not use the "ordinary case" approach of the third edition. Instead, the starting point under the federal guidelines is a "base offense" that assumes only the minimum culpability requirements for a particular type of crime. From there, the federal system requires a sequence of discrete factual determinations going to precisely weighted aggravating circumstances (and a small handful of precisely weighted mitigating circumstances) that increase or decrease the guideline sentence in exact increments. This mechanical, additive process is highly restrictive in comparison with the courts' unquantified departure power under the third edition and allows significantly less room for the role of judicial discretion.

Second, the Standards allow for greater consideration by sentencing courts of the personal characteristics of offenders, even when unrelated to culpability, than the current federal guidelines. There was great concern among the drafters that the federal guidelines were too rigid, not only in structure, but in limiting the "human" factors permitted to influence sentence decisions. Certainly among federal judges there have been frequent complaints that the federal law institutes "sentencing by computer." Standard 18-3.4 was created expressly to deal with

18. Professor Tonry has written that the federal guidelines are "easily the most disliked sentencing reform initiative in the United States in this century." Tonry, supra note 16, at 138.


such issues. Recognizing the danger that class and racial biases can be imported with the consideration of social and economic characteristics of offenders, the Standards provide that such characteristics should be consulted only as factors in mitigation of sentence, or as having bearing on the choice of sanctions to be imposed.

Third, the third edition takes the position that the overall pattern of sentences should be related to existing prison capacities unless the legislature acts to appropriate the funds needed for additional facilities. Given the predictive power of a sentencing system of guided judicial discretion, it is possible for a legislature and the agency performing the intermediate function to assess what effect each change in sentence severity levels will have upon the system as a whole. The agency, in reporting proposals to the legislature, must make such forecasts, and its proposals should not take effect if they will overload existing or funded capacities. The third edition specifies that such a limitation should be adopted explicitly by the legislature as part of the criminal code.

In contrast, the United States Sentencing Commission took the view that its work need not be tied to available or prospectively available prison resources. Accordingly, the commission prepared guidelines which, in conjunction with other changes in the federal criminal code, will double federal prison populations in less than ten years. Whatever the merits of such an approach for federal crimes, the third edition does not recommend it to the states. Indeed, the single greatest motivating factor in recent state sentencing reform has been the desire to slow the unchecked growth of prison populations and the need for new prison construction. Such problems can best be addressed through a sentencing structure that takes a responsible systemic view toward matching correctional outcomes with resources.

Fourth, the proposed third edition advocates sentencing based upon the “offense of conviction” rather than the modified “real offense” approach used in the federal system. Under federal law, a guideline sentence may be imposed based upon facts that have not been proven at trial or admitted in connection with a guilty plea if such facts are deemed “part of the same course of conduct” as the offense of convic-

21. More generally still, Standard 18-2.6 (Individualization of sentences) is intended to highlight the important and enduring role of sentencing court discretion in determinate systems of presumptive sentences.

22. See Standards 18-2.3 and 18-4.4(c)(i).
tion. 23 Often, such "real-offense" facts include alleged offenses of which the defendant was never charged or facts arising from offenses charged but later dismissed by the prosecution or court. In at least five circuits, a guideline sentence may now be imposed using facts implicitly rejected by a jury's acquittal at trial if the defendant is convicted on at least one other count. 24 The third edition rejects such practices, and specifies that a sentence should be based only upon the offense of conviction in conjunction with specified aggravating and mitigating factors. 25

Fifth, the third edition recommends policy-driven sentencing. The legislature and commission should make explicit choices regarding the purposes to be served by criminal sentences, and seek to implement those choices through the structure of guided judicial discretion. This approach deviates from the federal system, where guideline sentences were derived from average sentences imposed in the past. In the drafters' view, the systemic approach to sentencing practice should work toward deliberate goals, while requiring a responsible relationship between sentences imposed and available resources. 26

E. The Legislative Framework for Sentencing

The third edition of the Standards contains a number of significant provisions regarding the legislative framework for sentence determinations. Thus, the Standards provide that a sentence should be based upon the offense or offenses of which a defendant has been convicted rather than upon what is sometimes called the "real offense." 27 The Standards carefully circumscribe the use of personal information about

24. See United States v. Brady, 928 F.2d 844, 851 (9th Cir. 1991) (citing cases; the Ninth Circuit in Brady was the first circuit to rule that facts relating to acquittal counts may not be considered by the sentencing court).
26. Other differences between the model advanced in these Standards and the federal guidelines bear note: (1) The Standards recommend that the guidance provided to sentencing courts should embrace all sanctions, not just total confinement. See Standard 18-4.4(b). (2) The Standards suggest that the sentencing commission be composed of members with a broad base of experience in criminal sentencing, including representatives of the judiciary, prosecuting authorities, and defense bar. See Standard 18-4.2(a). (3) The Standards allow sentencing courts to consider a defendant's cooperation with prosecuting authorities in the absence of a government motion. See Standard 18-3.10.
offenders unrelated to the degree of their culpability for the offenses of which they have been convicted. Information regarding an offender's financial circumstances can be used, of course, to fashion a sentence that imposes an economic sanction. The Standards provide that personal characteristics may be used in determination of the type of sanction to be imposed, and characteristics indicative of hardship, deprivation, or handicap may be used to lessen the severity of sentences that would otherwise have been imposed. Race, gender, sexual orientation, national origin, religion, marital status, and political affiliation or belief are defined as characteristics that may not be used for any purpose in sentencing. The Standards address the complex sentencing issues that arise when an offender is sentenced for more than one offense.

F. Victims' Rights

The Standards recognize the rights of victims through the sanction of restitution or reparation and through victims' participation in sentencing proceedings. The Standards give preference to restitution rather than fines if offenders' financial means are insufficient for both types of economic sanction.

G. Appellate Review of Sentences

The Standards on appellate review of sentences are very similar to the Standards in prior editions. However, the nature of appeals inevitably changes as the system for sentencing by trial courts becomes more determinate. Enforcement of the criteria that guide or bind sentencing courts becomes a function of courts at the appellate level. The third edition provides that appeals from sentence may be initiated by the defense or the prosecution.
H. Conclusion

By some lights, the introduction of "law" to the sentencing field is a new development. Over the past two decades, substantial experimentation with determinate sentencing structures of different kinds has occurred. Before the 1970s, however, all American jurisdictions pursued indeterminate systems that, with great justification, were branded "lawless."35

Through an historical lens, twenty-odd years reduce to the blink of an eye. We should not expect that the newborn enterprise of structured sentencing can have succeeded in all respects in so short a time. Indeed, there should be little surprise that some well-intentioned innovations, such as the federal sentencing guidelines, have appeared to many observers to have missed the mark of acceptability or toleration. Any important and difficult project of law reform will produce successes and failures along the way.

The principal message of these Standards is that the enterprise of sentencing reform remains worthwhile, and that much of the learning accumulated in recent years has proven useful to the task. When a broad view is taken across all American jurisdictions, enormous progress has been made toward the creation of sentencing systems that strive to coordinate the roles of governmental actors, effectuate policy and resource priorities, reduce unwarranted disparities in sentences, preserve meaningful discretion in sentencing and appellate courts, and encourage the increased and more creative use of a broad array of criminal sanctions. The Standards borrow the best ideas from this recent history, and attempt to provide a push forward, for all jurisdictions, in the future.

Appendix

RECENT TRENDS IN CRIME RATES
AND THE USE OF TOTAL
CONFINEMENT

1. Crime Rates

National crime rates are reported in the Federal Bureau of Investigation's Uniform Crime Reports (UCR) or in the annual National Crime Victimization Survey (NCVS) conducted by the Bureau of Justice Statistics of the United States Department of Justice (BJS). The UCR measures certain "index crimes" reported to the police as indicated in the Uniform Crime Reporting System administered by the FBI since 1930. The NCVS relies on the answers of survey respondents from approximately 50,000 households rather than crimes reported to the police. Data from these different measures are reproduced in Tables 1 and 2, below.

The two sources give quite different pictures of crime rates for offenses they both measure. The NCVS indicates substantial declines between 1982 and 1992 in the rates of "personal crimes" (-21.9%) and "household crimes" (-26.9%). Isolating only "crimes of violence" (rape, robbery, and assault), the NCVS records a reduction of 6.4% over the same period but, overall, a pattern of relative stability in the incidence of violent offenses in the past twenty years. In contrast, the UCR shows that the rate of reported "violent crime" increased between 1982 and 1992 (+32.6%) and reported "property crime" deceased (-2.6%), but at a rate far less steep than found by the NCVS. Dating back to 1973, the UCR indicates that violent crimes reported to the police increased by

1. The UCR Program was redesigned during the 1980s, but implementation of the new design began only in 1989. Historical data are the result of the former UCR methodology. See U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 1992, at 1-6 (October 3, 1993).

### Table 1
Uniform Crime Reports
Index of [Serious] Crimes

Rate per 100,000 inhabitants

<table>
<thead>
<tr>
<th>Year</th>
<th>Violent Crimes*</th>
<th>Property Crimes**</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>417.4</td>
<td>3,737.0</td>
</tr>
<tr>
<td>1974</td>
<td>461.1</td>
<td>4,389.3</td>
</tr>
<tr>
<td>1975</td>
<td>487.8</td>
<td>4,810.7</td>
</tr>
<tr>
<td>1976</td>
<td>467.8</td>
<td>4,819.5</td>
</tr>
<tr>
<td>1977</td>
<td>475.9</td>
<td>4,601.7</td>
</tr>
<tr>
<td>1978</td>
<td>497.8</td>
<td>4,642.5</td>
</tr>
<tr>
<td>1979</td>
<td>548.9</td>
<td>5,016.6</td>
</tr>
<tr>
<td>1980</td>
<td>596.6</td>
<td>5,353.3</td>
</tr>
<tr>
<td>1981</td>
<td>594.3</td>
<td>5,263.9</td>
</tr>
<tr>
<td>1982</td>
<td>571.1</td>
<td>5,032.5</td>
</tr>
<tr>
<td>1983</td>
<td>537.7</td>
<td>4,637.4</td>
</tr>
<tr>
<td>1984</td>
<td>539.2</td>
<td>4,492.1</td>
</tr>
<tr>
<td>1985</td>
<td>556.6</td>
<td>4,650.5</td>
</tr>
<tr>
<td>1986</td>
<td>617.7</td>
<td>4,862.6</td>
</tr>
<tr>
<td>1987</td>
<td>609.7</td>
<td>4,940.3</td>
</tr>
<tr>
<td>1988</td>
<td>637.2</td>
<td>5,027.1</td>
</tr>
<tr>
<td>1989</td>
<td>663.1</td>
<td>5,077.9</td>
</tr>
<tr>
<td>1990</td>
<td>731.8</td>
<td>5,088.5</td>
</tr>
<tr>
<td>1991</td>
<td>758.1</td>
<td>5,139.7</td>
</tr>
<tr>
<td>1992</td>
<td>757.5</td>
<td>4,902.7</td>
</tr>
</tbody>
</table>

Percentage change:
- 1992/1982: +32.6, -2.6
- 1992/1987: +24.2, -0.1

*Murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault.

**Burglary, larceny-theft, and motor vehicle theft.

Table 2
National Crime Victimization Survey
Victimization Rates
Rate per 1,000 inhabitants

<table>
<thead>
<tr>
<th>Year</th>
<th>Crimes of Violence*</th>
<th>Personal Larceny</th>
<th>Household Crimes**</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>32.6</td>
<td>91.1</td>
<td>217.8</td>
</tr>
<tr>
<td>1974</td>
<td>33.0</td>
<td>95.1</td>
<td>235.7</td>
</tr>
<tr>
<td>1975</td>
<td>32.8</td>
<td>96.0</td>
<td>236.5</td>
</tr>
<tr>
<td>1976</td>
<td>32.6</td>
<td>96.1</td>
<td>229.5</td>
</tr>
<tr>
<td>1977</td>
<td>33.9</td>
<td>97.3</td>
<td>228.8</td>
</tr>
<tr>
<td>1978</td>
<td>33.7</td>
<td>96.8</td>
<td>223.4</td>
</tr>
<tr>
<td>1979</td>
<td>34.5</td>
<td>91.9</td>
<td>235.3</td>
</tr>
<tr>
<td>1980</td>
<td>33.3</td>
<td>83.0</td>
<td>227.4</td>
</tr>
<tr>
<td>1981</td>
<td>35.3</td>
<td>85.1</td>
<td>226.0</td>
</tr>
<tr>
<td>1982</td>
<td>34.3</td>
<td>82.5</td>
<td>208.2</td>
</tr>
<tr>
<td>1983</td>
<td>31.0</td>
<td>76.9</td>
<td>189.8</td>
</tr>
<tr>
<td>1984</td>
<td>31.4</td>
<td>71.8</td>
<td>178.7</td>
</tr>
<tr>
<td>1985</td>
<td>30.0</td>
<td>69.4</td>
<td>174.4</td>
</tr>
<tr>
<td>1986</td>
<td>28.1</td>
<td>67.5</td>
<td>170.0</td>
</tr>
<tr>
<td>1987</td>
<td>29.3</td>
<td>68.7</td>
<td>173.9</td>
</tr>
<tr>
<td>1988</td>
<td>29.6</td>
<td>70.5</td>
<td>169.6</td>
</tr>
<tr>
<td>1989</td>
<td>29.1</td>
<td>68.7</td>
<td>169.9</td>
</tr>
<tr>
<td>1990</td>
<td>29.6</td>
<td>63.8</td>
<td>161.0</td>
</tr>
<tr>
<td>1991</td>
<td>32.2</td>
<td>63.1</td>
<td>166.4</td>
</tr>
<tr>
<td>1992</td>
<td>32.1</td>
<td>59.2</td>
<td>152.2</td>
</tr>
</tbody>
</table>

Percent change:

<table>
<thead>
<tr>
<th>Period</th>
<th>Crimes of Violence*</th>
<th>Personal Larceny</th>
<th>Household Crimes**</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992/1973</td>
<td>-1.5</td>
<td>-35.0</td>
<td>-30.1</td>
</tr>
<tr>
<td>1992/1982</td>
<td>-6.4</td>
<td>-28.2</td>
<td>-26.9</td>
</tr>
</tbody>
</table>

*Rape, robbery, and assault (aggravated and simple).

**Household burglary, household larceny, and motor vehicle theft.

81.5%, with a general trend of increased reporting throughout that period.3

These indices do not track the number of narcotics offenses committed nor the number of such offenses known to police, and there is no reliable method for doing so.4 That there have been sharp increases in the number of persons convicted of such crimes is common knowledge. In a recent report, the BJS concluded that much of the growth in prison population since 1977 has been the result of increasing numbers of arrests for drug offenses (they have doubled) and a threefold increase in the probability that a person arrested will be sentenced to a term of total confinement.5 The very great significance of sentences imposed on narcotics offenders on the rate of incarceration is described further below.

2. Incarceration Rates

Information regarding rates of incarceration is compiled by the Bureau of Justice Statistics. The BJS reported a total prison population at year end 1992 of 883,5936 and a jail population of convicted inmates during 1992 of 217,940.7 The current sentenced population in prisons

3. The relative merits of the UCR and NCVS is a much discussed subject among criminologists. See Jay Livingston, Crime and Criminology 50–70 (1992); Samuel Walker, Sense and Nonsense About Crime: A Policy Guide 14–15 (2d ed. 1989). The UCR measures only offenses reported to and recorded by police departments. Fluctuations in victims' reporting rates can thus skew UCR figures, as can changes in police procedures regarding handling of complaints and forwarding of data to the FBI. See Livingston, supra, at 65–67; Understanding and Preventing Violence 413–14 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993). The NCVS, because it relies on the self-reports of a sample of crime victims, suffers from the methodological defects of large-scale surveys. Responses may vary among people from different social classes and backgrounds, and respondents may have difficulty recalling all criminal victimizations, particularly those of low seriousness, that occurred over the one-year period embraced in each survey. See Livingston, supra, at 67–68.


6. Id. at 2 & tbl. 2. This includes federal and state prisons.

7. U.S. Department of Justice, Bureau of Justice Statistics, Jail Inmates 1992, at 2 & tbl. 3 (August 1993). Convicted inmates accounted for only 49% of adult jail inmates; the total adult jail probation at midyear 1992 was 441,781. Id. Combined with prison statistics, the total national incarcerated population, convicted and unconvicted, exceeds 1.3 million.
and jails thus exceeds one million. Rates of incarceration continue to climb. Total prison populations have more than doubled since 1980 (+179.7%) and more than tripled since 1975 (+267.3%).

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>State</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>212,953</td>
<td>189,735</td>
<td>23,218</td>
</tr>
<tr>
<td>1970</td>
<td>196,429</td>
<td>176,391</td>
<td>20,038</td>
</tr>
<tr>
<td>1975</td>
<td>240,593</td>
<td>216,462</td>
<td>24,131</td>
</tr>
<tr>
<td>1980</td>
<td>315,974</td>
<td>295,363</td>
<td>20,611</td>
</tr>
<tr>
<td>1985</td>
<td>480,568</td>
<td>447,873</td>
<td>32,695</td>
</tr>
<tr>
<td>1990</td>
<td>775,124</td>
<td>707,598</td>
<td>65,526</td>
</tr>
<tr>
<td>1991</td>
<td>824,133</td>
<td>752,525</td>
<td>71,608</td>
</tr>
<tr>
<td>1992</td>
<td>883,593</td>
<td>803,334</td>
<td>80,259</td>
</tr>
</tbody>
</table>

Percent change:
- 1992/1975: +267.3% / +271.1% / +232.6%
- 1992/1980: +179.7% / +172.0% / +289.4%
- 1992/1985: +83.9% / +79.4% / +145.5%


8. In 1991, prisons across the country expanded at a rate of 6.8% and in 1992 at a rate of 7.3%. Prisoners in 1992, at 3 tbl. 3. See also U.S. Department of Justice, Press Release, Half Year Increase Pushes Prison Population to Record High (October 3, 1993) (January through June 1993 saw the third-largest increase in prison populations ever recorded for a six-month period.).

9. During the 1980s, probation populations grew even more rapidly than prison populations. At the end of 1990, a record 2,670,234 adult offenders were on probation and 531,407 on parole. See U.S. Department of Justice, Bureau of Justice Statistics, Probation and Parole 1990 (November 1991); U.S. Department of Justice, Bureau of Justice Statistics, National Update 4 (January 1992).
Data concerning rates of incarceration, controlled for population growth, are more meaningful than gross numbers of inmates.\(^\text{10}\) Table 4 shows large upswings in the numbers of prisoners per capita, but not so large as the rise in total prison populations. From 1980 to 1992, rates of imprisonment increased by 136.4%, and by 190.4% from 1975 to 1992.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>State</th>
<th>Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>118.6</td>
<td>105.7</td>
<td>12.9</td>
</tr>
<tr>
<td>1970</td>
<td>96.7</td>
<td>86.8</td>
<td>9.8</td>
</tr>
<tr>
<td>1975</td>
<td>113.3</td>
<td>102.0</td>
<td>11.4</td>
</tr>
<tr>
<td>1980</td>
<td>139.2</td>
<td>130.1</td>
<td>9.1</td>
</tr>
<tr>
<td>1985</td>
<td>200.0</td>
<td>187.0</td>
<td>14.0</td>
</tr>
<tr>
<td>1990</td>
<td>293.0</td>
<td>272.0</td>
<td>21.0</td>
</tr>
<tr>
<td>1991</td>
<td>310.0</td>
<td>287.0</td>
<td>22.0</td>
</tr>
<tr>
<td>1992</td>
<td>329.0</td>
<td>303.0</td>
<td>26.0</td>
</tr>
</tbody>
</table>

Percent change:
- 1992/1975: +190.4% +197.1% +128.1%
- 1992/1980: +136.4% +132.9% +185.7%
- 1992/1985: +64.5% +62.0% +85.7%


BJS also reports on the rate of new admissions to prison relative to certain data about "serious offenses," defined to mean the following:

---

crimes: murder, non-negligent manslaughter, rape, robbery, aggravated assault, and burglary.\textsuperscript{11} With respect to these "serious offenses," BJS tracks the rate of new commitments to prison relative to numbers of persons arrested for such offenses. The first column of Table 5 shows the number per 1,000 such persons committed to prison for any offense. The second shows the number committed for a serious offense. The indices are only for new admissions to state prisons.

Note that the rates of commitment for any offense and for a serious offense declined from 1960 into the mid-1970s. Since that time, the rates generally have been rising.

Sentences of narcotics law offenders have had great significance in the number of persons imprisoned in recent years. As indicated in the third column of Table 5, the rate of prison commitments per drug arrest has grown exponentially since the 1970s. BJS reported that drug crimes were the offenses of commitment for more than half of all federal prisoners in 1992.\textsuperscript{12} BJS also reported that, as of 1991, 22% of state prisoners were convicted of drug crimes; this percentage in 1979 was 6%.\textsuperscript{13} In 1990, for the first time the number of new court commitments nationwide for drug offenses (103,800) outnumbered those for property offenses (102,400) or violent offenses (87,200).\textsuperscript{14}

\textsuperscript{11} The BJS category of "serious offenses" is larger than the category of "violent crimes" reported in the Uniform Crime Reports. The latter are: murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault.


\textsuperscript{14} PRISONERS IN 1992, supra note 5, at 7.
# Table 5

Court Commitments to State Prisons Relative to Arrests for Serious Offenses

<table>
<thead>
<tr>
<th>Year</th>
<th>Commitments for Any Offense</th>
<th>Commitments for Serious Offenses</th>
<th>Commitments for Drug Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>299</td>
<td>163</td>
<td>—</td>
</tr>
<tr>
<td>1965</td>
<td>261</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1970</td>
<td>170</td>
<td>100</td>
<td>20</td>
</tr>
<tr>
<td>1974</td>
<td>155</td>
<td>102</td>
<td>22</td>
</tr>
<tr>
<td>1975</td>
<td>185</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1978</td>
<td>183</td>
<td>112</td>
<td>22</td>
</tr>
<tr>
<td>1980</td>
<td>196</td>
<td>128</td>
<td>19</td>
</tr>
<tr>
<td>1985</td>
<td>266</td>
<td>141</td>
<td>34</td>
</tr>
<tr>
<td>1986</td>
<td>268</td>
<td>136</td>
<td>45</td>
</tr>
<tr>
<td>1987</td>
<td>301</td>
<td>143</td>
<td>54</td>
</tr>
<tr>
<td>1988</td>
<td>292</td>
<td>130</td>
<td>59</td>
</tr>
<tr>
<td>1989</td>
<td>332</td>
<td>134</td>
<td>73</td>
</tr>
<tr>
<td>1990</td>
<td>367</td>
<td>143</td>
<td>103</td>
</tr>
</tbody>
</table>

Percent change:

- 1990/1978: +100.1 +27.7 +368.2
- 1990/1980: + 87.2 +11.7 +442.1
- 1990/1985: + 38.0 +1.4 +202.9

PART I.
SCOPE OF CHAPTER; SENTENCE AUTHORITIES

Standard 18-1.1 Scope of chapter

(a) This chapter deals with sentencing of adult individuals or organizations convicted of felonies and misdemeanors (for which an individual offender may be sentenced to total confinement for six months or more).
(b) This chapter does not deal with capital punishment.
(c) This chapter does not deal with sentencing of juvenile offenders unless those offenders are tried and convicted as adults.
(d) This chapter does not deal with commitments to institutions for treatment programs, whether characterized as criminal or civil, unless a commitment is a part of a sentence imposed following conviction for an offense.
(e) This chapter does not deal with sentencing by military justice tribunals.

History of Standard

This Standard makes explicit that the primary scope of the chapter is sentencing of persons convicted of felonies and misdemeanors. This is not inconsistent with prior editions of the Sentencing Standards. Capital punishment has not been within the scope of prior editions of the Standards and is not contemplated in these Standards.

Other scope provisions, new to this edition, except sentencing in the context of juvenile justice, military justice, and commitments to institutional treatment programs.

Related Standards

None.

Commentary

The Standards have been written primarily with regard to sentencing upon convictions of noncapital felonies and misdemeanors. Since vari-
OUS definitions of "misdemeanor" are found among the states, the six-month threshold, stated in brackets in (a), conveys in a different way the types of offenses to which the Standards in this chapter can and should be applied. The distinction drawn between "petty" and "serious" offenses for purposes of certain constitutional requirements is instructive.¹

This statement of scope should not be read as implying that the Standards would not have salutary application in other types of cases. Some, perhaps many, of the Standards could be extended to proceedings outside the stated scope.

The Standards do not address the entire universe of criminal sentencing. Sentencing in capital crimes has become a separate field greatly influenced by constitutional law and special legislation. Likewise, the Standards do not address the specialized fields of sentencing in juvenile and military justice.²

**Standard 18-1.2 The legislative function**

(a) The legislature and executive should determine the public policies of sentencing and enact the statutory framework for the sentencing system. The legislative function is performed best by statutes that articulate the societal purposes in sentencing, define the authorized types of sanctions, and set the maximum limits of those sanctions.

(b) The legislature and executive should establish the organs of government necessary to implement the legislatively determined policies within the legislative framework and delegate to them the powers appropriate to their roles.

**History of Standard**

This edition of the Sentencing Standards considers the legislative function more fully than did prior editions.

1. See, e.g., Blanton v. North Las Vegas, 489 U.S. 538, 542 (1989) (Sixth Amendment right to jury trial for offenses carrying potential penalty of more than six months incarceration).

2. For juvenile justice, see Institute of Judicial Administration—ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Adjudication (1979).
Related Standards

Part II of this chapter identifies seven matters of public policy regarding sentencing that are fundamental to the legislative function. Part III contains Standards that address the legislative framework for the sentencing system.

Commentary

Under constitutions that establish three branches of government, the legislative function is performed by interaction of the legislature and the executive. In this chapter, the Standards applicable to the "legislative function" are addressed to governors as well as legislatures.

The legislative function as conceived in these Standards comprises two large areas. The first area deals with public policy choices regarding the societal purposes of sentencing and relevant principles of sentencing justice. In a democracy, fundamental questions of public policy are within the province of those branches of government elected by the citizens. That is as true in matters of sentencing policy as in other fields of law. The second large area of legislative responsibility is to create a suitable systemic framework within which the courts and other public officials can carry out the legislatively determined policies.

Under these Standards, the legislative function does not extend to the determination of sentences in specific cases or types of cases. That is the primary responsibility of sentencing courts, which should always have power to adapt the sentence imposed to the relevant circumstances of the offense and the offender. The Standards recognize that the boundaries of discretion of sentencing courts should be delineated and that courts' exercise of sentencing discretion should be guided. The latter purpose, under these Standards, is characterized as the "intermediate function." See Standard 18-1.3. Governors and legislatures have a significant role in the "intermediate function," but the Standards reject the view that these bodies should eliminate all sentencing discretion and fix actual sentences by mandatory minimum sentence provisions or the like. See Standards 18-3.11(c) and 18-3.21(b).

Standard 18-1.3 The intermediate function; guided judicial discretion

(a) The legislature should create or empower a governmental agency to transform legislative policy choices into more particu-
larized sentencing provisions that guide sentencing courts. The agency should also be charged with responsibility to collect, evaluate and disseminate information regarding sentences imposed and carried out within the jurisdiction. Guidance of judicial discretion in sentencing and development of an information base about sentencing are the basic aspects of what these Standards describe as "the intermediate function."

(b) The intermediate function should be performed by an agency with state-wide authority. The intermediate function is performed most effectively through a sentencing commission.

(c) If a jurisdiction elects not to create a sentencing commission, the legislature should either undertake the intermediate function itself or designate another organ of government to do so. If the function is delegated to the judicial branch, it should be made the responsibility of the highest state court or a state-wide judicial conference.

History of Standard

The idea of the "intermediate function" was introduced in the second edition of the Standards in the addition of provisions regarding sentencing guidelines. The present chapter expands the idea of sentencing guidelines into a basic concept of sentencing policy and structure. The newly introduced phrase, "intermediate function," encapsulates the principles embodied in the concept.

Related Standards

Parts III and IV of this chapter develop the concept of the intermediate function. Guidance to sentencing courts is provided through the principle of presumptive sentences for ordinary offenders, determined by the intermediate function. See Standards 18-3.1 through 18-3.3.

Commentary

The intermediate function is a crucial element of a modern criminal justice system. Achievement of sentencing results that accord with legislatively established policy choices requires an agency that guides judges in making sentencing decisions in the myriad of individual cases that come before the courts. Conversely, an agency with knowledge of
sentencing patterns provides the base of knowledge needed by the legislature and executive to make informed policy choices and appropriation determinations. The product of the agency performing the intermediate function thus serves to assist better fulfillment of both the legislative and judicial functions.

One way in which the function of guiding judicial discretion may be performed is through the work of a sentencing commission. Paragraph (b) recognizes that this is the most effective way of doing so. For a jurisdiction that chooses to establish a sentencing commission, Part IV(B) provides standards as to the establishment and operations of such commissions. A number of states and the federal government have recently set up sentencing commissions. Paragraph (b) is not intended to endorse any existing system as a model. As sentencing systems mature, they will be modified in light of experience. Paragraph (b) asserts only that the optimal way of carrying out the intermediate function is through the work of a sentencing commission.

More fundamental than how the intermediate function may be performed is that each jurisdiction recognize that some mechanism is needed to carry out this essential function. Standard 18-4.1 expands on basic aspects of the intermediate function. Standards 18-4.5 and 18-4.6 apply to jurisdictions that choose not to establish a sentencing commission.

Standard 18-1.4 The sentencing function; abolition of jury sentencing; sentencing councils; appellate review of sentences

(a) Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence.

(b) Sentencing courts may convene councils, composed of judges sitting on a sentencing court, as advisory panels to develop common criteria for sentencing decisions and to assist individual judges in determining the appropriate sentences in particular cases.

(c) The highest court of the state, if authorized to promulgate rules of criminal procedure, should establish rules for presentence and sentencing proceedings.
Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts.

History of Standard

Prior editions of the Standards declared that sentencing involves a judicial function. The Standards have consistently disavowed delegation of sentencing determination to a jury. Since this edition continues to espouse vesting in trial courts considerable sentencing discretion, the Standards commend the use of sentencing councils in multijudge courts.

Prior editions of the Standards devoted a separate chapter to appellate review of sentences. That judicial function is incorporated here as Part VIII.

Related Standards

Standards regarding the exercise of the trial courts' sentencing power are found in Parts VI and VII. Standards on procedural aspects of sentencing proceedings are in Part V, which also includes Standards on presentence reports and victims' rights. Part VIII contains Standards regarding appellate review of sentences.

Commentary

The basic sentencing function of trial courts is to implement legislatively determined policy choices, within the framework of the criminal code, as guided in the exercise of discretion by the agency performing the intermediate function.

This edition restates the long-standing position of the American Bar Association that noncapital sentencing should be done by trial judges. A few states, including Texas and Virginia, permit juries to determine sentences. In such jurisdictions, some of the Standards may be adapted to the system of jury sentencing. Of particular importance would be the Standards with regard to the intermediate function, the use of presumptive sentences and related provisions on the guidance of sentencing discretion, and appellate review.

An important part of sentencing procedures is found in a jurisdiction's rules of procedure, which commonly are promulgated by the highest state court. The procedural Standards in Part V, addressed to the rule making authority of the state, are considered here to be part of the judicial function.

A regime of guided sentencing discretion, defined by these Standards, enlarges the function of appellate review of sentencing decisions to include development and refinement of sentencing criteria established legislatively or through the intermediate function. These Standards envision that trial courts' discretion is a form of bounded discretion. One of the tasks of appellate courts, in reviewing sentences, is to assure that trial courts adhere to the procedural and substantive standards of the jurisdiction.
PART II.

PUBLIC POLICY LEGISLATIVE CHOICES

A. Societal Purposes

Standard 18-2.1 Multiple purposes; consequential and retributive approaches

(a) The legislature should consider at least five different societal purposes in designing a sentencing system:
   (i) To foster respect for the law and to deter criminal conduct.
   (ii) To incapacitate offenders.
   (iii) To punish offenders.
   (iv) To provide restitution or reparation to victims of crimes.
   (v) To rehabilitate offenders.

(b) Determination of the societal purposes for sentencing is a primary element of the legislative function. The legislature may be aided by the agency performing the intermediate function.

History of Standard

This Standard is new. Former Standard 18-3.2(a)(i) (2d ed. 1979), addressed to the "guideline drafting agency" and sentencing courts, incorporated policies of just deserts and incapacitation. The present Standard makes public policy decisions concerning the societal goals of sentencing a matter of primary legislative responsibility. In addition, the present Standard is open-ended in comparison with the prior edition. While the combination of retributive and incapacitative goals

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1. Former Standard 18-3.2(a)(i) provided in part:
   (a) Both the guideline drafting agency in specifying presumptive ranges and the sentencing court in imposing sentence should be guided in exercising their discretion by the following principles:
      (i) The punishment imposed should neither exceed a ceiling equal to that level justly deserved by the offender for the instant offense nor fall below a floor level necessary either to protect the public from further serious criminal acts by the defendant or to assure that the gravity of the offense is not depreciated . . . .
in former Standard 18­3.2(a)(i) would be permitted under Standard 18­2.1, it is not required.

**Related Standards**

Standard 18­3.12 speaks to societal purposes of the sentencing system as relevant to the choice among criminal sanctions.

**Commentary**

Every aspect of a criminal justice system, including sentencing, derives legitimacy from the advancement of social ends. Current criminal codes are generally lacking in useful articulation of the policy objectives sought in the sentencing of offenders. This Standard calls attention to the vital need for a policy foundation upon which the sentencing system can be built. Without reasonably clear identification of goals and purposes, the administration of criminal justice will be inconsistent, incoherent, and ineffectual.

**The Choice of Societal Purposes**

The Standards’ drafters recognized that there is no national consensus regarding the operative purposes of criminal sentencing. Indeed, even among philosophers there has been unceasing disagreement over the goals of sanctions. Some current systems have been characterized as predominately retributive in nature. Other observers have claimed that the prevailing penology of the 1980s and early 1990s has been that of incapacitation. One need not go far back in time to find periods in

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2. This statement is meant to encompass both consequentialist and retributive views of criminal justice policy. Consequentialists seek to promote the prospective social good of reducing future crime. Retributivists find a different social end in the punishment of past criminal acts, even where no forward-looking benefits result.


5. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION (forthcoming 1994) (manuscript at vi–vii, on file with authors).
which theories of rehabilitation and deterrence were of high prominence. Indeed, the resurgence of interest in community-based sanctions signals that, at least for the sentencing of some offenders, rehabilitative theory is alive and flourishing.\(^6\)

Paragraph (a) catalogs five different societal purposes a legislature should consider when designing a sentencing system. No hierarchy of importance is intended in the ordering of the five subsections, nor is it contemplated that every jurisdiction must implement all five purposes. Rather, the Standard is drafted in recognition of the wide diversity of viewpoints that exist concerning ultimate goals, and is meant to express a conclusion that different schemas can be imagined consistent with rational and desirable public policy.

Subparagraph (a)(i) recognizes that criminal sanctions may be used in an attempt to foster respect for the law and deter criminal conduct. This goal might be understood as "general deterrence," which operates through the exemplary and educative force of criminal law.\(^7\) If the public is made to believe that criminal behavior will be answered by painful consequences, it is hoped that some individuals will be discouraged from risking such consequences. On a more abstract plane, the imposition of punishment may disseminate a generalized message that criminal transgressions are treated seriously by society. Thus, information about criminal sentences may encourage people to respect the law as a whole and increase the numbers of law-abiding citizens.\(^8\)

Subparagraph (a)(ii) states that a jurisdiction may legitimately consider the goal of incapacitating offenders in designing a sentencing system. There is no question that some degree of disablement occurs whenever groups of offenders are incarcerated or are subjected to the restraint and surveillance of nonprison sanctions. To this extent, all sentencing systems are incapacitative, intentionally or not. A jurisdiction may further choose to pursue incapacitation in deliberate and

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\(^7\) Some theorists have spoken in terms of "general deterrence" and "specific deterrence." The latter term refers to the tendency of painful punishments to deter the offender, who experiences them directly, from future criminal conduct. Under this Standard, such offender-specific effects are classified as "rehabilitation." See Standard 18-2.1(a)(v).

\(^8\) The classic study of deterrence theory is still Franklin E. Zimring & Gordon Hawkins, Deterrence (1973).
targeted ways, however, and such choices are matters of fair policy debate.9

Subparagraph (a)(iii) acknowledges that the punishment of offenders is a reasonable objective that legislatures may incorporate into a sentencing system. While retributivism had fallen from favor in the middle of this century, at least in the academic community,10 the theory has enjoyed both a scholarly and political rejuvenation since the 1970s.11 Today, a number of states have identified punishment or the meting out of "just deserts" as the central objective of their sentencing laws.12

Subparagraph (a)(iv) identifies victim restitution and reparation as an eligible goal of sentencing. This consequentialist purpose aims toward the restoration of losses suffered by crime victims, when possible. Obviously, restitution cannot adequately be achieved in all criminal cases. Some injuries defy compensation and most offenders lack the resources to make adequate payments. Where restitution can be made, however, it is hard to posit a reason not to provide for it in the criminal justice system. Accordingly, the Standards elsewhere take the position that victim restitution should be given priority over the assessment and collection of other economic sanctions.13

9. See generally ZIMRING & HAWKINS, supra note 5.
10. "Until the 1970s retributivism—the idea that criminals should be punished because they deserve it—was something of a dead letter in criminology; there were a few scholars in jurisprudence and philosophy who continued to dabble with retributive theories but they did so in ways that had little impact on public policy. During and since the Victorian era retributivism had become increasingly disreputable, probably unfairly, as an unscientific indulgence of emotions of revenge." JOHN BRAITHWAITE & PHILIP PETIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2 (1990).
12. For example, the California Penal Code, § 1170(1), provides:
The Legislature finds and declares that the purpose of imprisonment is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for the uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.
13. See Standards 18-3.15 (dealing with restitution and reparation); 18-3.16(d)(ii) (in imposing fines, sentencing court should not undermine offender's ability to make restitution); 18-3.22(c) (restitution should take priority over collection of court costs and correctional fees).
Last, subparagraph (a)(v) states that the legislature should consider the goal of rehabilitation of offenders when designing a sentencing system. As recently as the 1960s and early 1970s, rehabilitation was the prevailing theory of sentencing and corrections, and was the principal justification for the traditional structure of indeterminate sentences and parole.14 In the intervening years rehabilitation has lost its position of preeminence almost everywhere, but has hardly disappeared from view. Many incarcerative and nonincarcerative programs continue to attempt to reform offenders while at the same time serving other goals, such as punishment, deterrence, and incapacitation. The Standards endorse this as a worthy aim.15 It should be noted, in this regard, that the Standards take the view that rehabilitation, standing alone, is never an adequate basis for criminal punishment. In effect, reform should be attempted only in connection with sentences that are independently justified on some other ground.16

The preceding description of eligible purposes is only a starting point in the development of a meaningful statement of societal goals for a working sentencing system. To be useful, such a statement must identify which purpose or purposes the legislature wishes to pursue. If multiple goals are selected, a system of priorities is needed so that when two purposes conflict, decision makers have a guidepost for choosing between competing objectives. As suggested below, the legislature may even wish the hierarchy of relevant goals to change for crimes of lesser and greater severity.

Limiting Retributivism

One overall approach that individual jurisdictions may wish to consider is "limiting retributivism," which combines theories of utilitarianism and retributivism.17 Under this approach, the sentencing system can be designed to further instrumental ends such as deterrence, incapacitation, rehabilitation, or victim restoration, but the sanctions imposed cannot exceed the level of punishment deserved by the

16. This position is stated and explained in Standard 18-3.12(a)(iii) and Commentary.
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offender on moral grounds.\textsuperscript{18} To cite an extreme example, a first-time offender convicted of theft of $100 could not be sentenced to imprisonment for forty years in a system of limiting retributivism, even if it were believed that such a lengthy sentence would carry an impressive deterrent impact on the general population. Nor would the lengthy term be justified by persuasive evidence that the thief should be incapacitated or else will commit additional crimes during the forty years. Under either application of utilitarian theory, the resulting punishment would far outstrip any sense of moral blameworthiness attaching to a theft of $100.

The above example is an easy case, at least for most people, because the proposed utilitarian punishment appears so far out of line with a deserved sanction. Closer cases are more difficult. May the thief in the preceding paragraph be imprisoned for five years under limiting retributivist principles? Two years? Six months? Is any term of incarceration too much? Given that judgments of desert can vary from person to person, an upper limit of sanction does not spring clearly into view.

Retributive limits can be given sharper definition, however, under the system of presumptive sentences envisioned in these Standards. As a number of guideline states have done, the sentencing agency can create presumptive sentences responsive to the gravity of specific offenses. This is never a scientific process, but has been regularly performed by existing sentencing commissions based on variables such as community sentiment, proportionality among offenses, and the total resources available for execution of sentences. The final arrangement of presumptive sentences, therefore, can be viewed as a reasonable proxy for deserved punishments. Although personal assessments of desert will continue to differ, the system of presumptive sentences can impose a uniform template of desert across punishment decisions.\textsuperscript{19}

\textbf{Institutional Roles}

As a matter of institutional responsibility, paragraph (a) states that the legislature should consider a number of policy priorities for the sentencing system; paragraph (b) identifies the determination of

\textsuperscript{18} One version of limiting retributivist theory was endorsed by the second edition of these Standards. \textit{See} Standard 18-2.1, History of Standard, above.

\textsuperscript{19} Professor Frase has argued that the Minnesota Sentencing Guideline system has effectively been operating on a limiting retributivist model. \textit{See} Frase, \textit{supra} note 4, at 325.
controlling policies as "a primary element of the legislative function." The Standards' drafters concluded that, ultimately, such foundational decisions should be made by a democratically chosen and politically accountable organ of government. A forceful argument can be made, however, that the selection of societal purposes to be served, globally and in individual cases, should be done only with the assistance of an expert agency. Such decisions often intertwine value judgments and empirical knowledge. For example, a policymaker considering the goal of deterrence in sentencing might want to consider the moral limitations on such a policy, as well as the available data on the deterrent efficacy of various sanctions—which may differ from one type of crime to another.20 It is unlikely that the legislature will have the time or appropriate training to make such inquiries. On a further level of difficulty, some jurisdictions may wish to pursue different policies as to different offenses. It is possible, for instance, that the social purposes deemed essential for the most serious crimes, such as murder or rape (retribution and incapacitation might be considered especially important here), could differ from the operative purposes for offenses of lesser gravity, such as theft or fraud (policies of victim restoration and offender rehabilitation may in such cases rise to the fore).21

Because policymaking of this kind can be highly complex, paragraph (b) invites the legislature to seek the aid of the agency performing the intermediate function. The Standard is open-ended, allowing the collaboration between legislature and agency to play out in a number of different ways. The legislature may choose to pronounce broad societal purposes, while instructing the sentencing agency to design hierarchies and applications of those goals for particular offenses. Such an approach should not be viewed as abdication of the lawmaking responsibility. In most jurisdictions that have created sentencing agencies, the agency's work product is subject to legislative review or approval, so the legislature retains a determinative voice in eventual policy formation.22 Similarly, the legislature may instruct the sentencing agency to propose a statement of societal objectives in the first instance, again

20. See generally ZIMRING & HAWKINS, supra note 8.
21. A recent proposal to amend Pennsylvania's sentencing laws is based on the assumption that the dominant purposes of sentencing should be different for crimes at different levels of the penalty scale. See John H. Kramer & Cynthia Kempinen, History of Pennsylvania Sentencing Reform, 6 FED. SENT. RPRTR. 152, 157 (1993).
22. See Standard 18-4.3(a) and Commentary.
subject to legislative review.\textsuperscript{23} In jurisdictions that prefer to consolidate provisions as to societal goals in the criminal code, the sentencing agency may be asked to recommend original language, or amendments, for such statutes.\textsuperscript{24}

The assignment given to legislatures and agencies under this Standard is hardly an easy one to fulfill. Every jurisdiction should expect to expend considerable effort in developing the underpinnings of a purpose-driven sentencing system. Under the systemic approach taken by these Standards, much will depend on decisions made at this stage: The sentencing agency, in attending to each of its responsibilities, must seek to implement the basic policy choices of the legislature.\textsuperscript{25} Sentencing courts, in case-specific decisions, are made responsible for knowing what the legislature’s determinations of societal goals are, rendering sentencing decisions accordingly, and articulating reasons for sentences that are consistent with overarching legislative policy.\textsuperscript{26} Similarly, appellate courts, and especially the state’s highest court, must undertake appellate review of sentences in a manner that best enforces the legislature’s public policy choices.\textsuperscript{27} In sum, the resolution of issues raised by Standard 18-2.1, once in place, should permeate every facet and stage of the sentencing process.

\textbf{Goals and Systemic Evaluation}

Identified societal purposes are more than motivating forces in a sentencing system; they also provide the criteria for evaluating the system’s operation. These Standards, in numerous provisions, stress the need for better monitoring and assessment of sentencing decisions.\textsuperscript{28} It is manifestly impossible, however, to measure the successes and failures of particular sentences or overall programs without an

\begin{footnotesize}
\begin{enumerate}
\item This was in effect the course pursued by the Minnesota Sentencing Guidelines Commission when creating the first guidelines system in this country. Even in the absence of clear legislative direction, the Minnesota commission thought it necessary to articulate fundamental policy choices before drafting particular sentencing provisions. Eventually the commission’s decisions were ratified by the legislature. \textit{See Dale G. Parent, Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines 31–48} (Daniel J. Freed ed., 1988).
\item See Standard 18-4.2(b)(iv) (responsibilities of sentencing commission include “periodic recommendations to the legislature regarding changes in the criminal code”).
\item See Standards 18-1.3(a), 18-4.1(a), 18-4.3(b), and 18-4.4(a).
\item See Standards 18-6.1(a) and 18-5.19(b).
\item Standard 18-8.2(b).
\item See Standards 18-1.3(a), 18-2.7, 18-4.1(b), and 18-5.1(b).
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image of what they are trying to achieve. Thus, for example, a system created primarily to punish offenders might be evaluated to determine if offenders actually receive and complete sentences thought to reflect the gravity of their crimes. In such a system there might also be great concern that offenders who commit similar offenses receive similar sanctions, because disparities suggest unfairness and a breakdown in the system of proportional punishment. In another jurisdiction, however, that has chosen to pursue goals of rehabilitation and incapacitation, the efforts of monitoring and assessment would take quite a different form. Typically, the efficacy of a reformative program is gauged by tracking the recidivism rates of offenders who have participated in the program, or by testing the useful skills they have developed.29 The study of incapacitative strategies requires estimation of crimes avoided in the community as a result of sentencing practices.30 Under either kind of consequentialist evaluation, the search for "just" sentences and for offense-based uniformity, so important in the punishment-oriented jurisdiction, would be beside the point. The selection of societal purposes therefore contributes not only to how a sentencing system is built in the first instance but how it monitors itself and makes self-corrections over time.

B. Types of Sanctions

Standard 18-2.2  Types of sanctions authorized

(a) The legislature should enact a criminal code that authorizes imposition of the following types of sanctions upon persons convicted of offenses:

(i) Compliance programs. Compliance programs are sanctions intended to promote offenders' future compliance with the law. For individuals, compliance programs involve control or supervision of offenders within their communities, such as probation. For organizations, compliance programs may involve supervision or change in the management or control of an offender.


30. ZIMRING & HAWKINS, supra note 5, at 196-257 (study designed to measure crime-prevention effects of incapacitative incarceration policies in California).
(ii) Economic sanctions. Economic sanctions include fines, monetary awards payable to victims, and mandatory community service. The legislature should not authorize imposition of economic sanctions for the purpose of producing revenue.

(iii) Acknowledgment sanctions. Acknowledgment sanctions include court-ordered communications to the public at large, or to particular classes of persons, of information about offenders' convictions and other facts about the offenses.

(iv) Intermittent confinement. Intermittent confinement is confinement during specified hours in a local facility or in an offender's residence.

(v) Total Confinement. Total confinement is incarceration in a federal, state, county, or municipal institution.

(b) The legislature should be receptive to the development and use of new sanctions not set forth in these standards.

(c) The legislature should enact an adult community corrections act to facilitate the establishment of a comprehensive adult community corrections program. The Model Adult Community Corrections Act is a suggested example.

**History of Standard**

The prior edition of the Standards recognized that "'[a]ttention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other.'" Former Standard 18-2.4 (2d ed. 1979). The current edition greatly expands upon this observation. Apart from this Standard, the new edition contains separate Standards devoted to a range of freestanding sanctions, and addressed to the problems of structuring the use of such sanctions.

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1. See also, to similar effect, former Standard 18-2.1(b) (2d ed. 1979) ("The legislature should provide sentencing authorities with a range of alternatives, including nonincarcerative sanctions and gradations of supervisory, supportive, and custodial facilities, so as to permit an appropriate sentence in each individual case.


Related Standards

Standards 18-3.13 through 18-3.21 consider, separately and in greater detail, the array of criminal sanctions referenced in this Standard.

Commentary

The Movement Toward a Wider Range of Sanctions

In the drafting of the Standards, few issues commanded more concern, or a broader consensus within the ABA, than the need for all jurisdictions to work toward increased use of a wide array of criminal sanctions. Criminal justice systems are overly dependent upon the polar extremes of total confinement, a high-severity and high-cost sanction, and probation, usually a low-cost and low-intervention strategy. The Standards join many other voices in calling for a sustained effort to add variety and depth to the catalog of punishments available to sentencing agencies and sentencing courts. Through the 1980s and early 1990s it is no exaggeration to say that the impetus toward expanding the menu of sanctions has become a national movement.

The reasons for this surge in policy can be collected under several headings. First, to the extent that sanctions are designed to inflict pain in order to effectuate goals of retribution, general deterrence, and specific deterrence, it is useful to have a calibrated array of sentencing options that represent a continuum of punishment values. Thus, for example, it has been argued that creative use of economic sanctions

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BE IT RESOLVED, That the American Bar Association urges each State to enact an Adult Community Corrections Act to facilitate the establishment of a comprehensive adult community corrections program, and offers the appended “Model Adult Community Corrections Act,” dated May 9, 1991, as a suggested example.
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can exact punishment costs from offenders that now go untapped. Similarly, experiments with "intensive supervision probation" have sought to develop programs more punitive than "regular" probation but less punitive than total confinement.

Second, a broader menu of sanctions can more effectively respond to the needs of particular offenders. Drug treatment programs, both in- and outpatient, hold promise for reform of sufficient numbers of offenders so that rates of crime and imprisonment might be reduced simultaneously. Other compliance sanctions, geared toward the needs of offenders for psychological treatment, educational and vocational training, and family counseling, may also serve rehabilitative ends more effectively than the bookends of prison and probation. In particular, sanctions packages made up of compliance programs, economic and acknowledgment sanctions, and even intermittent confinement sanctions can combine varying measures of structure and discipline, imposed on the offender, with experience and training in the community.

Third, nonprison sanctions can sometimes advance incapacitative ends in ways that approximate, if not duplicate, the effects of total confinement. For example, an offender who tends toward violent behavior when drunk might be effectively incapacitated if a regime of intensive probation, with daily drug-and-alcohol testing, keeps the offender sober. Other offenders may require greater levels of control to be disabled from crime. Effective monitoring of home confinement, or a program of intermittent confinement paired with work release,

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8. See Franklin E. Zimring, Drug Treatment as a Criminal Sanction, 64 U. COLO. L. REV. 809, 824–25 (1993) ("A decisive preference for either community-treatment-cum-surveillance or imprisonment [of drug-abusing property felons and drug users convicted of possession and trafficking crimes] could make a difference approaching the hundreds of thousands in the cases sent to prison over the next decade.").
10. See FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION (forthcoming 1994) (manuscript at 314–15, on file with authors) (nonprison sanctions can exert control over offenders, but to a lesser extent than incarceration).
can account for an offender’s whereabouts at all hours of the day. While such restraints on offenders’ movements are surely not as formidable as prison walls, they can still exert a meaningful degree of incapacitative force. For some offenders, no more will be needed.

Fourth, nonprison sanctions can be better designed to serve goals of victim restitution than either the traditional prison or probation sentence. The freestanding economic sanction of restitution or reparation, discussed in Standard 18-3.15, is of course directly geared toward such an objective. Pragmatically, however, such a sanction is unlikely to succeed if the offender is imprisoned or is released with minimal supervision. The most promising scenarios include those where the offender is employed, is staying off drugs, is under regular supervision, and is responsible to make scheduled and enforced installment payments toward the full restitution amount.¹¹

Fifth, a widened array of criminal sanctions can serve all of the goals mentioned above—and almost invariably at a lower cost than imprisonment. While total confinement, in the minds of many policymakers and the public, provides clearly perceived benefits in punishment, deterrence, and incapacitation, it does so at a very high price. Across the country, one driving force of the movement toward a broad array of sanctions is the view that many benefits of incarceration can be realized at lower cost.

Types of Sanctions

The project of expanding the array of criminal sanctions is deserving of legislative attention, as recognized in paragraphs (a), (b), and (c) of this Standard. Under paragraph (a), the legislature should authorize imposition of sanctions including compliance programs, economic sanctions, acknowledgment sanctions, intermittent confinement, and total confinement.¹² Specific sanctions within these five categories are

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¹¹ See Standard 18-3.15 and Commentary.

¹² The ABA Model Community Corrections Act, Part II-A (1992), provides for local implementation of the following community-based sanctions (the list is not intended to be exclusive of other community-based sanctions):

1. Standard probation;
2. Intensive supervision probation;
3. Community service;
4. Home confinement with or without electronic monitoring;
5. Electronic surveillance (including telephone monitoring);
discussed in detail in Standards 18-3.13 through 18-3.21, below. Paragraph (b) adds that the legislature should remain receptive to the development of new types of sanctions. There is little reason to believe that the state of the art of criminal corrections will stagnate. Twenty years ago, little was known about day fines, electronic monitoring, or acknowledgment sanctions. In the coming decades, further innovations are to be expected and welcomed.

A related legislative responsibility is that of providing adequate funding for the range of sanctions. Under Standard 18-2.3(b):

The legislature should appropriate the operating and capital funds necessary for each part of the sentencing system to perform its prescribed role. In particular, the legislature should provide adequate funding for alcohol and drug treatment programs.

The development of effective nonprison sanctions requires initial cash outlays and continuing funding support beyond a "pilot" period. In the long run such expenditures can be recovered because the costs of total confinement are comparatively high. In the short run, however, few jurisdictions will enjoy immediate savings through the creation of nonprison programs. It is only years in the future, when new prison construction is averted, or when existing facilities can be scaled down, that such economies will be realized.

On the question of funding, therefore, the Standards assert two independent positions. First, a broader array of sanctions should be

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6. Community-based residential settings offering structure, supervision, surveillance, drug/alcohol treatment, employment counselling and/or other forms of treatment or counseling;
7. Outpatient treatment;
8. Requirement of employment and/or education/training;
9. Day-reporting centers;
10. Restitution;

13. The Standards further address issues concerning the selection of particular sanctions, or combinations of sanctions, in Standards 18-3.11 and 18-3.12.


15. See MORAIS & TONRY, supra note 4, at 18:
The "alternatives to imprisonment" movement sailed under false colors when it claimed immediate savings; prison budgets decline only when substantial numbers are taken out of the prison so that a prison or a wing of a prison may be closed—and that does not seem an immediate likelihood in most American jurisdictions.
supported by the legislature because the result will be sentences that are more just, humane, flexible, and effective. Second, the legislature should support such an agenda because, in the long term, substantial savings will result.

C. Costs and Resources

**Standard 18-2.3  Costs of criminal sanctions; resources needed**

(a) In designing or changing the criminal justice system, the legislature should consider financial and other costs of carrying out sentences imposed. For this purpose, the legislature should ensure that it receives a "sentencing impact statement" before it enacts new provisions in the criminal code.

(b) The legislature should appropriate the operating and capital funds necessary for each part of the sentencing system to perform its prescribed role. In particular, the legislature should provide adequate funding for alcohol and drug treatment programs.

(c) Presumptive sentences ideally should not be determined on the basis of funds or resources available.

(d) The legislature should recognize the consequences of not appropriating necessary funds, including the possibility that offenders will not serve appropriate and just sentences.

(e) In the event that the legislature fails to provide necessary funds, the agency performing the intermediate function should see that the aggregate of sentences imposed in conformity with legislative policies does not exceed the facilities and services provided for proper execution of those sentences. In particular, the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state.

**History of Standard**

This Standard is new.

**Related Standards**

For jurisdictions that elect to create a sentencing commission, see Standard 18-4.4(c).
Commentary

In an imaginary world of unlimited resources, legislatures could determine public policies with respect to sentencing or to matters of criminal justice generally, or indeed could fashion any other program, with no concern for cost. In the real world of finite resources, however, public policy must always be made with a view toward the economic demands of programs on government. While this statement is self-evident, it is often disregarded in matters of criminal justice. Lack of necessary resources is a fundamental problem that pervades the criminal justice system in most jurisdictions. Courts, prosecuting authorities, public defender agencies, probation offices, community-based service providers, institutions for intermittent confinement, jails, and prisons are being assigned missions that exceed, often by considerable amounts, the resources available to them. The most publicized example of this problem is the situation of current prison overcrowding, but lack of resources adequate to assigned tasks is an endemic condition.

The thrust of this Standard is that a legislature must take into account the financial impact of the sentencing policies it establishes. Paragraph (a) provides that in designing or changing the criminal justice system, the legislature should consider the financial and other costs of carrying out sentences imposed. In order to fulfill this mandate, a legislature needs reliable information on future sentencing patterns. The agency performing the intermediate function should be charged with preparation of forecasts of sentencing patterns so that the legislature can respond to the cost implications of those patterns. Useful forecasts must be made frequently, at least once each year, and must estimate the probable demands for facilities and services for each type of sanction.

Before approving changes to the criminal code or presumptive sentencing provisions, the legislature should ensure that it receives and considers a "sentencing impact statement." For example, a sentencing agency may submit one or more proposals to the legislature regarding new sentencing laws. Included in the agency’s submission should be

1. In order to allow for such projections, the sentencing structure must be adequately determinate within the meaning of Standard 18-2.5(a) (“The legislature should create a sentencing structure that enables the agency performing the immediate function to make reasonably accurate forecasts of the aggregate of sentencing decisions, including forecasts of the types of sanctions and severity of sentences imposed, so that the legislature can make informed changes in sentence patterns through amendment of the criminal code, or the agency can do so through revised guidance to sentencing courts.”).
projections concerning the resource implications of doing nothing, as well as those accompanying each proposal for change.\textsuperscript{2} The impact statement should include projections of initial capital outlays or savings associated with alternative proposals, as well as projections of continuing operating expenditures. The legislature can then move forward with knowledge of the funding implications of one decision as opposed to another.\textsuperscript{3}

This Standard does not suggest that the resources devoted to criminal sentences must remain at one fixed level. Paragraphs (b), (c), and (d) state complementary principles related to the political process of deciding what appropriations should be made for the sentencing system. All three paragraphs turn on the idea that the legislature should hold certain policy objectives for the system and its parts\textsuperscript{4} but must separately address implementation and funding issues. Paragraph (b) provides that the legislature should appropriate sufficient operating and capital funds so that each part of the sentencing system can perform its prescribed role. As with the first sentence of paragraph (a), this statement is both incontrovertible and frequently violated. The reach of paragraph (b) is extensive. It speaks to the funding necessary for the legislature's own consideration of sentencing issues, for a sentencing agency with adequate staff and research capability, for the court system and affiliated probation services, and for corrections programs as a whole, including prisons, jails, and community-based programs. Special mention is given to the need for adequate funding of alcohol and drug treatment centers in the second sentence of paragraph (b). Of the many parts of the sentencing system, the Standards' drafters recognized substance-abuse programs as deserving of high priority in resource-allocation decisions.

Paragraphs (c) and (d) speak to the tension between ideal sentencing policy and the art of the possible. In developing a purpose-driven scheme of presumptive sentences, the ideal conception of such

\textsuperscript{2} Impact statements are not useful unless they are seen as credible by legislators and other policymakers within a jurisdiction. Accordingly, these Standards elsewhere stress that the legislature should provide adequate funding for the research capacities of a sentencing agency. \textit{See Standard 18-4.2(c) \& (d).}

\textsuperscript{3} The legislature should likewise ensure that it receives a sentencing impact statement from the sentencing agency when it is considering other amendments to the criminal code, such as the enactment or alteration of habitual criminal laws, or provisions affecting maximum or minimum sentences.

\textsuperscript{4} \textit{See generally} Standard 18-2.1 and Commentary.
sentences should not be determined by presently available resources. Indeed, the criminal justice system would be intolerably arbitrary if existing resources were a determining, rather than merely a constrainting, factor in the creation of sentencing policy. Clearly, for example, the conception of proper sentences should not be formulated so as to fill existing prison beds or probation capacities, irrespective of rates of crime or the numbers of convicted offenders. Similarly, if the best policy judgments lead to the conclusion that some part of the sentencing system is not meeting important goals, policymakers should not have to live within the artificial ceiling of existing resources. In such conditions, it is incumbent upon the legislature to provide additional monies for the required expansion of programs. To give emphasis to this point, paragraph (d) admonishes legislatures to recognize that the consequence of inadequate funding is, predictably, a state of affairs in which offenders will not serve sentences that are appropriate and just.

Paragraph (e) operates one step beyond the determination of the amount of resources to be allocated to the sentencing system. Once appropriations decisions are made, and until they are altered, all actors within the system must seek to operate within established funding limits and to deploy finite resources in the most advantageous manner possible. In times of strained facilities, including prison and nonprison programs, it is foreseeable that excess capacities will not exist; prison beds and program slots will not be available so that every offender can serve an ideally determined sentence. When this is the case, the legislature should direct the sentencing agency to structure the system of presumptive sentences so that the aggregate of sentences imposed does not exceed the facilities and services provided for their execution. The first sentence of paragraph (e) speaks broadly to this point, encompassing all sentences and all sanctions programs. The second sentence of paragraph (e) repeats the point, but stresses the role of the sentencing agency in ensuring that incarcerated populations do not exceed the lawful capacity of the prison and jail systems of the state.5

The sentencing agency’s role in matching sentences to funded resources should be aimed toward much more than simply placing a “lid” on sentences that may be imposed. As stated in the first sentence of paragraph (e), the resource-matching function must be carried out

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5. The first state to institute a mechanism for the matching of prison sentences and prison space was Minnesota. See DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES 6-7 (Daniel J. Freed ed., 1988).
in conformity with legislative policies." The most important advantage of the agency's intervention is that a jurisdiction's policy priorities for sentencing may be carried out, to the maximum extent possible, within available means. For example, the legislatures and sentencing commissions in some jurisdictions have responded to crises in prison space by adapting presumptive sentences so that greater numbers of violent offenders are incarcerated, but fewer nonviolent offenders. Working with the commissions' projections, such offsetting policy changes can result in a net decline in general prison populations while better serving the community's sense that violent criminals are most deserving and in need of incarceration. In a similar fashion, across various classes of offenders, a sentencing agency can help ensure that the legislature's first priorities are met first, that second priorities come next, and so on.

Standard 18-2.3 simultaneously rejects two strong views of the relationship between resources and sentencing decisions: (1) the idea that existing resources should control sentencing policy, and (2) the notion that responsible sentencing policy can be made without consideration of resources. Either view, in its pure form, is nonsensical. Resources and policy are interactive variables. As policy evolves, or when it is discovered that existing policy is not being well served, significant changes in funding allocations may be necessary. At any one moment in time, however, the total facilities available for the administration of sentences are fixed and finite. It is a prime function of the legislature and sentencing agency to see that they are apportioned wisely.


D. Severity of Sanctions

Standard 18-2.4 Severity of sentences generally

The legislature should ensure that maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.

History of Standard

This Standard restates provisions of the prior edition, with cosmetic changes in wording. Former Standard 18-2.2 (2d ed. 1979), in its caption but not in text, alluded to the “[g]eneral principle” of the “least restrictive alternative” in criminal punishment. Former Standard 18-3.2(a)(iii) provided: “Parsimony in the use of punishment is favored. The sentence imposed should therefore be the least severe sanction necessary to achieve the purposes for which it is imposed.”

Related Standards

This Standard has a parallel provision, applicable to courts in their exercise of sentencing discretion, in Standard 18-6.1(a).

Commentary

Establishing the proper levels of severity of sanctions to be imposed on offenders is one of the most fundamental issues of criminal justice. On the systemic plane, such decisions go far toward determining the overall scale of the sentencing and corrections enterprise in each jurisdiction. As to individual offenders, severity decisions have obvious and direct impact. Criminal sentences represent the maximum use of a state’s coercive powers as against its own citizens. The question of “how much is enough?” carries unusually high stakes along dimensions of public policy, public resources, and individual lives.1

1. Little conscious decision making has gone into the question of how large our prison enterprise should be. Indeed, even in retrospect, we have no adequate theories to explain
The Standard addresses severity concerns with reference to both moral and utilitarian goals. The first sentence, addressed to the legislature, states that maximum and presumptive sentences should be formed consistent with rational, civilized, and humane values. A rational sentence is one imposed for articulable and justifiable reasons. Chimerical or purpose-free sentencing is defended by no one, but the task of bringing rationality to severity decisions is not easily achieved. The problem is compounded by the presence of great moral disagreements over the appropriate magnitude of sentences. The Standards cannot hope to resolve such subjective and politically infused controversies, but can and do exhort policymakers to attend to the highest values of civilization and humanity when creating laws that will influence sentence severity.

The second sentence of the Standard sets forth a principle that can usefully be applied in the creation of sentencing policy and the imposition of specific sentences, regardless of the societal purposes a particular jurisdiction has decided to pursue: All impositions of punishment should be no more than necessary for the attainment of identified societal goals. It is generally accepted that it is wrong to inflict gratuitous harm; thus government ought to impose only the minimum criminal sanctions consistent with the public's aims. This is sometimes called the principle of parsimony in punishment. It is made applicable

why rates of incarceration change over time. See FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 175 (1991) ("The absence of a conspicuous programmatic explanation for the increase in prison populations in the United States in the 1970s and 1980s leaves this pattern a compound mystery.").


4. When the type of sanction is incarceration, the deprivation involved is a near-complete loss of liberty. Our history reflects the overriding value we attach to individual freedom. Determining the proper scale of sanctions of total confinement ought to be done with regard for that historic principle.

5. The prior edition captured this general principle in the phrase "least restrictive alternative" appearing in the caption of former Standard 18-2.2 (2d ed. 1979), which declared in paragraph (a): "The sentence imposed in each case should call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime."

6. The prior edition declared in black letter that "parsimony in the use of punishment is favored." Former Standard 18-3.2(a)(iii) (2d ed. 1979). For the third edition, the Standards Committee concluded that the word parsimony, while colorful, was an imprecise guide for sentencing policy. The Committee opted to substitute more specific language without abandoning the principle of the earlier Standard.
here to severity decisions made by legislatures, sentencing agencies, and the courts.

Application of the parsimony principle depends to a great extent on the presence or absence of data on how well the sentencing system is serving intended objectives. As emphasized elsewhere in these Standards, there is a critical need for evaluative information in most segments of the criminal justice system. Programs aimed toward retribution, incapacitation, deterrence, rehabilitation, and victim restoration should be assessed on a regular basis to determine whether sentences that include such programs are more or less severe than necessary. For example, even for offenders who are considered very dangerous, the goal of incapacitation may not justify a sentence severity of life imprisonment without parole. If credible evidence suggests that few people commit serious offenses in their older years, an incapacitative system would stretch beyond the bounds of parsimony in enforcing lifetime prison sentences for all such offenders. Alternatively, in cases of drug-addicted offenders, it may be discovered that outpatient treatment programs are rarely effective for offenders of certain profiles. For such cases, a sentencing system in pursuit of rehabilitative effects might incline toward a required term of confinement in an inpatient treatment facility. In these and other inquiries about necessary levels of severity, however, our present empirical knowledge is often incomplete and can even appear paradoxical. A fulfillment of the mission laid out in Standard 18-2.4 thus requires an ongoing commitment to monitoring the workings of the sentencing system and its parts.

E. Determinacy, Disparity, and Individualized Sentences

Standard 18-2.5 Determinacy and disparity

(a) The legislature should create a sentencing structure that enables the agency performing the intermediate function to make

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7. Such a decision would be constrained, however, by the terms of Standard 18-3.12(a)(iii) ("Rehabilitation of offenders is an insufficient basis, standing alone, for imposition of a criminal sanction not otherwise justified, or for imposition of a more severe sentence than otherwise justified.").

8. For instance, the claim is sometimes made that prison sentences can work to increase ultimate crime rates because the prisons operate as "schools for crime."
reasonably accurate forecasts of the aggregate of sentencing decisions, including forecasts of the types of sanctions and severity of sentences imposed, so that the legislature can make informed changes in sentence patterns through amendment of the criminal code, or the agency can do so through revised guidance to sentencing courts.

(b) The legislature should create a sentencing structure that sufficiently guides the exercise of sentencing courts' discretion to the end that unwarranted and inequitable disparities in sentences are avoided.

**History of Standard**

Paragraph (a) of this Standard is new. Paragraph (b) restates, in somewhat different wording, the terms of former Standards 18-2.1(d) (legislature should create "guideline drafting agency" to help "curtail unwarranted sentencing disparities"), and 18-2.2(a) ("sentencing authorities best serve the public interest and the appearance of justice when they give serious consideration to the goal of sentencing equality and the need to avoid unwarranted disparities") (2d ed. 1979).

**Related Standards**

Part IV of these Standards provides detail concerning the agency performing the intermediate function in the sentencing system. Such an agency is necessary to meet the requirement of determinacy as defined by this Standard. See also Standard 18-1.3.

**Commentary**

Systems of "indeterminate" sentencing, which invest sentencing judges and parole boards with broad discretion in making sentencing decisions, have resulted in unwarranted disparity in individual sentences and have contributed to decades of unplanned change in overall patterns of sentencing.1 Prior editions of these Standards have

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noted the prevalence of unwarranted sentencing disparities in specific cases, demonstrated in analyses of sentence patterns for similar offenses and in studies of sentence choices by different judges considering identical cases. Some observers have condemned the arbitrary and random nature of indeterminate sentences; others have claimed that such a sentencing structure allows racial and class biases to infect sentencing decisions.

At every level of the drafting process (in the Task Force, the Standards Committee, and the Criminal Justice Section Council), the ABA consistently decided that the traditional practices of indeterminate sentencing, still followed in most states, should be rejected. It is a telling point that through four years of ABA debate, no defense was raised of the old practices of indeterminacy. Except in jurisdictions that retain the discredited indeterminate system, the Standards advocate that discretionary parole release should be abolished. Apart from credits for good time, presumptive sentences to total confinement should be cast with the expectation that the sentence imposed will determine the sentence served. These provisions echo calls, since the early 1970s, for greater rule of law and uniformity in the sentencing process.

The third edition adds an important new component of the requirement of determinacy: Standard 18-2.5(a) states that the sentencing structure should be sufficiently determinate to allow for reasonably accurate forecasts of aggregate sentencing decisions so that the legislature can make informed changes in sentence patterns through amendment of the criminal code, or the agency can do so through revised guidance to sentencing courts. Thus, the Standard contemplates a system in which policy decisions can be made to have predictable impacts on the system as a whole. Also, with adequate determinacy the legislature and agency can address discrete problems in targeted ways. For example, a jurisdiction that wants to heighten the severity

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2. The long-standing position of the Standards has been to search for appropriate ways to curtail case-by-case disparities through more determinate forms of sentencing. See History of Standard, above.

3. Standard 18-3.21(g).

4. See Standards 18-3.21(e) and 18-4.4(c).

5. See FRANKEL, supra note 1; KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 139-41 (1971).

6. A sentencing structure that is adequately determinate, within the meaning of paragraph (a) above, is a prerequisite to successful performance of the “resource matching” function required by Standard 18-2.3.
of sentences for violent crimes can do so with some precision. If the resulting changes will overload the prison system, the agency can propose offsetting amendments, such as fractional reductions in sentences for nonviolent crimes. Substantial state experience through the 1980s has shown that the related goals of predictability and manageability can be realized in determinate sentencing structures.\(^7\)

This Standard must be read in conjunction with Standard 18-2.6 regarding the "individualization of sentences." Determinacy, as a systemic and case-specific value, is not an absolute good that must be pursued to the exclusion of other concerns. As argued by Kenneth Culp Davis, predictable and uniform rules must always coexist with a degree of flexibility and discretion. The problem is finding the optimum balance between rule and discretion.\(^8\) In the realm of sentencing, this tension is vividly pronounced.

**Determinacy and Presumptive Sentences**

The Standards seek to strike a salutary balance between rule and discretion. They do so, in part, through the concept of presumptive sentences for ordinary cases.\(^9\) Through this mechanism, sentencing


It must be noted that the Standards' drafters did not intend to endorse all determinate schemes for sentencing. Indeed, a major stumbling block to the ABA policy decisions in favor of determinacy, a sentencing agency, and presumptive sentences was the widespread unpopularity of the federal guidelines. One central objection to the federal guidelines is that they are overly mechanical and restrictive of the authority of sentencing courts. See, e.g., Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681 (1992); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Amer. Crim. L. Rev. 833 (1993). In the federal system, presumptive guideline sentences are calculated through an additive process of many precisely weighted factors, which translate into a narrow sentencing range on a guideline grid. The sentencing court has limited power to deviate from the prescribed sentencing range, and the federal appellate courts have overturned many attempts by district courts to depart from the guidelines. In short, the current federal system is perceived as too high in determinacy and too low in flexibility.

\(^8\) Davis, supra note 5, at 4, 42.

\(^9\) See Standard 18-3.1 and Commentary.
18-2.6 Criminal Justice Sentencing Standards

courts across a jurisdiction can begin analysis of comparable cases from a common starting point. If the court finds that a particular case is not ordinary, so that there are substantial reasons to impose a sentence other than the presumptive sentence, the court has authority to fashion a departure sentence.10 While departures must be explained on the record and are subject to appellate review, the aggravating or mitigating factors that contribute to a departure decision may not, under the Standards, be given specific weights binding on sentencing courts.11

Through such mechanisms the Standards hope to build a sentencing structure in which the systemic, rulemaking authority of the sentencing agency coexists with substantial power to individualize sentences, when appropriate, vested in sentencing courts. Standards 18-2.5 and 18-2.6 articulate the two coordinate values of rule and discretion that are reflected and accommodated throughout the remainder of this chapter.

Standard 18-2.6 Individualization of sentences

(a) The legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders.

(i) Sentencing courts should be permitted to take into account facts and circumstances concerning the offense or the offender that constitute aggravating or mitigating factors.

(ii) Neither the legislature nor the agency performing the intermediate function should assign specific weights to aggravating or mitigating factors.

(b) The legislature should authorize sentencing courts, sentencing individual offenders, to take into account personal characteristics not material to their culpability that may justify imposition of a different type of sanction or, in limited circumstances, a sentence of lesser severity than would otherwise be imposed.

History of Standard

This Standard is new.

10. See Standards 18-3.1, 18-3.2(d), 18-3.3(e), and 18-4.4(b)(iv).
11. See Standards 18-3.2(c) (mitigating factors should not be assigned specific weights); 18-3.3(d) (aggravating factors should not be assigned specific weights).
Related Standards

The topic of judicial discretion in sentencing is addressed in Part VI of these Standards.

Commentary

This Standard provides that the legislature should create a sentencing structure in which courts exercise substantial discretion over sentences in particular cases. Even within determinate sentencing systems, it is desirable for government to invest a responsible public official with case-by-case power to respond to unusual, subjective, or unforeseen factors having bearing on sentencing decisions. No legislature or sentencing agency, however diligent, can forecast the appropriate sanction for every particular case. In the view of the Standards' drafters, sentencing courts are the best-positioned governmental actors to make such case-specific judgments. By institutional training, judges have long experience in rendering particularized outcomes within a legal framework, and their decisions are uniquely public and subject to appellate review. Under these Standards, the authority of the legislature and sentencing agency, directed toward systemic issues, should be counterbalanced by a meaningful case-sensitive authority on the part of the courts.

Paragraph (a) addresses the authority of courts to individualize sentences based on the gravity of offenses and the culpability of particular offenders. The legislature should provide for such power. Subparagraph (a)(i) states that sentencing courts should be permitted to take into account facts and circumstances concerning the offense or the offender that constitute aggravating or mitigating factors. These subjects are taken up in greater detail in Standards 18-3.2 and 18-3.3, below. Subparagraph (a)(ii) emphasizes that neither the legislature nor the agency performing the intermediate function should assign specific

1. Standard 18-2.6 is complementary to Standard 18-2.5, concerning "determinacy and disparity" in sentencing. The Commentary accompanying Standard 18-2.5 should thus be consulted with respect to this Standard as well.

2. In contrast, the other government officials who may participate in case-specific sentencing decisions, such as prosecutors and parole officials, do not operate under similar institutional constraints and their decisions are typically neither public nor reviewable. See Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550, 564 (1978).
weights to aggravating or mitigating factors. Thus, where such factors are found to be present, sentencing courts have discretion, subject to appellate review, to determine the proper impact of the factors on the punishment imposed.

Paragraph (b) speaks to the courts' power to consider personal characteristics of offenders that are not material to their culpability. The legislature should provide for such power, subject to the qualifications contained in Standard 18-3.4, below. In appropriate circumstances, an offender's personal characteristics may justify imposition of a different type of sanction or a sentence of lesser severity than would otherwise be imposed.

F. Systemic Review

Standard 18-2.7 Systemic review

(a) The legislature should ensure that valid, current data are compiled on the operation of the criminal justice system, including data on the use and efficacy of each type of sanction.

(b) At least once every ten years, the legislature should re-examine legislative policies regarding sentencing in light of the pattern of sentences imposed and executed.

History of Standard

This Standard is new.

Related Standards

The data-gathering requirement set forth in paragraph (a) is a primary responsibility of the agency performing the intermediate function. See Standards 18-1.3(a), 18-4.1(b), and 18-5.1.

Commentary

Sound public policy cannot be made unless policymakers have an adequate factual base on which to make judgments. The development

3. This point, repeated in Standards 18-3.2(c) and 18-3.3(d), was thought sufficiently important by the Standards Committee to be included in Part II's catalog of fundamental policy concerns. See Standards 18-3.2, 18-3.3 and Commentary.
of mechanisms for acquiring and using information about sentences imposed, including data on the efficacy of various types of sanctions, should be a priority of every criminal justice system. Paragraph (a) makes this a matter of ultimate legislative responsibility; elsewhere the Standards contemplate that the legislature will discharge its responsibility through the creation and adequate funding of a sentencing agency. Central to the mission of the agency performing the intermediate function should be collection, evaluation, and dissemination of data concerning the operation of the criminal justice system.¹

One purpose of this Standard is to emphasize the need periodically to make broad assessments of the overall sentencing system. Paragraph (b) states that such reviews should take place at least once each decade. This is intended as an outer boundary, however; more frequent systemic review would be desirable. Appropriate data gathering should include all aspects of sentences imposed and sentences executed. In addition, studies should be made of the impact of particular crimes on victims and society and the resources available for law enforcement. Regular studies should be undertaken of the impact of the administration of criminal law on minority groups to determine whether unwarranted systemic discrimination is taking place.²

¹ See Standards 18-1.3 and 18-4.1(b).

² See Michael Tonry, Racial Disproportion in U.S. Prisons, 34 Brit. J. Criminology 97, 100–103 (1994) (nationwide, per capita incarceration of blacks is 6.44 times that of whites, and disparity appears to be widening); Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 64 U. Colo. L. Rev. 743, 743–45 (1993). The extent of racial disparities in the prison populations of different states is highly variable, suggesting that each jurisdiction must study its own localized conditions. See Blumstein, id., at 755 tbl. 3 (in 1990, Hawaii had the lowest black-to-white incarceration ratio of 1.5; Minnesota had the highest ratio of 20.4).
A. Legislative Framework Generally

1. Current Offense Sentences

Standard 18-3.1 Ordinary offenses and offenders

(a) For each offense, the agency performing the intermediate function should guide sentencing courts to the presumptive sentence, i.e., the level of severity of the sentence and the permissible types of sanctions to be imposed in the ordinary case. For cases that are not ordinary, the legislature or the agency should establish criteria for imposing sanctions of more or less severity, or of different types of sanctions. Such criteria should include the factors aggravating or mitigating the gravity of offenses, the degree of offenders' culpability, and personal characteristics of individual offenders that may be taken into account.

(b) Presumptive sentences may be expressed in terms of ranges of severity of sanctions.

History of Standard

This Standard is new.

Related Standards

Part V of this chapter contains Standards regarding the process by which courts, prior to sentencing, may be informed of the unique facts and circumstances of particular cases and the manner in which sentences are imposed. See Standards 18-5.17 to 18-5.19. Standard 18-6.3(a) considers the system of presumptive sentencing from the perspective of sentencing courts exercising their sentencing discretion.
The concept of presumptive sentences is the cornerstone of a sentencing system that seeks, on the one hand, to eliminate unwarranted disparities in sentences and, on the other hand, to permit sentencing courts to take into account differences among offenders that justify disparate sentences. As envisioned in these Standards, the presumptive sentence is the starting point for a court in determining sentence; it is not a fixed endpoint for all cases. In each case, the court is authorized to take into account particular facts about the nature of the offense and circumstances of the offender. On the basis of such concerns, the court may decide to impose the presumptive sentence, or may decide—for stated reasons—that a different sentence is proper. When all sentencing courts in the jurisdiction follow the process of reasoning from a common baseline, the result should be a reduction of unwarranted sentence disparities. Further, the sentencing agency should monitor the decision making of sentencing courts, and the reasons given by courts for departures from presumptive sentences. Over time, the agency can make improvements to the guidance it gives sentencing courts by amending its sentencing provisions to take better account of factors found important by the judiciary.

In theory, "presumptive sentences" could be given greater, or lesser, binding effect on sentencing courts than contemplated in these Standards. During the early years of the federal sentencing guidelines, for example, the perception has developed that district courts have very little authority to deviate from the "presumptive" guideline sentence in particular cases. In contrast, in many state guidelines systems, the sentencing court retains substantial discretion to deviate from the

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1. The Standards identify both of these as basic policy objectives for every jurisdiction. See Standards 18-2.5 and 18-2.6.
2. See Standards 18-3.2, 18-3.3 and Commentary (sentencing agency can supplement formal enumeration of mitigating and aggravating sentencing factors in light of decisions of sentencing courts).
presumptive sentence in unusual cases.\textsuperscript{4} The Standards' drafters concluded that the highly restrictive current practice under the federal guidelines is not desirable, and that a more balanced allocation of authority between sentencing agency and sentencing judge is essential. As explained above, however, the Standards do not recommend that presumptive sentences be merely advisory. The states that have experimented with such systems have found that voluntary sentencing provisions do little to further the goals of determinacy.\textsuperscript{5}

Standard 18-3.1(a) provides that presumptive sentences should be formulated for each offense by the agency charged with the intermediate function. As emphasized in the first sentence of paragraph (a), the sentencing agency should design each presumptive sentence as that which should be imposed on an "ordinary" offender who has committed the offense or offenses of conviction in an "ordinary" way.\textsuperscript{6} Ordinariness, as used here, denotes those factual scenarios that most frequently come before the courts, often in high volumes, in cases of armed robbery, drug sale, first or second degree assault, and the like. During the Standards' drafting, judges reported that local court systems often develop "going rates" for sentencing of offenses commonly committed. Alternatively, individual judges, over time, employ personal benchmarks as a means of promoting internal consistency in their own sentences. Under these Standards, the simple but critical requirement of presumptive sentencing is that such judgments should be formulated at a systemwide level, not court-by-court or judge-by-judge, and should be applied with consistency throughout the jurisdiction.\textsuperscript{7}

\textsuperscript{4} See Standard 18-4.4 and Commentary.

\textsuperscript{5} See Michael Tonry, Sentencing Commissions and Their Guidelines 140, in 17 Crime and Justice: A Review of Research (Michael Tonry ed., 1993) (with the possible exception of Delaware, "[e]valuations showed that voluntary guidelines typically had little or no demonstrable effect on sentences imposed").

\textsuperscript{6} The system of presumptive sentences works best in jurisdictions whose criminal codes reflect care in the grading of offenses, so that the factors most material to offense gravity are determined at the guilt rather than the sentencing stage. See Standard 18-3.3(a) ("The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.").

\textsuperscript{7} Professor Alschuler, a proponent of ordinary-offense-based sentencing, has suggested that the sentencing agency should make a detailed explanation of the factors included in its vision of the ordinary case for each offense—a task that has not been
Presumptive sentences function most effectively when calibrated to govern the substantial majority of cases involving specific crimes. The goal of determinacy in sentencing is not served, or is served only weakly, if the policy judgments of the sentencing agency are given sporadic effect. In such a system, the power of presumptive sentences as tools for prediction and purposeful manipulation of sentencing patterns is diluted. Also, the ability of presumptive sentences to reduce unjustified disparity in sentencing is reduced. Elsewhere, the Standards explain that deviation from the presumptive sentence should be allowed when the sentencing court can identify "substantial reasons" for doing so. Such reasons may include factors aggravating or mitigating the gravity of the crime, the degree of the offender's culpability, or the personal characteristics of the offender that are eligible for sentencing consideration.

As stated in paragraph (a), a presumptive sentence should guide a sentencing court to the overall severity level of the sentence of an ordinary offender; in addition, it should guide the court to the several types of sanctions that may be appropriate for execution of the presumptive sentence. Thus, a presumptive sentence could guide courts toward imposition of sentences that are predominantly an economic sanction, a compliance sanction, a sanction of intermittent confinement, a sanction of total confinement, or composites of several types of sanctions. An important judgment, running throughout the Standards, is that

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discharged by existing sentencing commissions:

If sentencing commissions had shared their "rich and holistic picture of the typical case" with the rest of us, they would have helped sentencing judges like you. You could compare the features of any case before you with the features of the commission's typical case, and the sentence that the commission had prescribed for the typical case might give you a good sense of the appropriate sentence for yours. A sentencing commission that resolved recurring sentencing issues and that provided benchmarks, not boxes, could make a marvelous, lasting contribution to the quality of criminal justice.


8. For closer discussion of the components of the goal of determinacy, see Standard 18-2.5 and Commentary.

9. See Standards 18-3.2(d), 18-3.3(e), and 18-4.4(b)(iv). The "substantial reasons" standard for departure from the presumptive sentences is discussed in detail in the commentary following Standard 18-4.4.

10. See Standards 18-3.2 (mitigating factors); 18-3.3 (aggravating factors); 18-3.4 (personal characteristics of individual offenders).

11. Part IV of this chapter, particularly Standard 18-4.4, expands upon this aspect of the intermediate function.
sentences of high and low severity may be carried out in various ways, through the imposition of different sanctions or combinations of sanctions. The sentencing agency should not neglect the difficult task of providing guidance and structure for the decision-making process concerning the full array of criminal sanctions. Kay Knapp observed that, as of 1993, no American sentencing commission has given sufficient attention to the problem of providing guidance for the use of the full range of prison and nonprison sanctions. The Standards echo the view that much greater effort should be expended in this direction.

The Standards do not prescribe any one manner in which the sentencing agency must articulate presumptive sentences. Presumptive sentences may be set out in narrative form as is done in statutory language in California, as numerical percentages of legislatively authorized maxima as in Delaware, or in grid form as in many jurisdictions that have established sentencing guidelines. Many other possibilities doubtless exist. In preparing these Standards, the drafters were favorably impressed with some of the sentencing guidelines structures in use at the state level, and commend those systems as one possible model for other jurisdictions. However, the Standards do not require

12. See, e.g., Standard 18-3.12(a)(i) (the agency should recognize that “[e]very criminal sanction is a deprivation of liberty or property and has the effects of punishing offenders, deterring criminal conduct and fostering respect for the law”); 18-3.12(a)(ii) (the agency should recognize that “[s]anctions other than total confinement may serve to punish and incapacitate offenders”).


14. Although the Standards do not endorse any one fixed model for sentencing reform, the states that have adapted the “Minnesota approach” were influential in the drafting process. See generally Standards 18-4.2 through 18-4.4 and Commentary. Throughout the preparation of the third edition, persons with close familiarity with innovative state systems participated in the drafting process. For example, Douglas Amdahl, former Chief Justice of Minnesota and one of the architects of Minnesota’s sentencing guidelines, was a member of the Task Force that produced the original draft of the new Standards. Norman Maleng, Prosecuting Attorney, King County (Seattle), Washington, and a founding member of the Washington Sentencing Guidelines Commission, was an influential voice on the Standards Committee for the last three years of the Standards’ creation. At one meeting of the ABA Criminal Justice Section Council, representatives of the Oregon Criminal Justice Council made a formal presentation concerning the form and operation of Oregon’s sentencing guidelines. James Exum, Chief Justice of the North Carolina Supreme Court, was Chair of the Standards Committee throughout its consideration of the Sentencing Standards. As of this writing, an ambitious proposal to amend North Carolina sentencing law is scheduled to take effect in 1995. See generally Ronald F. Wright & Susan P. Ellis, A Progress Report on the North Carolina Sentencing and Policy Advisory
use of a guidelines grid or any other format, but rather encourage
continuing exploration and refinement of methods for expressing
presumptive sentences. It is especially important to develop provisions
for presumptive sentencing that guide sentencing judges in the choice
among the many types of sanctions that may be used. A simple grid
approach may be badly suited for this function if it attempts to state
presumptive sentences for only one or two of the available types of
sanctions. These Standards, where they speak to the issue of choice
of sanction, do so in narrative form. For example, Standards 18-3.12(c)
and 18-6.4 provide that the "in-out" decision should be made in light
of articulated criteria.

Paragraph (b) provides that presumptive sentences may be
expressed in terms of ranges of severity of sanctions. Most existing
determinate systems employ such a device, especially for the presum­
tive amounts of fines and lengths of incarcerative sentences. For exam­
ple, under the current Minnesota Sentencing Guidelines, the
presumptive sentence for an armed robber with no criminal record is
44 to 52 months in prison. Under the federal guidelines, the least
aggravated case of armed robbery for a first offender presently carries
a presumptive guideline sentence of 57 to 71 months in prison.

In contrast to the ABA's positive impression of state systems, the drafters borrowed
little from the current federal sentencing guideline system. See Introduction, supra, at
xxv–xxvii (distinguishing the approach taken by the Standards from the federal guide­
lines). As of 1993, no state has sought to imitate the federal sentencing structure. See Kay
A. Knapp, Allocation of Discretion and Accountability Within Sentencing Systems, 64 U. COLO.

15. Professors Morris and Tonry believe that a guidelines grid is the most promising
of current sentencing structures for directing judges toward nonprison, as well as prison,
sanctions. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION 27–30
(1990). Recent proposals in North Carolina and Pennsylvania attempt to effectuate the
Morris and Tonry scheme. However, no existing guidelines system has yet succeeded in
mapping a decisional process adequate to the complex questions surrounding the use of
all available sanctions. In light of the early stage of development of this field, the Stan­
dards do not prescribe rigid solutions, but seek to identify goals all jurisdictions should
pursue in ongoing experimentation with sentencing reform.

16. MINN. STAT. ANN. § 244 app. IV (sentencing guidelines grid).

17. See U.S.S.G. § 2B3.1 (robbery guideline) & Sentencing Table. This sentence calcu­
lation assumes that a firearm was "brandished, displayed, or possessed," but was not
"discharged" or "otherwise used." See id. § 2B3.1(b)(2)(A),(B),(C). It also assumes that
the amount of money or property involved in the crime was the lowest among the "loss"
other jurisdictions, presumptive sentencing ranges are much wider than in the above illustrations. In Colorado, for example, the “presumptive range” for a first-offender armed robber is four to sixteen years (48 to 192 months), with the choice between probation and prison left to the discretion of the judge.\(^{18}\)

The Standards do not require any precise degree of breadth or narrowness in the articulation of presumptive sentencing ranges. However, ranges should not be defined so broadly that they undermine the goals of determinacy set forth in Standard 18-2.5. Thus, presumptive sentencing ranges must be sufficiently defined so that the sentencing agency can make reasonably accurate forecasts of future sentencing patterns, the legislature or agency can make informed changes in sentencing patterns through amendments to statutes and guidelines, and unwarranted disparities in individual sentences can be avoided.

On this functional measure, the presumptive ranges currently in use in Minnesota and federal law, as in the illustrations above, are sufficiently defined to serve the goals of determinacy. Very broad ranges of the kind reported from Colorado are not.

**Standard 18-3.2 Mitigating factors**

(a) The legislature or the agency performing the intermediate function should identify factors that may mitigate the gravity of an offense or an offender's culpability in commission of the offense.

(b) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the mitigating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

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\(^{18}\) See **COLO. REV. STAT.** § 18-4-302(3) (aggravated robbery is a class 3 felony); **id.** § 18-1-105(1)(a)(IV) (“presumptive range” for a class 3 felony is four years imprisonment to sixteen years imprisonment); **id.** § 18-1-105(10) (except in certain cases, “the court shall have the power to suspend the imposition or execution of sentence for such periods and upon such terms and conditions as it may deem best”).
(c) Mitigating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(d) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider mitigating factors in determining sentences within the range and, if the factors are substantial, in departing downward from the range.

**History of Standard**

This Standard is drawn from former Standard 18-3.2(b)(ii) (2d ed. 1979). The new Standard differs from the prior edition in that it does not suggest specific mitigating factors in the black letter (this is now done in Commentary) and contains a new provision in paragraph (c) that specific weights should not be assigned to enumerated mitigating factors.

**Related Standards**

Aggravating factors at sentencing are discussed in Standard 18-3.3.

**Commentary**

Paragraph (a) provides that the legislature or sentencing agency should identify factors that may be considered at sentencing in mitigation of the gravity of the offense or an offender’s level of culpability. It is important that a governmental actor with systemwide responsibility discharge this task. When such determinations are left to sentencing courts on a case-by-case basis, experience teaches that high levels of disparity will result. In the worst scenarios, one judge may treat a fact as a mitigating factor while a colleague considers the same fact an aggravating factor.\(^1\) To avoid such results, the legislature or agency should set policy for the system as a whole. As Professor Alschuler has said, “A sentencing commission not only should determine the appropriate resolution of recurring cases but also should settle recurring sentencing issues.”\(^2\) To promote the goal of determinacy, it is less

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2. Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 942 (1991). Professor Alschuler illustrates the point with recommendations concerning the systemwide resolution of a number of questions that arise in the sentencing of drunk drivers:

   Should a court attempt to distinguish between alcoholic drivers and drivers who can better control their drinking? . . . Should an alcoholic driver’s inability to control
important what the designated factors in mitigation may be than that they be applied throughout the jurisdiction with consistency.

On the broader level of policy, however, there is added reason to recommend systemic oversight. The legislature and agency are entrusted to develop and effectuate the underlying goals of the sentencing system and bear responsibility for evaluating how well the system is working to achieve those goals. Such concerns have immediate bearing on the question of what circumstances should be considered as mitigating—and aggravating—factors in sentence decisions. For instance, a system oriented toward retribution will likely produce a list of factors focused on the nature of the offense itself, while a jurisdiction with a primarily rehabilitative agenda would look more closely at the offender and indicators of potential reform. In complex sentence decisions, where a broad range of sanctions or combinations of sanctions are possible, the sentencing agency may well be the only governmental actor with sufficient expertise to translate discrete offense- or offender-based factors into guidance concerning the appropriate choice of sanctions.

As of this writing, different jurisdictions have made varying statements of mitigating factors for their sentencing systems. Illustrative of factors that might be identified are the following:

(i) An offender acted under strong provocation, or other circumstances in the relationship between the offender and the victim were extenuating;

(ii) An offender played a minor or passive role in the offense or participated under circumstances of coercion or duress.

(iii) An offender, because of youth or physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.

his or her drinking and lack of control once intoxicated mitigate his or her sentence? Or does the alcoholic driver pose a special danger—a danger that a court should regard as an aggravating circumstance? . . . . To what extent should drunk driving sentences vary with an offender’s level of intoxication, with the quality of his or her driving, with the commission of other traffic offenses, with the legal or illegal character of the intoxicant used, with the offender’s age, with the involvement in a traffic accident while intoxicated, and with the harm resulting from the accident?

Id. at 942-44.


4. See, e.g., MINN. STAT. ANN. § 244 app. II.D. 2(a); WASH. REV. CODE ANN. § 9.94A.390(1).
(iv) Another ground exists that, although not amounting to a defense, excuse, or justification, diminishes the gravity of an offense or an offender's culpability.

The formal iteration of mitigating factors should not be fixed in stone. In every jurisdiction, the agency performing the intermediate function should, as part of its work, monitor sentence decisions in the courts, including the use of mitigating factors. The agency may find that the existing list of factors should be refined in some way to expand, contract, or clarify their application to actual cases. In addition, the agency may observe that sentencing courts are deciding cases based on an unenumerated factor with some frequency. If so, the formal list of mitigating circumstances can be supplemented to recognize the "new" factor and articulate its proper use. In some cases the agency or legislature may take the position that an unenumerated factor should not be considered by sentencing courts even though it is apparent that the courts have been doing so. This authority, however, should be exercised with caution and deference to the courts' expertise and responsibility to individualize sanctioning decisions to particular cases.

Both the agency and judiciary should regard the evolutionary process of developing sentencing factors as a "dialogue" in which neither participant seeks to dominate the other.

Paragraphs (b) through (d) speak to the form of guidance the legislature or agency should provide concerning the consequences that follow a finding that one or more mitigating factors is present. Paragraph (b) highlights the fact that such factors can have an impact on overall severity of sentence, but also may go to the selection of sanctions to impose on an offender. It is important for the agency to devote substantial energy and attention to the "choice-of-sanction" problem.

Paragraph (c) states that neither legislature nor agency should seek to assign specific weights to mitigating factors. By their nature, such factors go to subjective and difficult-to-quantify attributes of particular offenses and offenders. The effect of paragraph (c) is not to give trial courts unconstrained authority to determine the impact of mitigating circumstances. Such decisions are always subject to appellate review. In drafting the Standards, few positions were as widely held as the view that the judiciary should retain discretion to assign degrees of

5. See Standard 18-4.1(b).
importance to both mitigating and aggravating sentencing factors. In part this sentiment reflected a broad-based unhappiness with the detailed and rigidly weighted character of the current federal sentencing guidelines. More generally, however, it sprang from a structural decision that sentencing courts should retain meaningful discretion to individualize sentences. As before, the image of a properly functioning determinate system is one in which the agency and courts function in partnership, each exercising discretion over issues within their areas of greatest competence.

Paragraph (d) provides that mitigating factors may appropriately be consulted by courts to determine what sentence to impose within the presumptive range, and may also supply grounds for departure from the presumptive sentence when the factors are "substantial." This is consistent with the departure standard throughout the Standards, which recognize departures as appropriate and necessary when "substantial reasons" exist.

Standard 18-3.3 Definition of offenses; aggravating factors

(a) The legislature should define offenses so that important factors determining the gravity of offenses are made elements of the offenses rather than aggravating factors to be considered only in sentencing.

(i) The legislature should categorize offenses in which an act of violence is an element separately from similar non-violent offenses so that the levels of severity of authorized and presumptive sentences are appropriate for each type of offense.

(ii) For offenses in which the gravity of the offense varies with the amount of money or quantity of goods, the legislature should differentiate offenses by including amounts or quantities as elements of the offenses.

(b) The legislature or the agency performing the intermediate function should identify factors that may aggravate the gravity of an offense or an offender's culpability in commission of the offense.

8. Standard 18-3.3(d) contains a provision analogous to Standard 18-3.2(c).
9. See Standards 18-3.3(e); 18-4.4(b)(iv).
(c) The agency performing the intermediate function should guide sentencing courts, upon finding that one or more of the aggravating factors is present in a case, in the use of discretion to choose a level of severity or type of sanction different from the presumptive sentence for an ordinary offense by an ordinary offender.

(d) Aggravating factors should not be assigned specific weights by statute or by guidance to sentencing courts.

(e) When presumptive sentences are expressed in ranges of severity, sentencing courts should be guided to consider aggravating factors in determining sentences within the range and, if the factors are substantial, in departing upward from the range.

History of Standard

The first paragraph of this Standard is based on former Standard 18-2.1(a) (2d ed. 1979). The remainder of the Standard is drawn from former Standard 18-3.2(b)(iii) (2d ed. 1979). The new Standard differs from the prior edition in that it does not suggest specific aggravating factors in the black letter (this is now done in Commentary) and contains a new provision in paragraph (d) that specific weights should not be assigned to enumerated aggravating factors.

Related Standards

Mitigating factors are discussed in Standard 18-3.2. An important limitation on aggravating factors, that they must be limited to those consistent with the offense of conviction and should not be employed to institute the practice of "real-offense" sentencing, is laid out in Standard 18-3.6.

Commentary

Legislative Grading of Offenses

Paragraph (a) expresses an important policy judgment concerning the legislative role in defining offenses in the criminal code. Each offense is comprised of statutory elements that detail what the prosecution must prove, or the defendant must admit, to support conviction.1 The law provides defendants with many important protections

1. See In re Winship, 397 U.S. 358 (1970); American Law Institute, Model Penal Code and Commentaries § 1.12 (1985)
with respect to such elements, including the right to jury trial, the right to confront and cross-examine prosecution witnesses, and the right to acquittal unless all elements are proven beyond a reasonable doubt. In contrast, none of these basic rights applies to factual determinations made at sentencing. Therefore it is a matter of considerable procedural consequence whether a fact is incorporated into the offense definition or is made an aggravating factor to be resolved at sentencing.

The appropriate dividing line between statutory elements and sentencing factors has not been settled as a matter of federal constitutional law. The Supreme Court has imposed few restrictions on the power of legislatures to designate facts in one category or the other. In its most recent ruling the Court suggested that under the Due Process Clause a fact determined at sentencing may not be "a tail which wags the dog of the substantive offense." Short of that extreme, however, the Court has left the matter to the best judgment of each jurisdiction.

Paragraph (a) declares that legislatures ought to incorporate factual issues important to the gravity of offenses as elements of those offenses. This is not meant to create a new or unfamiliar policy, but to explicate what most legislatures have been doing most of the time. At least since the wave of criminal law reform prompted by the Model Penal Code, the majority of states have undertaken to rationalize and make careful gradations in their criminal statutes, drawing distinctions based on "material" offense elements. The rationale for having an orderly criminal code extends far beyond the concerns of sentencing law, and includes the legislature's particular competence to define offenses and the necessity of affording notice to the public of the boundaries and consequences of criminal law violations. In the realm of sentencing, however, there is further reason to delineate between "trial" and

2. See Standard 18-3.6 and Commentary.
5. McMillan, 477 U.S. at 85. See also Patterson, 432 U.S. at 201–02.
6. See American Law Institute, Model Penal Code and Commentaries § 1.02(1)(e) (1985) (one of five general purposes of "provisions governing the definition of offenses" is "to differentiate on reasonable grounds between serious and minor offenses"). The Model Penal Code commentary explains that "in its effect on the offender's status in society, the law delineating these distinctions has an impact second only to that which establishes that proscribed conduct will be criminal." Id., Commentary at 20. Sixteen state legislatures have adopted a provision comparable to § 1.02(1)(e) into their criminal codes. Id. at 20–21 & n. 13.
"sentencing" facts. Concerns of fairness dictate that matters of importance to the degree of punishment should not be relegated to the procedural informalities of the sentencing hearing.\(^7\)

Subparagraphs (a)(i) and (ii) are specific applications of the general principle in paragraph (a). Subparagraph (a)(i) directs legislatures, where possible, to draw distinctions between crimes of violence and nonviolence; subparagraph (a)(ii) focuses on offenses whose gravity is thought to vary depending on the amount of money or quantity of goods involved. In both cases it is inappropriate for the sentencing agency to perform the legislative grading function, and critical determinations of offense seriousness should not be relegated to the sentencing hearing.\(^8\)

If the agency perceives that important grading distinctions have not been made in the criminal code, the Standards direct the agency to propose statutory amendments to address the defect.\(^9\)

**Aggravating Factors at Sentencing**

Paragraph (b), like Standard 18-3.2(a), signals the importance of having an actor at the systemwide level set basic policy concerning aggravating factors that may be considered at sentencing.\(^10\) Most existing determinate systems have done so either in statutory provisions or sentencing guidelines.\(^11\) Illustrative of aggravating factors that might be identified are the following:

(i) An offense involved multiple participants and the offender was the leader of the group.

(ii) A victim was particularly vulnerable.

(iii) A victim was treated with particular cruelty for which an offender should be held responsible.

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7. Standard 18-3.3(a) is closely related to Standard 18-3.6, which provides that offense behavior should be determined at the conviction stage rather than at sentencing.

8. The federal sentencing guidelines, alone among existing guideline systems, contain quantity-driven provisions that determine offense severity in detailed increments based on facts resolved at sentencing. See U.S.S.G. § 2B1.3(b) (for offenses of larceny, embezzlement, and other forms of theft, the guidelines offense level may be increased by zero to twenty levels depending on the amount of loss involved in the offense); § 2D1.1(c) (drug quantity table varying offense level with type and quantity of drug involved in offense).

9. This is an integral part of the agency's responsibilities. See Standard 18-4.2(b)(iv).

10. See Standard 18-3.2(a) and Commentary.

11. See, e.g., MINN. STAT. ANN. § 244 app. II.D.2(b); WASH. REV. CODE. ANN. § 9.94A.390(2).
(iv) The offense involved injury or threatened violence to others committed to gratify an offender's desire for pleasure or excitement.

(v) The degree of bodily harm caused, attempted, threatened, or foreseen by an offender was substantially greater than average for the given offense.

(vi) The degree of economic harm caused, attempted, threatened, or foreseen by an offender was substantially greater than average for the given offense.

(vii) The amount of contraband materials possessed by the offender or under the offender's control was substantially greater than average for the given offense.

As with mitigating circumstances, it is unrealistic to expect that all aggravating factors can be identified categorically; experience will lead to refinements and reformulations of the items on the list. In recognition of this, all existing determinate jurisdictions allow courts some freedom to impose a departure sentence based on factors not previously enumerated. Judge-made aggravating factors, however, should be subject to appellate review for legal sufficiency. Care should be taken, both at the trial and appellate level, that such factors serve the overarching goals of the sentencing system as identified by the legislature. Further, the sentencing agency should monitor closely sentencing courts' recognition of aggravating factors not previously categorized. Where such factors are seen to recur with regularity, the agency may seek to capture them in the formal terms of the enumerated factors. Alternatively, the agency may decide as a matter of policy that a judge-made aggravating circumstance is not appropriate and should not be considered in the future.

12. See, e.g., MINN. STAT. ANN. § 244 app. II.D.2 ("The following is a nonexclusive list of factors which may be used as reasons for departure: . . .") (emphasis in original); WASH. REV. CODE ANN. § 9.94A.390 ("The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences."); ORE. ADMIN. R. 253-08-002(1) ("the following nonexclusive list of mitigating and aggravating factors may be considered in determining whether substantial and compelling reasons for a departure exist").

13. See Part VIII below.

14. In some instances, under the terms of paragraph (a) the agency may recommend that legislation be enacted to include the "new" factor in the definition of offenses in the criminal code.
18-3.3 Criminal Justice Sentencing Standards

In enumerating aggravating factors, the legislature and agency should take care not to undermine the offense-of-conviction philosophy set forth in Standard 18-3.6. This can occur if an aggravating circumstance invites the sentencing court to consider whether the defendant committed offenses for which he was not convicted. For example, a state that allows a departure sentence for “multiple episodes” of an offense risks the introduction of real-offense sentencing into some cases. In such a state, following a conviction on one count of burglary, a trial court might decide that an aggravated sentence is appropriate if the court decides at sentencing that the defendant committed a number of other burglaries for which he was not convicted. Such a result directly contravenes the policy of Standard 18-3.6.

The same problem can arise in cases of offenses graded in degrees, such as homicide, assault, larceny or narcotics laws. If a defendant has been convicted of a second-degree offense, facts tending to show that the offense was “really” a first-degree offense may be introduced at sentencing as tending to establish a defined aggravating factor. For example, the fact that a victim suffered “serious bodily injury,” an element of first-degree assault, might be asserted in a sentencing hearing on a second-degree assault conviction as tending to show that the victim’s injury demonstrates the aggravating factor of “particular cruelty to the victim.” Again, such a finding would violate the offense-of-conviction policy of Standard 18-3.6.

A number of jurisdictions that have adopted the offense-of-conviction model guard against such results by specifying that defined statutory offenses, or elements of such offenses, may not be used to justify an aggravated departure sentence. Thus, the Minnesota guidelines provide that departures, like ordinary sentences, must remain “proportional to the severity of the offense of conviction and the extent of the offender’s prior criminal history.”15 In commentary, the Minnesota Sentencing Guidelines Commission explained:

> It follows from the Commission’s use of the conviction offense to determine offense severity that departures from the guidelines should not be permitted for elements of alleged offender behavior not within the definition of the offense of conviction. Thus, if an offender is convicted of simple robbery, a departure from the guidelines to increase the severity of the sentence should not be permitted.

Criminal Justice Sentencing Standards 18-3.4

because the offender possessed a firearm or used another dangerous weapon.\textsuperscript{16}

Washington and Florida, in legislation and guidelines, provide similar black-letter prohibitions against real-offense sentencing.\textsuperscript{17}

Appellate courts should also act to ensure that aggravated departure sentences do not serve as a back-door vehicle for real-offense sentencing. In offense-of-conviction jurisdictions, there is a growing body of case law on this issue.\textsuperscript{18}

Paragraphs (c), (d), and (e) of Standard 18-3.3 mirror the equivalent provisions set forth in Standard 18-3.2(b), (c), and (d) respectively. Paragraph (c) identifies the question of “choice of sanction” as coequal in importance to overall sentence severity; the sentencing agency should see that guidance is given to sentencing courts on both scores when aggravating factors are found to be present. Paragraph (d) underlines the Standards’ strongly held position that aggravating factors should not be assigned pre-ordained weight by legislature or sentencing agency. Paragraph (e) explains that aggravating factors may be consulted in reaching sentence decisions within the presumptive range or, when present in “substantial” dimension, in setting departure sentences.\textsuperscript{19}

\textbf{Standard 18-3.4 Personal characteristics of individual offenders}

(a) The legislature and the agency performing the intermediate function should authorize sentencing courts, sentencing individ-

\begin{itemize}
\item \textsuperscript{16} MINN. STAT. ANN. § 244 app.11.D.103 (emphasis added).
\item \textsuperscript{17} See WASH. REV. CODE § 9.94A.370(2) (“Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when [specific statutory exceptions are applicable].”); FLA. R. CRIM. P. 3.701(d)(11) (“Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.”).
\item \textsuperscript{18} See, e.g., State v. Womack, 319 N.W.2d 17 (Minn. 1982) (on guilty plea for possession of weapon, trial court erred in imposing departure sentence based on conclusion that defendant had committed an assault with the weapon for which no conviction was obtained); State v. Simpson, 554 So. 2d 506, 510 (Fla. 1989) (sentencing court improperly relied on finding that defendant had long history of criminal activity when most of the cited misconduct did not result in conviction); State v. McAlpin, 740 P.2d 824 (Wash. 1987) (nonconviction arrests and confessions may not be considered by sentencing judge).
\item \textsuperscript{19} For a more complete discussion of the policies behind paragraphs (c), (d), and (e), see the commentary accompanying Standard 18-3.2(b), (c), and (d).
\end{itemize}
ual offenders, to consider their physical, mental, social and economic characteristics, even though not material to their culpability for the offenses, only as provided in this Standard.

(b) The legislature and the agency should permit sentencing courts to use information about offenders' financial circumstances for the purpose of determination of the amount or terms of fines or other economic sanctions.

(c) Except as provided in (b), the legislature and the agency should provide that sentencing courts may take into account personal characteristics of offenders not material to their culpability to determine the appropriate types of sanctions to impose or, if the characteristics are indicative of circumstances of hardship, deprivation, or handicap, to lessen the severity of sentences that would have been imposed.

(d) The legislature should specify that the following personal characteristics shall not, in and of themselves, be used for this or any other purpose with regard to sentencing:

(i) Race,
(ii) Gender or sexual orientation,
(iii) National origin,
(iv) Religion or creed,
(v) Marital status,
(vi) Political affiliation or belief.

History of Standard
This Standard is new.

Related Standards
This Standard helps to effectuate the goal of individualization of sentences set forth in Standard 18-2.6(b).

Commentary
Personal Characteristics Not Material to Culpability
It is important at the outset to emphasize the nature of the personal characteristics of offenders addressed in this Standard. Only characteristics not material to offenders' culpability are encompassed. These can include such things as a defendant's age, health, handicaps or impair-
ments, psychological well-being, wealth, class, past affluence or poverty, current job status, employment history, level of education, standing in the community, family background, and current family circumstances. In many but not all instances, such biographic information about an offender will not have bearing on the gravity of his or her offense.

In some cases it may be fair to treat an offender’s personal characteristics as reflecting upon the gravity of an offense. For example, a theft of $500 may be viewed as less severe when motivated by the offender’s financial hardship and desire to feed his family than when perpetrated by a non-needy offender. Alternatively, a sex offense may be deemed especially cruel when committed by a person with authority over the victim because of a family or occupational relationship. In such occasions, when an offender’s personal characteristics go to the gravity of an offense, they may properly be considered as mitigating or aggravating circumstances under Standards 18-3.2 and 18-3.3. The present Standard considers the use of personal characteristics in the absence of such a nexus to culpability.

Policy Concerns

Many determinate jurisdictions have sought to restrict or prohibit the sentencing consideration of personal characteristics unrelated to culpability on the theory that such consideration can act to preserve or exacerbate preexisting class and race disparities in sentencing patterns. At least in the federal system such restrictions have prompted criticism that the sentencing process has been dehumanized, that the life history of defendants can no longer be argued to show extenuating circumstances, and that desirable individualization of sentences cannot occur.

The Standards attempt to find a balance between the need to avoid class and race disparities and the need to preserve a meaningful level

1. See, e.g., U.S.S.G. § 5H1.1 through 5H1.6 (the following factors are "not ordinarily relevant" to determinations of departure sentences: education and vocational skills, mental and emotional conditions, physical condition, including drug or alcohol dependence or abuse, employment record, family ties and responsibilities, and community ties); Minn. Stat. Ann. § 244 app. II.D.1 & cmt. II.D.101 ("the Commission has listed several factors which should not be used as reasons for departure from the presumptive sentence because these factors are highly correlated with sex, race, or income levels"); State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986) (Florida guidelines expressly forbid using social and economic status as a basis for sentencing.)

of individualization in sentences. Standard 18-3.4(c) accordingly permits limited use of personal characteristics unrelated to culpability. With regard to the severity of sentences, the Standard is most restrictive. Personal characteristics unrelated to culpability may never be used to justify a sentence more severe than is otherwise appropriate. Such characteristics may be used, however, to lessen severity, but only when indicative of circumstances of hardship, deprivation, or handicap. The drafters' intent is to preserve argumentation about sympathetic personal or life-history factors, but to channel such concerns to cases of misfortune rather than cases of privilege.

In addition, paragraph (c) does not restrict sentencing courts from using personal characteristics unrelated to culpability in choosing the types of sanctions to be imposed, provided that overall sentence severity is unchanged. For example, it may be appropriate for a court to take into account the fact that an offender is an alcoholic or drug addict in deciding whether a compliance program should require the offender to participate in a program for substance abusers. Alternatively, it may be proper for a court to weigh an offender's health or physical condition in deciding whether to impose a sentence of total confinement or a particular type of intermittent confinement. The Standard contemplates that choices among types of sanctions—including different combinations of sanctions—may be made in large numbers of cases without material modifications of overall sentence severity.

Economic Sanctions

Paragraph (b) recognizes that appropriate sentences to economic sanctions often require consideration of offenders' economic circumstances. The Standard permits sentencing courts to do so. For example, the concept of the means-based fine, incorporated in Standard 18-3.16(c), measures the severity of fines by offenders' actual earnings. When economic sanctions are imposed, the terms of payment, immediate or deferred, should be fixed in accordance with offenders' ability

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3. This tension is reflected throughout the Standards, beginning with the basic policies of Standards 18-2.5 ("Determinacy and disparity") and 18-2.6 ("Individualization of sentences").

to pay. Among other ends, this avoids routine, unnecessary violations of economic sanctions by offenders unable to pay as ordered.

**Prohibited Factors**

Paragraph (d) provides that personal characteristics of race, gender or sexual orientation, national origin, religion or creed, marital status, and political affiliation or belief may not be considered for any purpose with regard to sentencing decisions. Many of these factors would be forbidden as a matter of constitutional law. Irrespective of constitutional command, however, the legislature in each jurisdiction should provide that such personal attributes are not available to any part of the decisionmaking as to criminal punishment.

2. Criminal History of Offenders

**Standard 18-3.5 Criminal history; recidivism**

(a) The legislature should authorize more severe sentences for convicted offenders with prior convictions. The extent of enhancement should be reasonably related to the sentence severity levels authorized for the offense of conviction.

(b) Standards for enhancement of sentence on the basis of criminal history should take into account the nature and number of prior convictions and the time elapsed since an offender’s most recent prior conviction and completion of service of sentence. The legislature should fix time periods after which offenders’ prior convictions may not be taken into account to enhance sentence; these periods may vary with the nature of the prior offenses.

(c) The agency performing the intermediate function should guide sentencing courts to the appropriate weight to be given to an offender’s criminal history.

(d) If a jurisdiction has an “habitual offender” statute or comparable law regarding recidivists, the statute should provide that sentences imposed because of prior convictions should be reason-

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5. See Standards 18-3.13(c)(iv), 18-3.15(c)(ii), and 18-3.16(d).
ably related in severity to the level of sentence appropriate for the offense of current conviction.

History of Standard

This Standard is largely new. Paragraph (d), concerning “habitual offender” statutes, is based on former Standard 18-4.4(b)(i) (2d ed. 1979). Much of former Standard 18-4.4 has not been continued in the new edition. Most notably, the present Standards disapprove of the prior edition’s view that the application of an habitual offender statute should depend on a finding that an enhanced term is necessary to protect the public from further serious conduct by the defendant. See former Standard 18-4.4(c).

Related Standards

Sentencing courts’ discretion to weigh offenders’ criminal histories in sentence decisions is discussed in Standards 18-6.2(a) and 18-6.3(a).

Commentary

Theories of sentencing, virtually without exception, regard offenders who engage in repetitive criminal conduct as deserving either more severe sentences or sentences to different types of sanctions than those imposed on offenders without any criminal history. Paragraph (a) thus provides that the legislature in every jurisdiction should authorize more severe sentences for offenders with prior convictions. The weight to be accorded offenders’ past history of criminal convictions ought to be determined in light of the legislative choice of the societal purposes to be served in the enforcement of criminal law.

In many jurisdictions, criminal history is included as a sentencing factor to further the goal of incapacitation, based on the belief that defendants with past records of multiple offenses are more likely to reoffend in the future. As prison resources have become more scarce,

1. Sentencing based on pure act-retributivist principles would not deem any given offense as more grave because an offender had previously committed other offenses.
2. The Standard does not contemplate sentence enhancement for alleged past criminality that has not resulted in conviction. Cf. Standard 18-3.6.
there have been proposals to prioritize the use of incarceration to "selectively incapacitate" those offenders who present the greatest danger to the public.\footnote{See, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME 286-87 (2d ed. 1983).} To this end, considerable research was performed in the 1980s to test the power of criminal history, and other variables, to predict future dangerousness. The results were disappointing. While past criminality of large subject groups is statistically related to the future criminal behavior of the group as a whole, attempts to make predictions about individuals within the group are more often wrong than right.\footnote{See Norval Morris & Marc Miller, Predictions of Dangerousness 15-16, in 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH (Michael Tonry & Norval Morris eds., 1985) ("With our present knowledge, with the best possible long-term predictions of violent behavior we can expect to make one true positive prediction of violence to the person for every two false positive predictions."); JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981). Not all scholars have rejected the claim that the social sciences can predict offenders' future dangerousness with some degree of accuracy. See Albert W. Alschuler, Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process, 85 MICH. L. REV. 510, 546-47 (1986) (criticizing "studies commonly cited as demonstrating the inability of mental health professionals to predict violent behavior" but acknowledging that "[a]ny policy of preventive detention likely to reduce the amount of crime substantially would be likely to require the detention of many people who would not commit crimes if released"). Peter Greenwood developed a sophisticated model to predict recidivism rates among robbery and burglary offenders, which claimed to reach correct predictions 51% of the time. PETER W. GREENWOOD, U.S. DEPT. OF JUSTICE, SELECTIVE INCAPACITATION 59 (1982). His data suggested that judges correctly forecast recidivism in only 42% of such cases. Id. at 60.} The "false positive" effect (e.g., the tendency to classify a person as dangerous when that person is not) is reason for concern on at least three dimensions: First, and pragmatically, prison resources cannot be conserved when large numbers of false positives appear in the population designated for extended incarceration. In fact, existing research acknowledges that great increases in prison capacities would be needed to implement an effective program of selective incapacitation. Second, on a moral level some have serious qualms concerning the use of the criminal sanction to punish behavior that has not yet occurred.\footnote{See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 51-52 (1968); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 80-84 (1974).} The Standards do not insist upon but are sympathetic to this position;\footnote{Cf. Standard 18-3.12(a)(iii).} in some jurisdictions policymakers may hold similar reser-
vations about incapacitation theory. Third, research has shown that
criminal history, while of limited predictive value, does correlate with
the race of offenders. Given the high levels of racial disproportionality
in American correctional populations, the question is fairly raised
whether we should place heavy emphasis on prior criminal history
when the gains realized are disappointingly small.

The Standards do not adopt the view that criminal history should
be no part of sentencing decisions, but work from the premise that
current convictions should remain the grounding point for sentences
imposed. Accordingly, paragraph (a) provides that the extent of
enhancement for prior convictions should be reasonably related to the
severity level appropriate for the offense of conviction. Whether the
current offense is a major crime or petty misdemeanor, the court should
first determine the severity of sentence for that offense and then make
adjustments for the offender's criminal history. On this score, para-
graph (c) provides that the sentencing agency should translate the
legislature's public policy choices into more particular guidance to
sentencing courts.

It is generally accepted that the weight to be given an offender’s
prior convictions should be determined in part by the time elapsed
since they occurred. Formulaic criteria to measure staleness of prior
convictions, contained in prior editions of this chapter, have not been
continued. Under paragraph (b), legislatures should provide that
offenders’ prior convictions may not be used as a basis for sentence
enhancement if, after a legislatively specified time not defined in the
Standard, the offenders have not been convicted of further offenses.

Paragraph (d) addresses habitual offender and recidivist statutes,
and continues long-standing ABA policy that where such provisions
exist, they should ensure that sentences imposed bear a reasonable
relationship to the level of severity appropriate for the offense of
current conviction. In other words, habitual offender statutes, where
they exist, should be premised on the same policies applicable to the

8. The Colorado legislature did not include incapacitation in its statutory purposes
9. See ROGER HOOD, RACE AND SENTENCING: A STUDY IN THE CROWN COURT (1993);
Alfred Blumstein, Racial Disproportionality of U.S. Prison Populations Revisited, 65 U. COLO.
L. REV. 743 (1993); Joan Petersilia & Susan Turner, Guideline-Based Justice: The Implications
for Racial Minorities (Rand Corp. 1985).
10. See former Standard 18-4.4(c) (2d ed. 1979).
consideration of criminal history in general, as articulated in paragraph (a) of this Standard. Under Standard 18-3.21(b), such statutes should not operate through mandatory terms of total confinement. Consistent with paragraph (c) of this Standard, the sentencing agency should be called upon to provide guidance to the courts concerning appropriate enhanced levels of punishment for the persistent or habitual criminal.

Many jurisdictions have habitual offender laws that are in noncompliance with the above Standards. In some jurisdictions mandatory, usually lengthy, prison terms are imposed when the statutes' requirements are satisfied. Only a minority of states provide for judicial discretion in deciding whether to impose the enhanced terms, or in fixing the amount of enhancement.12

The Standards have never disapproved of habitual offender laws categorically, but have taken the view that such provisions should be integrated into the remainder of the criminal code.13 This position carries even greater force in a system of determinate and presumptive sentencing than in older, indeterminate structures. Consistent with paragraphs (a) through (c) of this Standard, a determinate scheme will provide for calibrated consideration of prior convictions in reasonably spaced increments as offenders present criminal histories of increasing seriousness. The precipitous effect of a habitual offender statute with mandated additional penalties will seldom coincide with the more flexible scheme of presumptive sentences, and will introduce gross disparities into sentencing patterns and distortions into the policy objectives the sentencing agency is seeking to implement.14 Also, to the extent that habitual offender statutes were once thought justified as a control on judicial discretion (and a check on unwanted judicial lenity), that concern is now addressed by the role of the sentencing agency. In fulfilling the intermediate function, the agency is entrusted to communicate systemic judgments concerning appropriate punishment severity to sentencing courts.15

13. See former Standard 18-4.4(a) (2d ed. 1979) ("The failure to integrate habitual offender statutes into a unitary penal code both impedes the interests of law enforcement and results in the uneven application of such statutes.").
15. The policies militating against mandatory habitual offender statutes are no different than those against mandatory sentencing in general. See Standard 18-3.11(c) and
This edition of the Standards rejects prior ABA policy that the operation of habitual offender statutes should turn upon a specific finding of "a substantial possibility of further serious criminal conduct by the defendant."16 As discussed above, research has failed to develop reliable predictors of future dangerousness in individual cases. Aside from moral questions that arise when punishing someone for conduct they have not yet engaged in, we have no empirical tool at present to make such judgments.17

3. Simultaneous Sentences for More than One Offense

Standard 18-3.6 Offense of conviction as basis for sentence

The legislature and the agency performing the intermediate function should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contende. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

History of Standard

This Standard is new.

Related Standards

This Standard is addressed to the legislature and sentencing agency. See also Standard 18-4.4(b)(i). A parallel provision, applicable to sentencing courts, is set forth in Standard 18-6.5(a). This Standard

Commentary.
16. See former Standard 18-4.4(c) (2d ed. 1979). The prior edition also set out detailed criteria on which such a finding might be based. Id.
17. The prior edition also contained an outside limit of a prison term of 25 years for the most extreme cases governed by habitual offender statutes. Former Standard 18-4.4(b)(ii) (2d ed. 1979). Consistent with the general policy of the third edition, no specified term of years has been included in the current Standard.
provides a limitation on the nature of aggravating factors that may be considered in the sentencing process. See Standard 18-3.3 and Commentary.

**Commentary**

This Standard endorses an "offense-of-conviction" orientation to sentencing and disapproves of the practice of "real-offense" sentencing.¹ The Standard provides that both legislature and sentencing agency should act to ensure that the severity of sentences and the types of sentences imposed are determined accordingly. The choice between offense-of-conviction and real-offense sentencing should not be left for trial courts to make on a case-by-case basis.²

Under the offense-of-conviction system contemplated by the Standards, the major determinant of sentence is the charge or charges of conviction as proven at trial or established by plea. Despite this emphasis, the Standards do not envision, and no American jurisdiction has ever provided, that such charges must be the sole ground for imposition of sentence.³ Other informational bases for sentence decisions are the defendant's history of prior convictions (see Standard 18-3.5), defined aggravating and mitigating factors associated with the current conviction (see Standards 18-3.2 and 18-3.3), and any personal characteristics of the defendant permitted to influence sentence determination (see Standard 18-3.4). Most states that have adopted sentencing guidelines have followed an offense-of-conviction model similar to that endorsed by the Standards.⁴

"Real-offense" sentencing embraces all of the considerations eligible in offense-of-conviction systems, but goes further to allow the sentenc-

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². As explored below, this choice implicates broad concerns of policy and fairness that should be resolved for each jurisdiction as a whole, if for no other reason than the pursuit of uniformity in sentence decisions. Most jurisdictions today permit ad hoc decisions by sentencing judges about whether to engage in real-offense sentencing, and to what degree. Under such regimes, where the starting point for decision making is itself variable, there is little hope for adequate determinacy in overall sentencing patterns.


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ing judge to determine whether the defendant committed additional or more serious offenses for which he was not convicted, and base sentence on such offenses. Thus, for example, in a real-offense jurisdiction, a defendant who has been convicted of one crime but acquitted of another may be sentenced as if he had been convicted of both—provided the statutory maximum for the offense of conviction permits such a result. Similarly, an offender who pleads guilty to certain counts in exchange for dismissal of others may be sentenced on the basis of all the original charges. In some instances of real-offense sentencing, the nonconviction crimes determined at sentencing can far outnumber those resulting in conviction, and can have greater effect on the offender's ultimate sentence than the conduct supporting the conviction.

The rejection of real-offense sentencing in Standard 18-3.6 stems from a policy decision that infliction of punishment for a given crime ought to be preceded by conviction for that crime. Conviction by trial or plea is a meaningful—even momentous—event that cannot easily be replaced by substitute fact-finding at sentencing. Procedurally, in noncapital cases, sentence hearings have never been undertaken with the rigor surrounding guilt determinations at the conviction stage. Instead of the requirement of proof beyond a reasonable doubt, facts at sentencing are typically determined by a preponderance of the evidence. The jury trial guarantee is inapplicable at sentencing, as are the exclusionary rule and the confrontation clause. The rules of evidence are not in force and the admission of hearsay, even double and triple hearsay, is commonplace.

5. See, e.g., United States v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989) (per curiam) (defendant convicted of distribution of cocaine but acquitted of firearms charge; trial court enhanced sentence for the distribution count by an additional five years of imprisonment for possession of a firearm; enhanced sentence was identical to that defendant would have received if he had been convicted of both counts).


7. See Williams v. New York, 337 U.S. 241 (1949) (conviction for one count of felony murder; sentencing court accepted as true allegations that defendant committed 30 additional burglaries for which charges were not brought).

8. See, e.g., McMillan v. Pennsylvania, 477 U.S. 79, 88 & n.4 (1986) (in one of four consolidated cases, the finding at sentencing that the defendant had used a weapon during the offense resulted in a more than fivefold increase in the sentence the trial court would otherwise have imposed).

Most of the trial protections above are matters of constitutional mandate. They must be afforded to an accused or waived consistent with constitutional requirements. On this basis, some judges and commentators have argued that the practices of real-offense sentencing are unconstitutional, and will remain so unless the sentence hearing is reworked to incorporate some or all of the procedural protections available at trial. 10 Without entering this ongoing debate, the Standards adopt the position that real-offense sentencing is bad policy and should be rejected on that ground alone. 11 This conclusion is not divorced from the guarantees of the Constitution; it is fair policymaking to seek to effectuate constitutional interests with greater care than minimally required.

In addition to near-constitutional concerns, real-offense sentencing carries undesirable systemic effects that militate against its use, especially in jurisdictions hoping to achieve a reasonable level of determinacy in sentencing. 12 First, real-offense sentencing adds appreciably to the government’s power to influence sentence outcomes, and may carry incentive for prosecutors not to bring all available charges against defendants. Real-offense sentencing gives the government “two bites at the apple” for proof of criminal conduct. Moreover, the second opportunity for the government to make its case is encumbered by


many fewer procedural obstacles than the guilt phase. Thus, if certain charges are marginal, or involve practical difficulties of proof, the real-offense system encourages the prosecutor to view the sentencing hearing as the most propitious forum for establishing the defendant's "true" culpability—not the trial or plea negotiation.\(^{13}\)

Second, discretionary real-offense sentencing introduces enormous windows for disparity. Some judges, having reached the conclusion that an offender committed a crime for which he was not convicted, will impose the same sentence the offender would have received if he had been convicted of the additional crime.\(^{14}\) Other judges may award a "discount" for the absence of conviction but will nonetheless increase punishment by some self-determined amount for the nonconviction crime. Still other judges may balk at adding anything to the sentence they would otherwise have given except in the most extreme cases.\(^{15}\)

The present federal guidelines system has attempted to address these uniformity concerns (but not the procedural fairness concerns discussed earlier) through a system of mandatory real-offense sentencing. Under the federal approach, judges must calculate offense seriousness based on the conviction charges and specified nonconviction offenses under the "relevant conduct" provision of Guideline § 1B1.3.\(^{16}\) The guideline treats conviction and nonconviction offenses exactly alike. Thus, for example, a defendant convicted of selling a small quantity of drugs, if shown at sentencing to have sold a much larger quantity, will receive the same "offense level" score as a defendant actually convicted of selling the larger quantity.\(^{17}\) The federal guidelines do not give courts discretion to disregard such additional charges, or to discount their effect on the final sentence.

\(^{13}\) See e.g., United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990), cert. denied, 111 S. Ct. 980 (1991) (Merritt, C.J., dissenting) (real-offense features of federal guidelines "obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office").

\(^{14}\) See, e.g., United States v. Juarez-Ortega, supra note 5.

\(^{15}\) In conversations with judges about their own real-offense practices, the reporters have discovered a variety of personal approaches.

\(^{16}\) U.S.S.G. § 1B1.3. The federal guidelines do not mandate real-offense sentences for all nonconviction crimes the defendant is thought to have committed, but only those designated in § 1B1.3. See U.S.S.G. Manual, Introduction at 5 (1993) (Commission decided against a "pure" real offense system in favor of a modified system "with a significant number of real offense elements").

\(^{17}\) U.S.S.G § 1B1.3(a)(2).
No other jurisdiction has followed the federal approach of mandatory real-offense sentencing, and it has produced a great deal of controversy within the federal system itself.18 Many critics object to the required imposition of punishment without conviction on fairness or constitutional grounds. Others claim that a requirement of real-offense sentences renders plea bargains illusory. Still others question the ability of mandated real-offense practice to enforce sentence uniformity. Unless there is an active "watchdog" to police the parties, they can conceal alleged nonconviction crimes from the sentencing judge, and may have substantial incentive to do so in order to facilitate bargained settlements.19

Based upon considerations of policy and fairness, and the experiences in the state and federal systems, the Standards endorse the offense-of-conviction approach followed in most guideline states and reject the real-offense philosophy of the current federal guidelines.

Plea Bargains and Restitution

Standard 18-3.6 is not intended to preclude the possibility that a plea bargain to specified offenses may contain an agreement whereby the defendant undertakes to make restitution to victims of other nonconviction offenses. The content of a plea bargain is determined largely by the voluntary consent of the parties; such consensual arrangements are generally enforced unless contrary to law or public policy. One charged with criminal conduct may accept responsibility to provide restitution without acknowledging that the conduct giving rise to that responsibility was a criminal offense. Although the restitution sanction is one of the array of economic sanctions that may be imposed as part of

18. The relevant conduct provision has been hugely unpopular with federal judges. See Forum on the Sentencing Guidelines: Suggestions for the New Administration and the 103rd Congress, 5 FED. SENT. REPTR. No. 4 (January/February 1993) (collecting comments of federal judges, lawyers, and commentators).

sentences, restitution also has a civil aspect. Including within a sentence an agreement to pay restitution for conduct not within the offense of conviction recognizes the hybrid criminal and civil nature of that type of sanction. The result is efficient in an economic sense and is not inconsistent with any fundamental principle of criminal justice. It is not disapproved by the offense-of-conviction principle posited in this Standard.

Standard 18-3.7 Convictions of multiple offenses

(a) The agency performing the intermediate function should direct sentencing courts to impose on any offender convicted of multiple offenses a consolidated set of sentences that appropriately takes into account all of the offender's current offenses.

(b) For offenses that are part of a criminal episode,

(i) convictions of offenses whose elements substantially overlap should be merged for sentencing,

(ii) sentencing courts should not change the type of sanction or increase the severity of sentences for multiple offenses merely as a result of the number of counts or charges made from a single episode, and

(iii) where the separate offenses are not merged for sentencing, sentencing courts should impose sentences of a type of sanction and level of severity that take into account the fact that the separate offenses occurred as part of an episode.

(c) If multiple offenses are of a kind that is graded by the amount of money or property involved, sentencing courts should be authorized and guided to determine the appropriate sentence by treating the offenses as a single offense and measuring its gravity by cumulating the amounts of money or property in the separate offenses.

(d) Upon conviction of an offender for multiple offenses not within (b) or (c), the presumptive sentence should be derived by reference to the sentence appropriate for the most serious offense. If the court determines that an enhanced sentence is appropriate because of the other current offenses, the enhancement should ordinarily be determined as if the other current offenses were treated as part of the offender's criminal history or as factors aggravating the most serious offense.
(e) Sentencing courts, sentencing an offender who is subject to service of a prior sentence, should be authorized and guided to take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

History of Standard

The prior edition addressed the problem of sentencing for multiple offenses as posing a choice between concurrent and consecutive sentences. See former Standard 18-4.5 (2d ed. 1979). The current Standards analyze the problem in a wholly different manner, and submit that interpolations between concurrent and consecutive punishments are appropriate in cases of multiple criminal conduct. In contrast to the prior edition, this Standard gives the sentencing agency initial responsibility to fashion presumptive sentences for cases of multiple conviction, depending on the interrelationships among the multiple counts, and to provide guidance to sentencing courts concerning the appropriate application of such provisions. Also in contrast to the second edition, the current Standards do not continue the policy of premising the most severe sanctions on a finding of the offender’s future dangerousness. See former Standard 18-4.5(b)(iv) (2d ed. 1979) (consecutive sentences available only when court finds “that confinement for such a term is necessary in order to protect the public from further serious criminal conduct by the defendant”).

Related Standards

Judicial discretion in cases involving sentences for more than one offense is treated in Standard 18-6.5.

Commentary

This Standard confronts one of the most difficult conceptual issues presented in the Standards as a whole: In cases where an offender has been convicted of multiple current offenses, how should an overall sentence be calculated? In the traditional practice of consecutive

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1. This former policy is rejected consistently in the new Standards. For an explanation, see Standard 18-3.5 and Commentary. See also Standards 18-3.8 and 3.12(c).
2. Sentencing commissions around the country report that this question is one of the thorniest they have faced in their work. Few if any states claim to have arrived at a
sentencing, it is possible to stack the penalties that would have been imposed for each offense considered separately. Such an additive approach can result in sentences of extraordinary harshness, however, and poorly tailored to serve consequentialist goals. On the other hand, the practice of concurrent punishment results in overlapping sentences for multiple counts, so that the most serious charge of current conviction determines the outside sentence severity. In some respects, the remaining counts are "free" as far as determination of the present sentence is concerned.

Standard 18-3.7 advocates an approach to all sentencings for multiple convictions that is neither consecutive nor concurrent. The theory running through the Standard is that multiple offenses normally ought to be punished more harshly than single offenses, but that mechanisms short of stacking should be used to evaluate their combined seriousness. The operative policy is best established through the continuing work of the sentencing agency, which can tailor sentencing provisions and amendments to the many different configurations of cases that may arise. Accordingly, this Standard recognizes the sentencing agency as the originator of graduated punishments for multiple offenses, to be expressed in the terms of presumptive sentences and other provisions for guidance of sentencing courts. The separate and complementary role of the courts in multiple-conviction cases is discussed in Standard 18-6.5.

Paragraph (a) provides in broad terms that the agency should direct courts to impose a consolidated set of sentences that appropriately takes into account all of the offender's current offenses. The succeeding paragraphs offer mechanisms for how this can be done in different settings.

Paragraph (b) addresses multiple conviction counts that arise from the same criminal episode. In choosing this language, the drafters did not have in mind a precise or legalistic concept of a "criminal episode." Rather, the Standard is meant to provide guidance to the sentencing agency in exercising its policymaking responsibility. It calls attention to criminal events or occurrences where prosecutors have discretion to bring one or several charges. For example, one confrontation between a police officer and a citizen could produce charges for both resisting satisfactory resolution.

3. For jurisdictions that retain the dichotomy of concurrent and consecutive sentences, see Standard 18-6.5 (sentencing discretion; sentencing for more than one offense).
arrest and disorderly conduct; another "single" incident could result in charges for possession of burglary tools, breaking and entering, and burglary; one fraudulent mail-order scheme could give rise to hundreds of counts of mail fraud.4

The issues arising when sentencing an offender on multiple offenses that were part of one event or occurrence are addressed in paragraph (b). Subparagraph (b)(i) provides for merger of certain offenses for purposes of sentencing. If the elements of separate offenses substantially overlap, treatment of them as a unity is appropriate. Paragraph (b)(ii) focuses on prosecutorial discretion to frame some indictments or informations in many or a few counts. The manner in which that discretion has been exercised should not, of itself, determine how courts determine appropriate sentences. This Standard, however, does not disapprove charging offenders in multiple counts when the charges are for wholly separate offenses. For example, a person who committed several burglaries would be properly charged with each offense in a separate count.

Criminal codes may define the gravity of certain offenses in terms of quantities of property or money. Often defendants are convicted of multiple charges of such offenses. Paragraph (c) recommends that sentencing courts be guided to aggregate the amounts of property or money in all of the counts and to impose a consolidated sentence based upon that aggregate. Circumstances may arise tending to show that a law enforcement agent delayed arresting a person committing a series of minor offenses until evidence had accumulated to warrant imposition of a relatively severe sentence through the principle of aggregating quantities. Sentencing courts may be cautioned to take such circumstances appropriately into account.

Paragraph (d) provides for cases in which multiple offenses cannot be grouped under the terms of paragraphs (b) or (c). The Standard recommends that a legislature or sentencing agency should guide sentencing courts on the construction of consolidated sentences, using the most serious offense as a foundation and enhancing sentence for that offense by reference to the other offenses. This is preferable to

4. See, e.g., United States v. Hord, 6 F.3d 276, 281 (5th Cir. 1993), cert. denied, 114 S. Ct. 1551 (1994) (course of conduct where defendant made five deposits of counterfeit checks into bank account amounted to five violations of federal bank fraud statute, over defendant's objection that there was only a single scheme to defraud); State v. Miller, 527 A.2d 1362, 1364 (N.J. 1987) (applying multifactor, case-specific test for determining whether separate counts of conviction should be held to merge for sentencing purposes).
sentencing separately for each offense and then seeking some principle to determine whether the sentences should be made consecutive or concurrent. To determine the appropriate level of severity of a consolidated sentence, the Standard suggests that the other offenses be considered as part of an offender's criminal history or as factors aggravating the most serious offense of conviction.5

Finally, paragraph (e) addresses cases where an offender who appears for sentencing for one or more current offenses is still subject to serve a portion of a sentence for one or more prior offenses. Such cases commonly arise when an offender is tried for separate crimes in stages, or violates the conditions of a nonincarcerative sentence through the commission of a new crime. In fixing the current punishment, it is most sensible for the sentencing judge to fashion a consolidated penalty that takes account of all the offender's adjudicated criminal conduct, and is integrated with sanctions already in place for previous violations. Indeed, there is no rationale, retributive or consequentialist, for failing to base sentence on all legal developments up to the time of the current sentencing. In circumstances of staggered prosecution, it would be especially unfair to treat one offender differently from another and not impose an integrated sentence merely because of the happenstance of separate prosecutions.

In jurisdictions that seek to promote utilitarian goals of sentencing, the failure of sentencing courts to weigh any unserved portion of prior sentences can produce nonsensical and counterproductive results. For example, an earlier sentence aimed toward drug treatment, the payment of restitution, or some other nonincarcerative agenda could be derailed by a severe current sentence to total confinement. This is not to say that a severe current sentence would never be appropriate; that of course depends on the circumstances of past and current offenses. Rather, the Standard highlights the importance of considering the earlier sentence in each case. The legislature and sentencing agency, in their separate domains, should take steps to ensure that this occurs.

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5. Some jurisdictions may find it desirable to impose a ceiling on the total severity of a consolidated sentence for multiple crimes. In Oregon, for example, the most severe "consecutive" sentence for multiple offenses is ordinarily limited to twice the presumptive sentence of the most serious charge, but in exceptional cases a sentence of up to 400 percent may be imposed. See State v. Davis, 847 P.2d 834 (Or. 1993) (explaining and enforcing the "400 percent rule").
Standard 18-3.8  Multiple offenses in different jurisdictions

(a) The agency performing the intermediate function should direct sentencing courts, sentencing an offender who is subject to a prior sentence of total confinement imposed by a court in another jurisdiction, to take into account the unexecuted part of the prior sentence in shaping the sentence to be imposed.

(b) The legislature should make it possible for multiple sentences of total confinement imposed by different states to be served under one prison authority. A sentencing court should be authorized to impose a sanction of total confinement to run concurrently with an out-of-state sentence, even though the time will be served in an out-of-state institution.

(c) Outstanding charges of offenses committed in different states should be disposed of promptly.

(d) The legislature should authorize implementation of the principles in this standard through interstate and federal-state agreements.

History of Standard

This Standard derives entirely from former Standard 18-4.6 (2d ed. 1979), although its text has been streamlined. As with new Standard 18-3.7, this Standard discontinues past policy of endorsing the imposition of consecutive sentences upon a purported showing of future dangerousness on the part of the offender.

Related Standards

None.

Commentary

There is no reason to treat an offender who has committed offenses in more than one jurisdiction differently, on that ground alone, from an offender who has confined his criminal activities to a single jurisdiction. Therefore this Standard provides that the processes of guilt determination, sentencing, and execution of sentence should be coordinated among multiple jurisdictions. Subparagraph (d) states that
such coordination should be effectuated by legislative action through interstate and federal-state agreements.

Paragraph (a) reiterates the principle of Standard 18-3.7(e) and makes it applicable in the multijurisdictional context. Even when different states are involved, the current sentence should reflect a consolidated response to all of the offender’s adjudicated criminal conduct. The sentencing agency should see that its guidance to sentencing courts includes provision for the unexecuted portion of any prior sentence to total confinement that has been imposed by a sister jurisdiction. Although paragraph (a)'s express terms are limited to incarcerative sentences, in spirit it is equally applicable to sentences to nonimprisonment sanctions.

Paragraph (b) directs legislatures to create mechanisms by which multiple sentences to total confinement imposed in different jurisdictions may be served under the prison authority of one of the jurisdictions. Such unified sentences are beneficial for efficiency reasons, and may be executed pursuant to expense-sharing agreements among the interested states. Further, under any system of composite sanctions, where an incarcerated offender may be enrolled in in-prison programs, or may be subject to post-incarceration sanctions and supervision, it is desirable that there be a continuity in the authority over the offender. To preserve the integrity of an in-state sentence, the legislature should authorize courts to impose a sentence to run concurrently with an out-of-state sentence even though the time will be served in an out-of-state institution. Thus, for example, if an out-of-state conviction is overturned, the home state may easily assume responsibility for the remainder of the in-state sentence.

Paragraph (c) states that outstanding charges in different states should be disposed of promptly. To the extent resolution is delayed, the project of fashioning an integrated sentence for all of the offender’s adjudicated criminal behavior cannot proceed. Under paragraph (a), each successive sentencing must take account of what has gone before, including the unexecuted portion of previous sentences. Accepting this as appropriate procedure, earlier sentencings can be reduced to preliminary and even meaningless exercises. For example, an initial sentence to a nonrestrictive compliance program may serve no purpose if it is superseded by a more severe sentence to a confinement sanction.
4. Offenders' Conduct in Response to Charges Affecting Sentence

Standard 18-3.9 Acknowledgment of responsibility

(a) On guilty pleas, the agency performing the intermediate function should guide sentencing courts to impose sentences in accordance with Standard 14-1.8.

(b) In the absence of a guilty plea, sentencing courts should be guided to impose sentences of lesser severity or of a different type of sanction upon defendants who have acknowledged responsibility for their conduct.

History of Standard

This Standard builds upon former Standard 18-6.9 (2d ed. 1979), which provided that "the sentencing court may appropriately take into consideration the defendant's admission of guilt." The content of the Standard is otherwise new.

Related Standards

ABA Criminal Justice Standard 14-1.8 (2d ed. 1979).

Commentary

This Standard treats the subject of an offender's acknowledgment of responsibility for his offenses, either through a plea of guilty or when established as a matter of fact-finding at sentencing.

Paragraph (a) focuses upon offenders who have demonstrated acknowledgment of responsibility for their offenses through pleas of guilty. The appropriate consideration of such circumstances should not be left to the discretion of individual sentencing judges, who may take differing views of the proper impact on offenders' sentences. The questions of whether and when a plea should be allowed to affect punishment should be answered for the jurisdiction as a whole, and the relevant policies should be applied with consistency.

Paragraph (a) recognizes that the Criminal Justice Standards elsewhere speak to the issue of guilty pleas and their use as a factor in sentencing decisions. Specifically, Standard 14-1.8 (2d ed. 1979)
provides that a court may grant "sentence concessions" to offenders who plead guilty or nolo contendere provided certain other conditions are met. This chapter incorporates those preexisting judgments. Standard 14-1.8 provides in its entirety:

(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when consistent with the protection of the public, the gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that:

(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;
(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
(iii) the defendant, by making public trial unnecessary, has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or
(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.1

1. The commentary to Standard 14-1.8 suggests that sentence concessions may not be appropriate in determinate sentencing jurisdictions because "determinate sentencing laws reject rehabilitation as the primary goal of sentencing." Id. Commentary at 14-45. This commentary, prepared in 1979, does not reflect the current understanding of determinate sentencing systems as endorsed by these Standards. Standard 18-2.1(a)(v), supra, explicitly recognizes rehabilitation as one possible goal of a determinate system. Beyond this, however, the drafters of the Sentencing Standards reject the view that the sentence concessions contemplated in Standard 14-1.8 can stem only from a rehabilitative perspec-
Standard 18-3.9(a) adds the important point that the agency performing the intermediate function should incorporate the principles of Standard 14-1.8 in the guidance the agency provides sentencing courts. Likewise, judges passing individual sentences should seek to adhere to those concerns.

Currently, judges in some determinate jurisdictions treat offenders' pleas of guilty or acceptance of responsibility as grounds for mitigated departure from the presumptive sentence that would otherwise be imposed. In these jurisdictions, the weight to be assigned to an offender's admission of guilt is determined by the sentencing court.\(^2\) Under the federal sentencing guidelines, in contrast, the offender's "acceptance of responsibility," once found to exist by the court, results in a fixed two-point reduction in the overall severity score used in the guideline calculation.\(^3\) Consistent with Standard 18-3.2(c), these Standards do not favor the approach of assigning definite weights to identified mitigating circumstances. Rather, it is preferable to allow the sentencing court to assess the importance of a given factor in light of the other circumstances of the case.\(^4\)

Paragraph (b) contemplates the possibility that defendants may, in some cases, acknowledge responsibility for their criminal conduct even though they have exercised their right to a trial on the merits. This could occur, for instance, when trial was prompted by an unrealistic settlement demand by the prosecutor, or where a defendant develops genuine contrition during or following trial. The drafters believe that such circumstances will occur infrequently and that sentencing courts will naturally, and appropriately, be suspicious of claims of acknowledgment of responsibility following a full adjudication of guilt. None-

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2. See MINNESOTA SENTENCING GUIDELINES COMMISSION, DEPARTURE CODES (January 1993) (departure factor no. 710—"shows remorse/accepts responsibility"—has been cited with increasing frequency by sentencing judges since guidelines were implemented). A recent study of Minnesota's guidelines found that the entry of a plea agreement by the defendant was a strong predictor of the likelihood of a mitigated departure by the sentencing judge. Richard S. Frase, Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota, 2 CORNELL J.L. & PUB. POL. 279, 310–11 & tbl. 2 (1993).


4. See Standard 18-3.2(c) and Commentary.
theless, it is inappropriate to penalize the exercise of the constitutional right to trial by automatically forbidding consideration of a potentially relevant mitigating factor, regardless of the unlikelihood of its existence in run-of-the-mill cases.

**Standard 18-3.10 Cooperation with prosecution**

(a) The agency performing the intermediate function should guide sentencing courts to impose sanctions of lesser severity or of a different type upon defendants who have cooperated with the prosecution.

(b) The agency should ensure that the views of the relevant prosecutor are considered by the sentencing court.

**History of Standard**

Former Standard 18-6.9 (2d ed. 1979) provided that "the sentencing court may appropriately take into consideration ... assistance given the prosecution [by the defendant] in some circumstances." The present Standard retains that earlier position and specifies a role for the sentencing agency in detailing the circumstances in which cooperation with the prosecution may have impact on sentence decisions.

**Related Standards**

ABA Criminal Justice Standard 14-1.8 (2d ed. 1979).

**Commentary**

This Standard provides that sentencing consideration should be available to defendants who have provided assistance to the government and that the agency performing the intermediate function should guide sentencing courts in extending such consideration. In the context of guilty pleas, this judgment has long been incorporated in the Criminal Justice Standards.\(^1\) Apart from other recognized goals of sentenc-

\(^1\) Standard 14-1.8(a)(iv) (2d ed. 1979) provides that in the event of a plea of guilty or nolo contendere, the sentencing court may grant "sentencing concessions" to an offender who "has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct." Of course, the vast majority of cases in which an offender cooperates with authorities also involve plea agreements.
ing, the mitigating effect given cooperation reflects a pragmatic trade-off: "Whatever is lost by the reduced punishment of the offender is gained by the resulting conviction of one or more other offenders." This is not to say that it is impossible to justify the Standard in moral or utilitarian terms. It can be argued, for example, that a cooperating defendant demonstrates a willingness to uphold the law that was absent in his past behavior and character.

This Standard does not endorse the rule that sentence consideration of an offender's cooperation must be conditioned upon affirmative motion or acquiescence by the prosecution. Currently, such a requirement exists in federal law but not in other jurisdictions. While paragraph (b) assures that the views of the prosecution will be considered, the Standard does not contemplate a governmental veto. It is expected that most sentencing courts will place great reliance on the prosecutor's evaluation of an offender's cooperation. In practical effect, therefore, an offender's claim that mitigation is proper will often be unavailing in the face of a contrary report by the government. Even acknowledging this, however, the ultimate decision should remain with the court, and the law should not facilitate the arbitrary withholding of consent by the government, however infrequently this may occur.

2. Standard 14-1.8 Commentary at 14-49.
3. See U.S.S.G. § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines"). In Wade v. United States, 112 S. Ct. 1840 (1992), the Court interpreted § 5K1.1 and its statutory antecedent, 18 U.S.C. § 3553(e), as giving the government "a power, not a duty, to file a motion when a defendant has substantially assisted." Id. at 1843. The Court held that the prosecutor's discretion in this regard must be exercised within constitutional limits, however, stating that "a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." Id. at 1844.


4. This Standard represents a compromise between groups, most notably the U.S. Department of Justice, which advocated a government motion requirement and others, most notably defense lawyers, who advocated an express statement that a government motion may not be required.
B. Legislation as to Types of Sanctions

1. Authorization and Use

Standard 18-3.11 Authorization of sanctions

(a) The legislature should authorize sentencing courts to impose sentences composed of any one or more of the available sanctions.
   (i) All types of sanctions should be available for sentences of individual offenders.
   (ii) The sanctions of intermittent or total confinement are not feasible for sentences of organizations, but all other sanctions should be available.

(b) For each offense, the legislature should specify a maximum authorized severity level for each type of sanction.

(c) The legislature should not mandate the use of the sanction of total confinement for an offense unless the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction.

History of Standard

The present edition's position on mandatory minimum terms of confinement continues that of the second edition. Former Standard 18-2.3(a) (2d ed. 1979) provided that "[t]he legislature should authorize the sentencing authorities to consider a sentence of probation or a similar sentence not involving confinement for all crime categories. Limited exceptions to this principle may be appropriate but only for the most serious offenses." Thus, as in present Standard 18-3.11(c), the legislature under the second edition was permitted to create "limited exceptions" for "the most serious offenses" for which only a sentence of incarceration might be authorized. Also, like present Standard 18-3.21(b), former Standard 18-4.3 (2d ed. 1979) provided that "it is unsound for the legislature to prescribe a minimum or mandatory period of imprisonment."
Related Standards

Paragraphs (a) and (b) expand on the principles of Standard 18-2.2. Paragraph (c) should be read in conjunction with Standard 18-3.21(b).

Commentary

Paragraph (a) provides that the legislature should make the entire array of sanctions available for sentencing in every case and that judges should be given power to impose composite sentences of any one or more of the available sanctions. This provision is meant to enlarge substantially upon courts' present ability to order that various sanctions be imposed in combination, to be executed simultaneously or sequentially. It is intended to permit fuller and more creative use of the array of criminal sanctions, and to tailor the "packaging" of sanctions to the needs of particular offenders. The broad language of paragraph (a) extends to every case, regardless of the number of charges of conviction. Thus, for example, in a case involving only a single count of conviction, the judge may choose to order a term of intermittent confinement followed by a period of supervised release, during which the offender must perform community service and make restitution to his victim. Similarly, based on one conviction count, a sentencing court could impose a term of total confinement followed by an additional term of supervised release including a compliance program.

Subparagraph (a)(i) provides, without exception, that the legislature should make all types of sanctions available for sentences of individual offenders. The unqualified language of subparagraph (a)(i) is deliberately chosen. The provision is meant to extend to all cases and all offenses. Such broad statutory authority permits maximum flexibility and creativity by the sentencing agency in fashioning presumptive sentences from the menu of sanctions, and serves the same ends in giving judges access to the array of sanctions when imposing presumptive or extraordinary sentences on a case-by-case basis.

For the sentencing of organizations, the above principles apply, except that confinement sanctions are inapplicable. Thus, subparagraph (a)(ii) provides that the legislature should make all other sanctions available for sentences of organizational offenders.

Paragraph (b) restates the traditional principle that legislatures should establish maximum levels of authorized severity for every offense. Within these maxima, the sentencing agency will identify
presumptive sentences and sentencing courts will determine sentences appropriate to particular cases. The manner of defining maxima for sanctions other than intermittent or total confinement should be considered or reconsidered by the legislature. For example, maxima for fines, commonly expressed in the past as fixed dollar amounts, would have to be restated to permit effective use of means-based fines.

Paragraph (c) provides that, in a limited category of offenses where the legislature can contemplate no mitigating circumstance that would justify a less restrictive sanction, the legislature may mandate imposition of the sanction of total confinement. Legislatures should use this power with restraint. Even cases of first degree murder—in exceptional situations—may be sufficiently mitigated so that an incarcerative sanction would not be appropriate. Any use of legislative power to mandate sentences undermines the principles of the intermediate function in the sentencing structure.

The provision in paragraph (c) must be read in conjunction with Standard 18-3.21(b), which provides that “[a] legislature should not prescribe a minimum term of total confinement for any offense.” The intended effect of the two Standards, read together, is to permit legislatures to mandate that some term of total confinement must be part of a sentence for a narrowly defined set of offenses without, however, mandating any minimum length of term to be imposed. The length of such sentences should be set by sentencing courts in light of the guidance provided by the sentencing agency. Many state and federal statutes are in noncompliance with Standards 18-3.11 and 3.21 in that they mandate lengthy mandatory minimum terms of imprisonment for numerous offenses.

1. See Standard 18-3.16. For example, a maximum means-based fine could be expressed as 100 “fine units,” each unit equaling one day’s wages given the offender’s earning power. Obviously, such a maximum sentence would differ in absolute dollar amount from offender to offender.

2. For a full discussion of the policy grounds for the ABA’s opposition to mandatory minimum prison terms, see Standard 3.21 and Commentary.
Standard 18-3.12 Use of authorized sanctions; guidance to sentencing courts

(a) The agency performing the intermediate function should provide principles of preference among the types of sanctions to guide sentencing courts in the determination of sentences in light of the societal purposes to be served. The agency should recognize that

(i) Every criminal sanction is a deprivation of liberty or property and has the effects of punishing offenders, deterring criminal conduct and fostering respect for the law.

(ii) Sanctions other than total confinement may serve to punish and incapacitate offenders.

(iii) Rehabilitation of offenders is an insufficient basis, standing alone, for imposition of a criminal sanction not otherwise justified, or for imposition of a more severe sentence than otherwise justified. The possibility of rehabilitation or treatment of an individual offender is properly considered in choosing the type of sanction to impose.

(b) The agency should give priority to the use of sanctions that have the purpose and effect of promoting offenders' future compliance with the law. Compliance programs, alone or in conjunction with other types of sanctions, are an appropriate type of sanction for all offenders.

(c) Imposition of a sanction of total confinement may be proper:

(i) if the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) if other types of sanctions imposed upon an offender for prior offenses have proven ineffective to induce the offender to avoid serious criminal conduct,

(iii) if necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) for a very brief period, if necessary to impress upon an offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(d) Use of economic sanctions, alone or in conjunction with other types of sanctions, is appropriate for offenders with ability to pay the amounts ordered. Use of the sanction of restitution or reparation is not proper unless the amount of the claims can be
ascertained without inordinate burden on the time and resources of sentencing courts.

(e) The legislature should ensure that levels of severity of composite sentences that combine sanctions of different types are not, in the aggregate, unreasonably severe.

   (i) The agency performing the intermediate function should provide particular guidance on the maximum severity of composite sentences.

   (ii) Appellate courts reviewing sentences should monitor the patterns of composite sentences being imposed and develop, through case law, standards of appropriate severity.

History of Standard

Much of the content of this Standard is new with the third edition. Subparagraphs (a)(i) and (a)(ii) are drawn from former Standards 18-3.1(c)(i) and 18-3.2(a)(i) (2d ed. 1979). Subparagraph (a)(iii) is based on former Standard 18-3.2(a)(v). Paragraph (c) (necessary conditions for total confinement) is a reworking of former Standard 18-2.5(c). In other respects, current Standard 18-3.12 reflects this edition’s increased attention to problems surrounding the choice of appropriate sanctions or combinations of sanctions.

Related Standards

This Standard applies some of the eligible societal purposes of a sentencing system, see Standard 18-2.1, to the problem of selecting among the array of authorized criminal sanctions.

Commentary

Standard 18-3.12 addresses some of the most important and difficult decisions that must be made by sentencing authorities concerning the appropriate use of authorized sanctions. Paragraph (a) provides that the agency performing the intermediate function should guide sentencing courts in choosing an appropriate sanction or combination of sanctions for particular cases. This is an integral part of the sentencing agency’s responsibility to promulgate presumptive sentences for ordinary cases. See Standard 18-3.1(a). Such guidance is necessary to further the objectives of reasonable determinacy, avoidance of unwarranted
Criminal Justice Sentencing Standards 18-3.12

disparity, and systemwide predictability in the use of finite correctional resources.\(^1\) In addition, as the range of available sanctions broadens, the task of matching offenders to appropriate programs becomes increasingly complex. The agency performing the intermediate function can bring essential expertise and a systemic perspective to such problems, thereby providing valuable information and guidance to sentencing courts.

The first sentence of paragraph (a) is stated in general terms, and does not mandate a particular mechanism for the sentencing agency to use in expressing "principles of preference" among types of sanctions. During the drafting of the Standards, considerable experimentation in this regard was under way at the state level, but no jurisdiction had yet amassed a substantial track record, and the ongoing state efforts had taken a number of different forms.\(^2\)

For example, a few jurisdictions have experimented with a system of "sanction units," under which the sentencing commission expresses presumptive sentences through a numerical figure of, say, 50 or 100 units. Each sanction is also given a unit score: A day in prison might count for 5 units; eight hours of community service might count for 3. At sentencing, the court selects from the menu of sanctions, imposing a single or composite sanction adding up to the presumptive 50 or 100 units.\(^3\) Other jurisdictions have begun work with a less exacting approach of "penalty levels." Under this scheme, particular offenses and offenders might be categorized into, for instance, five or six levels. At each level, different sanctions or combinations of sanctions are available. The sentencing court, in an ordinary case, is expected to assemble a package of sanctions from the specified level.

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1. See Standards 18-2.5 (Determinacy and disparity) and 18-2.3 (Costs of criminal sanctions; resources needed).

2. For reports on the activities in a number of states, and some new conceptual work in the field, see U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, THE INTERMEDIATE SANCTIONS HANDBOOK: EXPERIENCES AND TOOLS FOR POLICYMAKERS (Peggy McGarry & Madeline M. Carter eds., October 1993).

3. During the drafting process, the Standards Committee and Criminal Justice Section Council were urged to include an express endorsement of the concept of sanction units in the black letter of the new Standards. For the reasons stated in text above, this suggestion was rejected. The Committee and Council, however, intended that Standard 18-3.12(a), and the remainder of the Standards, would be consistent with the use of sanction units if any jurisdiction chose to do so.
The academic literature has generated other ideas for the structuring of the full array of criminal sanctions but, as stated by Kay Knapp, much serious work remains to be done. The Standards Committee concluded that it would be premature to endorse any one of the new schemes.

Paragraph (a) further notes that the agency should create principles of preference among sanctions that reflect the legislatively determined societal objectives of the sentencing system. This is perhaps an unnecessary restatement of the principle of Standard 18-1.3(a), that the agency is charged at all times "to transform legislative policy choices into more particularized sentencing provisions." Still, the point is fundamental and bears repetition.

Under Standard 18-2.1, the choice of objectives of the sentencing system is largely left to the legislature in each jurisdiction. For the most part, the Standards Committee believed that many reasonable policy choices could be imagined, and it was inappropriate for the Standards to dictate any single resolution. Consistent with this view, portions of Standard 18-3.12 are drafted in an open-ended fashion, to apply to jurisdictions that have adopted different objectives. However, in places

4. Norval Morris and Michael Tonry, in BETWEEN PRISON AND PROBATION 37-81 (1990), described a system for structuring the use of the full range of criminal sanctions in conjunction with sentencing guidelines. Andrew von Hirsch, Martin Wasik, and Judith Greene, in their article Punishments in the Community and the Principles of Desert, 20 RUTGERS L.J. 595 (1989), have suggested a structure built on just deserts principles, which would use a "relatively small standard group of penalties." Id. at 598, 618. Their proposal, however, is not applicable to sentencing systems that do not give just deserts sole or highest priority among the possible societal purposes of sentencing.

Perhaps the most elaborate proposal in the current literature belongs to Alan T. Harland in his article Defining a Continuum of Sanctions: Some Research and Policy Development Implications, in THE INTERMEDIATE SANCTIONS HANDBOOK, supra note 2. Professor Harland suggests that each sanction might be scaled within a complex matrix, where numerical values are assigned to numerous dimensions of each sanction, including retributive severity, crime reduction, recidivism reduction, reparation, economic cost, and public satisfaction. Id. at 40 fig. 6-2. Once such a matrix is prepared, it can be matched against an equally sensitive needs assessment for the particular offender. Professor Harland recognizes that he has set a difficult task; he notes that "we are almost completely lacking in information to fill in any of the cells in Figure 6-2 with any degree of confidence." Id. at 40.

5. Kay A. Knapp, Allocation of Discretion and Accountability Within Sentencing Systems, 64 U. COLO. L. REV. 679, 702 (1993) ("To date, no state efforts have seriously tackled these tasks [of structuring the full range of criminal sanctions].").

the Standard also asserts firm positions with respect to some of the goals of the system and the priorities that should be assigned among them in specific situations.

Subparagraph (a)(i) states that, to the extent that punishment, deterrence, and fostering respect for the law are goals a system seeks to advance, the agency should recognize that every criminal sanction has the effect of furthering such ends. Similarly, where jurisdictions seek to punish and incapacitate offenders, subparagraph (a)(ii) stresses that sanctions other than total confinement may be used for these purposes. The combined intent of subparagraphs (a)(i) and (ii) is to encourage the creative use of the full range of sanctions, and challenge the traditional sensibility that total confinement is the best or only way to effectuate important societal objectives.

Subparagraph (a)(iii) applies to every jurisdiction in which rehabilitation is a purpose of sentencing. The subparagraph sets out a concept that is easily misunderstood, and bears further explanation. The key principle is that rehabilitation, standing alone, is an insufficient basis for the imposition of a criminal sanction, or a sanction more severe than otherwise justified. That is not to say that rehabilitation is an improper consideration at sentencing. On the contrary, rehabilitation may appropriately be weighed in every case where there is an independent basis for imposing a sanction, so long as the perceived need to rehabilitate does not result in a sentence more severe than the independent basis would require.

Imagine, for example, that a young offender has been convicted of a minor crime, such as shoplifting a screwdriver. Imagine further that the offender can be shown to have serious psychological and educational deficits that make it appear likely he will reoffend, but that will take many years of therapy and training to cure. Subparagraph (a)(iii) provides that it is improper to fashion sentences based on rehabilitative need standing alone. Otherwise, in the above illustration, the judge might pronounce a five- or ten-year prison sentence on the belief that a lesser term would be inadequate to reform this offender. The Standard asserts that sentence severity must always be limited by goals other than rehabilitation. Thus, for the theft of one screwdriver, no more than a penalty at the low end of the sanctions continuum would be warranted. Within that ceiling, the sentencing authorities are free,
and indeed are encouraged, to designate a sanction or combination of sanctions geared toward rehabilitation or treatment.\footnote{7} Paragraph (b) sets a standard applicable to every jurisdiction. The first sentence expresses a clear policy choice that the agency should give priority to sanctions that have the purpose and effect of promoting offenders' future compliance with the law. Sentencing courts should follow this principle as well, on a case-by-case basis. Thus, for example, in a state that adheres to retributive principles, at least in part, two or more sanctions of equivalent punitiveness will often be available as sentencing options in a given case. Paragraph (b) provides that, in such a circumstance, the agency should direct courts toward the sanction that best serves the goal of future compliance with the law, and the courts should choose such a sanction.

The second sentence of paragraph (b) makes the additional point that compliance programs are an appropriate sanction for all offenders, without qualification. This does not mean that compliance sanctions must be ordered in every case governed by these Standards; paragraph (b) merely states that it is never a mistake to do so, and that wide use of compliance sanctions should be encouraged. Finally, the second sentence of paragraph (b) contains a reminder that compliance sanctions, like all sanctions, need not stand alone and may be imposed in combination with other sanctions.\footnote{8}

Paragraph (c) articulates policy choices concerning the use of total confinement that are meant to apply in every jurisdiction. As forcefully argued in a recent book by Zimring and Hawkins, this country lacks a coherent rationale for when, and how much, imprisonment is necessary in response to criminal offenses.\footnote{9} The Sentencing Standards, since the first edition, have attempted to fill this void by specifying necessary conditions for the use of total confinement.\footnote{10} That remains the ambition of new Standard 18-3.12(c)(i) through (iv). The circumstances set out in which the use of total confinement "may be proper" have been carefully considered by the Standards' drafters and are meant to be


\footnote{8} See Standard 18-3.11(a).


\footnote{10} See former Standard 18-2.5(c) (2d ed. 1979).
exclusive. They are intended to govern the decision making of the legislature, sentencing agency, and sentencing courts.\footnote{See also Standard 18-6.4(a) (parallel provision addressed to sentencing courts).}

Subparagraph (c)(i) states that the use of total confinement may be proper if the offender caused or threatened serious bodily harm in the commission of the offense. In the judgment of the Standards Committee, such cases may call for the use of imprisonment on several grounds: to foster respect for the law and to deter similar criminal conduct, to incapacitate, to punish, and possibly to rehabilitate violent offenders. Subparagraph (c)(i) does not provide, however, that all cases of actual or threatened serious bodily harm should result in sentences of total confinement. Otherwise, for example, all convictions for reckless endangerment or attempted assault would require incarceration. Instead, the subparagraph states that such actual or threatened harm is one permissible predicate for imposition of a total confinement sanction. Further discrimination by the sentencing agency and courts is necessary and desirable.

Subparagraph (c)(ii) addresses the use of total confinement for offenders who are convicted of serious criminal conduct and who have prior records of convictions for such conduct. Under these circumstances, where sanctions other than total confinement have proven ineffective to induce the offender to avoid serious criminality, the use of total confinement may be proper. Again, this is not to say that incarceration is always an appropriate response to a defendant with a prior record. First, the pattern of recidivism must be "serious." Second, the Standard calls for judgment as to whether nonimprisonment sanctions have indeed "proven ineffective." For example, suppose an offender is convicted of a third sizeable theft, all three evidently spurred by addiction to cocaine. The earlier convictions resulted in sentences first to probation and second to intensive supervision probation with outpatient drug treatment. The earlier convictions resulted in sentences first to probation and second to intensive supervision probation with outpatient drug treatment. Evidently the two earlier sentences were ineffective at securing compliance with the law, but this does not automatically justify a conclusion that sanctions other than total confinement "have proven ineffective." Particularly in cases of drug-related crime, it is now understood that addiction treatment seldom works the first time it is tried, and a series of relapses may be expected before the addiction is brought under control.\footnote{See Norval Morris, Comments to Franklin E. Zimring, Drug Treatment as a Criminal Sanction, 64 U. COLO. L. REV. 831, 834 (1993) ("drug addiction is a chronic relapsing}
tion above, the agency and sentencing court might sensibly conclude that an additional, perhaps more intensive, treatment regime is in order for this type of offender.

Of the four permissive conditions for total confinement stated in paragraph (c), the most open-ended category is that given in subparagraph (c)(iii). It provides for the use of incarceration when necessary to avoid unduly depreciating the seriousness of the offense, thereby fostering disrespect for the law. In the view of the Standards Committee, this provision could permit imprisonment of certain white-collar offenders as well as persons convicted of major violations of laws dealing with controlled substances. It is, however, impossible to give a precise formula for when the failure to use total confinement will unduly depreciate the seriousness of an offense. Such conclusions depend on moral valuations of the gravity of the crime and the relative impacts of other available sanctions. The last six words of subparagraph (c)(iii) are meant to give greater definition to the provision, however, by reference to community sentiment concerning offense seriousness. Unless disrespect for the law would be fostered by the failure to employ an incarcerative sanction, the use of total confinement is not appropriate under subparagraph (c)(iii).

Finally, the use of total confinement for very brief periods is authorized by subparagraph (c)(iv), when necessary to impress on an offender that his conduct was unlawful and could have resulted in a longer term of total confinement. The theory of this provision is that very short terms of “shock incarceration” can be beneficial in driving home to offenders the serious consequences that can follow criminal behavior, without entailing the enormous dislocation in the offender’s life or the large public expense of sustained imprisonment. By its terms, subparagraph (c)(iv) does not extend to all crimes; it is limited to offenses for which a longer period of total confinement could have been imposed. It thus functions as a less severe alternative to a sentence of incarceration that would otherwise be permitted under subparagraphs (c)(i) through (iii).

condition, in which the path to abstention is usually accompanied by an occasional relapse”).

13. The application of subparagraph (c)(iii) will matter most in jurisdictions that adhere in whole or in part to a retributive or just deserts theory of punishment, as it turns upon difficult and subjective determinations of offense seriousness.
Paragraph (d) draws attention to the significant role that can be played by economic sanctions as defined in these Standards. The first sentence of paragraph (d) states that such sanctions may appropriately be used in all cases in which the offender has the ability to pay the amounts ordered. Indeed, there is a growing sentiment that the United States lags behind other nations in the development and use of meaningful fines and other economic penalties. If economic sanctions are calibrated to the financial circumstances of offenders, the door is opened for their greater use to achieve important societal objectives of punishment, deterrence, and restitution for victims of crimes.

The limitation of economic sanctions to those within an offender's ability to pay is important for several reasons. The imposition of an unrealistic financial burden lacks credibility, cannot be enforced, and may encourage recidivism if the offender is prompted to resort to crime to meet his financial obligations, or is simply discouraged by the apparent impossibility of discharging the terms of his sentence. In addition, the attempt to enforce collection of an economic sanction beyond an offender's means raises constitutional concerns.

The second sentence of paragraph (d) states a principle of judicial economy and fairness, that the sanction of restitution or reparation is not proper unless the amount of the claims can be ascertained without inordinate burden on the time and resources of the sentencing court. In some cases, such as those involving white-collar crimes, the measurement of restitution owing to victims of illegal activity can be a highly complex matter, and adequate proof may require the comparatively elaborate procedures of discovery and trial available in the civil forum. Paragraph (d) contemplates that sentencing courts will expend

14. For greater detail concerning specific economic sanctions, see Standards 18-3.15 through 18-3.17.
15. See Morris & Tonry, supra note 4, at 116 ("the fine is used in the United States much less frequently than it is used in Western Europe").
17. See, e.g., State v. Newman, 623 A.2d 1355, 1362 (N.J. 1993) ("The court should be cognizant of the futility of imposing any fine or restitution when the defendant does not or probably will not have the ability to pay. . . . [In addition,] [i]mposing a sentence of restitution that requires payment of more than a defendant can afford would frustrate the goal of rehabilitation.").
18. See Bearden v. Georgia, 461 U.S. 660 (1983) (sentencing court cannot automatically revoke offender's probation for failure to pay a fine without determining that the offender "had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist").
all reasonable efforts to ascertain the value of such claims but that, when the burden of doing so becomes “inordinate,” claimants should be referred to their civil remedies.

Paragraph (e) addresses the difficult problem of placing limits on the severity levels of various sanctions when used in combination. Elsewhere these Standards provide that, for every offense, the legislature should specify maximum authorized severity levels for particular types of sanctions.\(^{19}\) Despite such ceilings on separate sanctions, however, untoward severity can easily result when a single offender receives a sentence composed of numerous different sanctions—especially if the severity level of each sanction is imposed at or near its authorized maximum. When jurisdictions move toward the greater use of composite sanctions, as urged by these Standards,\(^{20}\) the need to develop composite maxima will intensify.

The Standards do not advocate a detailed solution to this quandary. The problem is related to that of structuring the use of the various sanctions, discussed above in connection with paragraph (a). It is possible, for example, to state a composite maximum sentence in terms of sanction units—but only in jurisdictions that follow the units approach. Similarly, composite maxima may also be included in a “penalty levels” structure, if the packages of authorized sanctions at each level have prescribed ceilings. Because these and other possible approaches are largely untried, paragraph (e) speaks in general terms and invokes the jurisdictions of the legislature, sentencing agency, and courts to address the issue of composite maxima. Thus, the first sentence of paragraph (e) directs that legislatures should “ensure” that the aggregate severity of composite sentences is not unreasonably severe. The manner of so ensuring will be different in different systems. Similarly, subparagraph (e)(i) instructs the agency to provide guidance to sentencing courts on the maximum severity of composite sentences, but no single mechanism is mandated. Finally, the sentencing courts and appellate courts should act to prevent composite sentences of unreasonable severity through the common law process of case decision and appellate review, as provided in subparagraph (e)(ii).

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20. See Standard 18-3.11(a) and Commentary.
2. Compliance Programs

Standard 18-3.13 Compliance programs for individuals

(a) The legislature should authorize sentence of an individual to a compliance program or programs. Sentence to a compliance program should be authorized as an appropriate sentence whether an offender has pled guilty, was convicted on plea of not guilty, or intends to appeal from conviction.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to a compliance program for a period specified in the sentence, subject to legislatively established maximum periods.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for individuals.

(i) Programs should promote offenders’ future compliance with the law.

(ii) Programs should not be unduly restrictive of an offender’s liberty or autonomy. Where fundamental rights are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance.

(iii) Before an offender is sentenced to a program of education, rehabilitation, or therapy, the court should consider whether the offender will participate in and benefit from the program, and

(iv) When an individual is required to pay a fine as a condition of a compliance program, the court should consider the offender’s financial circumstances in determining the total amount of the fine and the schedule of payment. When an individual is required to make restitution to a victim as a condition of a compliance program, the court should consider the offender’s financial circumstances in determining the schedule of payment.

(d) The agency should ensure that sentencing courts set conditions of a compliance program that fit the circumstances of an individual offender. The basic condition of every sentence to a compliance program is that the offender lead a law-abiding life. Discretionary conditions may deal appropriately with other
matters to the extent that restrictions have a reasonable relationship to the individual’s current offense and criminal history, such as:

(i) cooperating with the required terms of supervision;
(ii) meeting family responsibilities;
(iii) maintaining steady employment or engaging in a specific employment or occupation;
(iv) pursuing a prescribed educational or vocational training program;
(v) undergoing available medical, rehabilitative, psychological or psychiatric treatment, including periodic testing for illegal use of controlled substances;
(vi) maintaining residence in a prescribed area or in an available facility for individuals sentenced to a compliance program;
(vii) refraining from consorting with specified groups of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities;
(viii) making restitution of the proceeds of the offense or making reparation for loss or injury caused by the offense;
(ix) payment of a fine;
(x) refraining from the use of alcohol or illegal substances or the possession of a dangerous weapon;
(xi) performing specified public or community service.

The agency performing the intermediate function should develop a model set of compliance program conditions and guidance concerning their use.

(e) The legislature should authorize sentencing courts to set terms of a compliance program following release from total or intermittent confinement. The post-release program may, but need not, require supervision of an offender.

History of Standard

Standard 18-2.3 of the second edition dealt with “sentences not involving confinement,” defined as “probation or a similar sentence.” Much of the content of the former Standard is retained in the third edition, although the reach of the Standard is extended; the new term “compliance programs” is meant to be broader than the old usage of “probation.” See commentary below.
Related Standards

None.

Commentary

"Compliance programs," as the term is used in these Standards, refers to those sanctions whose main purpose is to promote offenders' future compliance with the law. For individual offenders, compliance programs may include probation; parole; intensive supervision probation (ISP); drug, alcohol, sex-offender, psychiatric, and other treatment programs; family counseling; and vocational and educational training. The present Standards do not rely upon the term "probation," as did the second edition. In part this is to signal the wide range of programs embraced under the general heading of compliance programs, which extend beyond the ordinary connotations of the word "probation." Additionally, the new term is chosen to avoid association with the traditional concept of probation, still in force in some jurisdictions, as a provisional sentence imposed in conjunction with a suspended sentence to total confinement. It has been long-standing ABA policy that the legislature should authorize sentences to probation as a freestanding sanction. Paragraph (a) continues that policy, and extends it to compliance programs generally.

1. See Standards 18-2.2(a)(i) and 18-3.13(c)(i). Admittedly, there is no sharp theoretical dividing line between "compliance programs" and other criminal sanctions. To some extent all sanctions may be thought of as encouraging compliance with the law through individual deterrence. See Herbert L. Packer, The Limits of the Criminal Sanction 56 (1968) ("In truth, the threat of punishment for future offenses as extrapolated from the experience of suffering punishment for a present offense may be the strongest rehabilitative force that we now possess."). Recognizing that sanctions often serve overlapping goals, this Standard embraces those whose primary design is rehabilitative.

2. Compliance programs for organizational offenders are addressed separately in Standard 18-3.14.

3. In former Standard 18-2.3(a) (2d ed. 1979), "probation" was defined as "a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if its conditions are violated."

4. Original Probation Standard 1.1(a), (b) stated that probation should be recognized as a sentence in itself. Accord, Sentencing Standard 18-2.3(a) (2d ed. 1979). As a freestanding sanction, a compliance program may be imposed in the absence of an offender's consent. Compare Paul F. Cromwell et al., Probation and Parole in the Criminal Justice System 37 (3d ed. 1985) (as a general rule probation cannot be imposed without defendant's consent).
The second sentence of paragraph (a) provides that compliance programs should be authorized as an appropriate sentence regardless of how conviction was obtained, and whether or not the offender intends to appeal. The Standards reject the notion that offenders who claim the right to trial or appeal should therefore be adjudged poor candidates for compliance sanctions.

Paragraph (b) provides that the legislature should authorize sentencing courts to specify the durations of sentences to compliance programs, and to retain jurisdiction over offenders during such periods. Such continuing jurisdiction is required for enforcement of compliance sanctions. Experience has shown that meaningful enforcement is critical to the success of compliance sanctions, both for the achievement of their objectives and for their integrity as criminal punishments.

Paragraph (b) further provides that compliance programs, like every sanction contemplated by the Standards, should be subject to a legislative maximum as to duration and overall severity. The third edition does not prescribe what those maxima should be, but entrusts such decisions to the judgment of the legislature in each jurisdiction.

Paragraphs (c) and (d) outline the terms of appropriate collaboration between the agency performing the intermediate function and sentencing courts with respect to the use of compliance sanctions. Paragraph (c) states that the sentencing agency should provide guidance to courts regarding the appropriate use of compliance programs as sentences for individuals. The Standards do not mandate any single method of doing so, which could include, inter alia, sentencing guidelines, sanction units, sanction levels, or narrative statements of princi-
ple. Instead, paragraphs (c) and (d) elucidate important concepts that should be built into the sentencing provisions promulgated by the agency and followed by sentencing courts when making case-by-case dispositions.

Subparagraph (c)(i) sets out the definitional requirement that compliance programs should promote offenders' future compliance with the law. The agency's expertise can be important in identifying and evaluating such programs, and in setting criteria for those offenders most likely to benefit from particular interventions. Before the advent of sentencing commissions or equivalent agencies, no governmental body with systemwide authority performed such missions.

Subparagraph (c)(ii) provides that programs should not be unduly restrictive of an offender's liberty or autonomy. Where fundamental rights are concerned, special care should be taken to avoid overbroad restraints that are so vague or ambiguous as to fail to give real guidance.

Subparagraph (c)(iii) speaks to the issue of offender amenability to compliance programs that are designed to provide education, rehabilitation, or therapy. The agency, in fashioning presumptive sentences that include such sanctions, and the courts, in pronouncing sentences that include such sanctions, should consider first whether an offender will participate in and benefit from the contemplated program or programs. The language of subparagraph (c)(iii) was carefully chosen by the Standards Committee and bears explanation. The drafters meant to avoid recommending sentences to compliance programs where there is good reason to believe they will be ineffectual. At the same time, the Committee did not want to endorse any particular theory (perhaps soon to be discredited) of when such sanctions are or are not effective. For example, it was once accepted wisdom that many rehabilitative programs, such as drug treatment, could not work without the cooperation of the client. Accordingly, the offender's sincere willingness to undergo treatment was viewed as a necessary prerequisite to its use. During the drafting of these Standards, however, new research has developed the hypothesis that compulsory drug treatment can realize

9. For a discussion of various possible approaches for structuring the use on nonimprisonment sanctions, see Standard 18-3.12(a) and Commentary.
rates of success comparable to those of voluntary treatment.\textsuperscript{11} Thus, subparagraph (c)(iii) asks the agency and court to consider whether individual offenders "will participate in and benefit from" a given program, but does not incorporate the view that amenability must always take the form of voluntary participation.

More generally, our knowledge about what compliance programs work for which offenders is at an early stage of development. Only since the mid-1980s has program-offender matching been recognized as a critical area of inquiry.\textsuperscript{12} Rather than enter the debate in an inexpert way, subparagraph (c)(iii) says no more than that this matching effort should continue.

Subparagraph (c)(iv) underscores the importance of weighing an offender's financial circumstances when imposing a fine or the obligation to make restitution as a condition of a compliance program.\textsuperscript{13}

Paragraph (d) addresses the question of appropriate conditions that may be imposed as part of compliance programs. As before, the sentencing agency and courts are expected to play interlocking roles in this determination. The first sentence of paragraph (d) stresses that the agency must ensure that courts retain and exercise the ability to fashion conditions that fit the circumstances of individual offenders. Thus, the agency is counseled to view its task as assisting courts to reach consistent but individualized judgments about the proper contours of compliance sanctions.

The second sentence of paragraph (d) emphasizes the "basic condition" of every compliance program that the offender lead a law-abiding life. As explained above, this is the central, definitional feature of all compliance programs; there can be no dispute that the agency and courts should act to make this an express condition in every case. Additional conditions, of course, will often be helpful or necessary to secure the overriding goal of compliance. The third sentence of paragraph (d) states that such discretionary conditions may be imposed when they have a reasonable relationship to the offender's current offense and criminal history. This continues the Standards' prior


\textsuperscript{12} See, e.g., \textsc{Ted Palmer}, \textit{The Re-Emergence of Correctional Intervention} 43–45 (1992).

\textsuperscript{13} This parallels the provisions made in other Standards dealing with fines and restitution. See Standards 18-3.12(d), 18-3.15(c)(ii), and 18-3.16(d).
policy, and reflects the majority rule as developed in case law across the country. The final sentence of paragraph (d) provides that sentencing courts should not operate in a vacuum when devising discretionary conditions of compliance programs. Here again, the sentencing agency should play an important role in developing a model set of conditions, and should seek to provide guidance to courts concerning their use.

Subparagraphs (d)(i) through (xi) illustrate common and useful sentence conditions that may be imposed as part of compliance programs. They derive originally from the Model Penal Code’s suggested conditions of probation, and were incorporated in the second edition of the Sentencing Standards. The subparagraphs are not meant to be exhaustive nor mechanically adopted in every case.

Paragraph (e) provides that the legislature should authorize sentencing courts to impose compliance programs, with or without supervision, on offenders following release from total or intermittent confinement. This repeats the Standards’ more general position that the courts should have the power to impose composite sanctions, but the Standards Committee thought the redundancy useful here. First, because the Standards advocate the abolition of early-release mechanisms for prisoners, the traditional form of parole will no longer exist as a way to complete a sentence to total confinement outside the prison walls. The aftercare needs of just-released prisoners will be unmet if no alternative device for postrelease control is used. Second, the courts’ ability to include a postrelease compliance program as part of a sentence has an important advantage over some parole systems, where offenders can decline parole release and elect to serve out their sentence in confinement. Surprisingly, many prisoners do choose to “max out” their sentences within institutional walls, apparently believing that supervised release would be more rigorous than prison or would entail

15. See, e.g., Biller v. State, 618 So. 2d 734 (Fla. 1993) (setting aside probation condition that offender convicted of carrying concealed firearm refrain from using or possessing alcoholic beverages; condition found unrelated to offense and addressed to noncriminal conduct not reasonably related to future criminality); In re Bushman, 463 P.2d 727 (Cal. 1970) (condition of probation will be held invalid if it (1) has no relation to the crime for which the offender was convicted, (2) relates to conduct that is not itself criminal, and (3) requires or forbids conduct that is not reasonably related to possible future criminality).
unwanted risks of violation and reincarceration for lengthy periods. In systems where this is allowed to take place, offenders can frustrate the goal of providing transitional supervision in the community. Under the terms of paragraph (e), in contrast, postrelease supervision can be made a nonwaivable part of the sentence originally imposed by the court.

Standard 18-3.14 Compliance programs for organizations

(a) The legislature should authorize sentences of an organization to a compliance program. Sentence to a compliance program should be authorized as an appropriate sentence whether the organization has pled guilty, was convicted on plea of not guilty, or intends to appeal from conviction.

(b) The legislation should authorize a sentencing court to retain jurisdiction over an organization for a period specified in the sentence, subject to legislatively established maximum periods for various offenses.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of compliance programs for convicted organizations.

   (i) Programs should promote offenders’ future compliance with the law;

   (ii) Programs may require that an organization cease or modify specified practices or activities that gave rise to the organization’s criminal behavior, including a requirement that the organization engage in an internal study to identify such practices or activities;

   (iii) Programs should not interfere with or delay the making of legitimate “business judgment” decisions by the organization’s management, governing board, shareholders, or members.

(d) The legislature should authorize continuing judicial oversight of the overall activities of a convicted organization if the sentencing court finds from the organization’s current offense and criminal history that the organization’s criminal behavior (i) was serious, repetitive, and facilitated by inadequate internal management, accounting or supervisory controls, or (ii) presented a clear and present danger to public health or safety. Judicial oversight may be effected through adoption of monitoring, reporting, record
keeping, and auditing controls designed to increase the organization's mechanisms for internal accountability, such as an independent audit committee, special counsel, and a separate staff system for an organization's governing board.

History of Standard

The prior edition contained an omnibus Standard addressing "organizational sanctions" as a unified subject.¹ The Standard included discussion of restitution, special fine schedules, disqualification of individuals from office, and notice of conviction. For the third edition, the drafters have expanded such concepts to the sentencing of individuals as well as organizations.²

Related Standards

None.

Commentary

Organizations may be sentenced to every sanction available for individual offenders with the exception of confinement sanctions.³ See Standard 18-3.11(a)(ii). Thus, the Standards relating to restitution or reparation (Standard 18-3.15), fines (Standard 18-3.16), community service (Standard 18-3.17), and acknowledgment sanctions (Standard 18-3.18) all have application to organizational offenders. In addition, the sanction of forfeiture, not addressed in the Standards,⁴ may be

¹. Former Standard 18-2.8 (2d ed. 1979).
². See Commentary below. The subject of disqualification from office or employment, which is not an organizational sanction per se, is included in Standard 18-3.13(d)(vii) (compliance programs for individuals).
⁴. See Standard 18-3.16 Commentary.
available for the sentencing of organizations and the costs, fees, and assessments allowed under Standard 18-3.22 may be imposed.

Special concerns arise in the creation of compliance programs for organizational offenders, warranting separate treatment in the present Standard. The cognitive and behavioral variables weighed in fashioning compliance sanctions for an individual relate to the personality, difficulties, and potential of one person. In contrast, organizations operate through the collective behaviors of many persons, often with conflicting motivations, and these complex dynamics must be specially considered when seeking to develop programs to control future criminality.

Paragraph (a) provides that the legislature should specifically authorize sentences of an organization to a compliance program. Without express authorization the use of the sanction may be in doubt. Paragraphs (a) through (c) are parallel to the provisions of Standard 18-3.13(a) through (c). As with compliance programs for individuals, organizational compliance programs should be available as free-standing sanctions, sentencing courts should retain jurisdiction for enforcement purposes, the legislature should establish maximum time periods for particular offenses, and the sentencing agency should provide guidance to sentencing courts regarding the appropriate use of the sanction.

The subsections of paragraph (c) and the whole of paragraph (d) elaborate upon the content of organizational compliance sanctions. The Standard adopts a two-tier approach: For most organizational offenders, the level of sanction envisioned in paragraph (c) should be sufficient. For the most serious cases of organizational criminality, however, the legislature should make available the additional and more intrusive interventions contemplated in paragraph (d), extending to judicial oversight of an organization's overall activities.


Subparagraph (c)(i) sets forth the universal requirement that all organizational compliance programs should seek to promote the offender's future compliance with the law.

Subparagraph (c)(ii) envisions compliance sanctions requiring that an organization alter its operations in ways designed to avoid future criminality. For example, a corporation may be ordered to institute internal educational, auditing, and disciplinary procedures to better ensure that its agents will act in compliance with relevant criminal laws. The contours of such orders will vary enormously from one organization to another, depending on such factors as the size of the organization, its structure, the widespread or isolated nature of its offenses, the compliance culture that already exists within the organization, and many other variables. To assist the court in crafting an appropriate ultimate sanction, paragraph (c)(ii) provides that one part of the sanction process can be a requirement that the organization engage in an internal study to identify those practices and activities in need of change. This should be done at the organization's expense, and is best performed by an outside consultant retained by the organization with approval of the court. Subparagraph (c)(iii) places a limitation on the reach of programs created under subparagraph (c)(ii). While such programs should be aimed toward securing future lawful behavior, they should not be restrictive of legitimate "business judgments" made on behalf of the organization by its management, governing board, shareholders, or members.

Paragraph (d) provides for especially intensive judicial oversight of the overall activities of the most serious organizational offenders. As under paragraph (c), the sanctions available under paragraph (d) may take a number of forms. If necessary, the court may take over governance of the organization through ouster of existing management and

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8. Such oversight can be effected through adoption of monitoring, reporting, record keeping, and auditing controls designed to increase an organization's mechanisms for internal accountability, such as an independent audit committee, special counsel, and a separate staff system for an organization's governing board.
appointment of a trustee. The legislature should authorize the courts to assume such oversight in two defined circumstances. First, such overall supervision should be authorized where the organization’s current offense and criminal history demonstrate that its criminal behavior was serious, repetitive, and facilitated by inadequate internal management, accounting, or supervisory controls. In these circumstances, there is reason for great pessimism that the implementation of internal compliance measures as envisioned in paragraph (c) can be successful in rooting out the organization’s propensity for serious criminal violations. Accordingly, more pervasive controls of the organization’s operations are required and should be available to the sentencing court.

Second, where the organization’s current offense or criminal history present a clear and present danger to the public health or safety, the more intensive sanctions under paragraph (d) should be available. In such cases, the courts’ increased powers to regulate and monitor the organization’s affairs are justified by the magnitude of the danger presented if the organization were to reoffend. Organizations, much more so than individual offenders, have the capacity to cause harm on a massive scale. The public’s interest in the incapacitation and reform of such organizational criminals is greater than for any other category of offender. Therefore, for such cases, high-severity compliance programs should be at the disposal of the sentencing court.


3. Economic Sanctions

Standard 18-3.15 Restitution or reparation

(a) For an offense that resulted in a victim's personal injury or loss of money or property, the legislature should authorize sentencing an individual or an organization to make restitution to the victim or to compensate the victim for losses suffered. The legislature should authorize a sentencing court to order payment to a fund for future disbursement if the identities of the victims or the amounts of their claims are not ascertained at the time of sentencing.

(b) In the event of injury or loss that the offender has special capacity to restore or repair, the legislature should authorize sentencing an individual or organization to perform such reparations.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of restitution and reparation.

(i) The sanction should be limited to the greater of the benefit to an offender or actual loss to identified persons or entities. Claimants seeking general, exemplary, or punitive damages, or asserting losses that require estimation of consequential damages, such as pain and suffering or lost profits, should be limited to their civil remedies.

(ii) The agency should provide that sentencing courts may require offenders to pay the full amount of the sanction forthwith or, taking into account the financial circumstances of an offender, to pay the amount in scheduled installments.

(d) The legislature should enact appropriate provisions to integrate the criminal sanction of restitution or reparation with a victim's right of civil action against an offender. The legislature should authorize sentencing courts to allow a defense or plea in bar, which might have been raised in a civil proceeding by a victim against an offender, as appropriate and relevant to liability imposed in the criminal proceeding.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a restitution or reparation sanction until the sanction is satisfied or the sentence is rescinded.
(f) The legislature should place responsibility for enforcement of orders of restitution or reparation on a designated public official. The legislature should authorize that official to enforce the court order by use of any method available to enforce a civil judgment.

History of Standard

This Standard is new with the third edition. The prior edition made reference to restitution as a condition of probation, as one example of intermediate sanctions that jurisdictions were encouraged to develop, and as a sanction for organizational offenders.

Related Standards

In August 1988, the American Bar Association House of Delegates adopted a resolution that approved a set of Guidelines Governing Restitution to Victims of Criminal Conduct. This Standard incorporates some of the principles from those Guidelines that are pertinent to sentencing.

Commentary

Since the 1970s restitution has gained renewed prominence as a criminal sanction. This reflects increased attention to the interests of victims of crime as well as the search for an expanding range of sentencing options. The Standards endorse both of these trends in criminal justice. In addition, victim restitution for criminal conduct will nearly always be an available remedy in a separate civil proceeding;

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4. At common law and in the colonial period, criminal actions were brought by private parties for private redress. See Lawrence M. Friedman, Crime and Punishment in American History 21, 29 (1993). Compensatory goals receded with the system of public prosecution and remained dormant until the latter part of this century. See William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 Am. Crim. L. Rev. 649, 651, 669 (1976).
5. See Part V(C) below ("Victims' rights in sentencing").
concerns of judicial economy are advanced if restitution is adjudicated, to the extent reasonably possible, in one rather than two actions. Accordingly, paragraph (a) states that the legislature should authorize sentencing courts to impose a sanction of restitution upon an individual or organization whose offense has resulted in a victim's personal injury or loss of money or property. Where the identities of victims of particular offenses have not been ascertained at the time of sentencing, but it is contemplated that they will be identified in the future, the legislature should provide for a restitution fund; sentencing courts should be given express power to order offenders to make payments into the fund so that the monies will be available when the relevant victims are located.

Paragraph (b) introduces the related concept of reparation. Some offenders, particularly organizational offenders, may have special capacity to restore or repair the injury or loss occasioned by their crimes. When this is so, the legislature should expressly grant sentencing courts authority to order such reparations as part of the offender's sentence.

Under this Standard, an order of restitution or reparation should be available as a free-standing sanction, to be imposed alone or in combination with other sanctions. In some cases, it may be appropriate for the sentencing judge to link the making of restitution or reparation with a broader compliance program under Standard 18-3.13. For example, an offender's ability to make monetary restitution may be directly related to his maintenance of steady employment under the conditions of a compliance sanction. In addition, research indicates that the likelihood of compliance with restitution orders is correlated with other behaviors, such as attendance at school and maintenance of a steady residence. For appropriate circumstances, Standard 18-3.13(viii) recognizes that restitution and reparation orders may be combined with other conditions of a compliance sanction.

7. For example, an organization that has committed an environmental offense may have special capacity to perform a cleanup of the affected site. Or a government contractor, convicted of fraud in the supply of defective materials to the government, may be uniquely positioned to repair or cure the defect.
8. See 18 U.S.C. § 3663(a)(1) (federal courts may order restitution in addition to or in lieu of any other penalty authorized by law).
10. See Davis, Smith, & Hillenbrand, supra note 6, at 247.
The third edition assigns priority to restitution in relation to other economic sanctions. Many offenders’ resources are inadequate to satisfy all financial obligations imposed on them following conviction. To the extent this is true, restitution to victims should come ahead of fines, forfeitures, or other payments to governmental bodies. Accordingly, Standard 18-3.16(d)(ii) provides that sentencing courts should not impose fines that will undermine an offender’s ability to make restitution. Similarly, Standard 18-3.22(c) states that any costs, fees, and assessments levied against offenders should not undermine their ability to make restitution. Although the Standards do not separately address forfeiture as a criminal sanction,!! the policy of holding victims’ interests above those of the state is fully applicable in the forfeiture context.

As with all sanctions, the sentencing agency should provide guidance to sentencing courts regarding the presumptive use of restitution and reparation. Subparagraph (c)(i) imports the principle from commercial law that restitution is measured by the greater of the benefit to the offender or the actual loss suffered by the victim. In many cases fact-finding during the criminal process will be adequate to establish such amounts. 12 The computation of more exotic damages, however, is removed from the normal business of the criminal courts and would require an expansion of existing process, including full discovery and a lengthening of the sentencing hearing. Accordingly, criminal restitution sanctions should not include general, exemplary, or punitive damages, or losses that require estimation of consequential damages, such as pain and suffering or lost profits. Such claims are appropriately left to the civil courts. 13


12. Like all sentences under this chapter, the amount of a restitution sanction can be based only on those offenses for which an offender has been convicted. See Standard 18-3.6; United States v. Hughey, 495 U.S. 411 (1990) (construing federal statute to reach this result). The offense-of-conviction principle, however, does not prevent the parties from agreeing to more extensive restitution or reparation as part of a plea agreement. See Standard 18-3.6 and Commentary.

13. See ABA GUIDELINES GOVERNING RESTITUTION TO VICTIMS OF CRIMINAL CONDUCT 1.2(a) and Commentary (1988) (restitution sanction should not “unduly broaden the [criminal] proceeding or burden the court”; “For that reason it is contemplated that damages that are not directly related to the criminal conduct of the defendant will not be considered. Damages which are not easily quantified, e.g., pain and suffering, mental anguish and loss of consortium, are excluded”).
Subparagraph (c)(ii) highlights the importance of considering an offender's ability to comply with a restitution sanction. Recent research has suggested that less than half of all restitution orders are satisfied in full, but that higher levels of compliance have been realized in jurisdictions that take an offender's financial circumstances into account.\footnote{14} Further, as with all economic sanctions, there are risks that an unrealistic restitution sanction will not be taken seriously by an offender, and may create an attitude of disrespect toward other sanctions imposed.

In drafting the Standards there was a minority view that the total amount of a restitution order ought to be set with an eye toward an offender's ability to pay. This position finds some support in the ABA's Restitution Guidelines.\footnote{15} A competing view prevailed in the Standards Committee, however. Based on the quasi-civil character of a restitution sanction, and the fact that a defendant's ability to pay would not be a factor in determining the amount of recovery in civil proceedings, the Committee decided that the gross amount of restitution should be fixed by the offender's gain or the victim's loss, but that the schedule of payment should be responsive to the offender's financial circumstances. Hence, for offenders with the capacity to make immediate restitution, such an order should be made. For others, who may comprise a majority of offenders, a realistic schedule of installment payments should be the normal course.\footnote{16}

Paragraph (d) reinforces the thesis that restitution and reparations are remedial in nature, and bear close kinship to victims' civil remedies.

\footnote{14} Barbara Smith, Robert C. Davis & Susan Hillenbrand, \textit{Improving Enforcement of Court-Ordered Restitution} (Report of the ABA to the State Justice Institute 1989).  
\footnote{15} The text of the ABA guideline can be read to allow for variance of the amount of a restitution order to take account of the offender's financial circumstances. \textit{See ABA Guidelines Governing Restitution to Victims of Criminal Conduct} 1.5(a) (1988) (order of restitution shall be based upon the court's "findings of damages and in consideration of . . . the defendant's financial resources, earnings and ability to earn [and] the financial needs of the defendant and the defendant's dependents"). The Commentary to Guideline 1.5(a) sends an opposite signal, however. It provides: "This Subsection suggests that an order of restitution be entered in the full amount of damages found if causation and the amount of the damages are established to the satisfaction of the court."  
\footnote{16} The terms of subparagraph (c)(ii) are echoed in Standard 18-3.13(c)(iv), concerning restitution as a condition of a compliance program. For victims in pressing need of immediate payment, many states make provision for emergency restitution awards from state funds. \textit{See U.S. Department of Justice, National Institute of Justice, Compensating Crime Victims: A Summary of Policies and Practices} 30 (January 1992).
The legislature should integrate the criminal and civil actions so that defenses and pleas in bar, which would have effect in a civil restitution proceeding, are likewise recognized in the criminal courtroom.

Paragraphs (e) and (f) stress the importance of adequate mechanisms for the enforcement of restitution sanctions. Under paragraph (e), the legislature should authorize the sentencing court to retain jurisdiction over an offender sentenced to complete a restitution or reparation sanction until the sanction is satisfied or the sentence is rescinded.\(^\text{17}\)

In addition, paragraph (f) recommends that the legislature vest a public official with responsibility for enforcement of restitution or reparation orders. The law should provide that the official may resort to any method available to enforce a civil judgment in carrying out this task. It may be desirable to entrust the official with the duty of keeping the victim informed of developments in the restitution process, as contemplated in Standard 18-5.9(a).\(^\text{18}\) Similarly, the official may be best positioned to collect information needed to monitor and evaluate the ongoing operation of restitution programs, as required by Standard 18-5.1(b). Under the general principle of Standard 18-2.3(b), the legislature should take care to provide adequate resources for such efforts.

**Standard 18-3.16 Fines**

(a) The legislature should authorize sentence of an individual or an organization to a fine.

(b) The legislature should not prescribe a minimum fine for any offense.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of fines. Fine amounts may be set by use of one or more factors, including the following:

\(^{17}\) Standards relating to sentence revocation appear in Part VII(B) below. If an offender fails to pay an economic sanction, Standard 18-7.3 requires a court to consider the reason for an offender’s default as a basis for resentence. Under prevailing constitutional law, courts may not impose total confinement in response to nonpayment resulting from inability to pay. Bearden v. Georgia, 461 U.S. 660 (1983).

\(^{18}\) The ABA study found that in existing restitution programs victims are often dissatisfied and feel that they are not apprised of the status of restitution collection efforts instituted on their behalf. One recommendation of the report is that greater attention should be devoted to relations with victims themselves. Smith, Davis & Hillenbrand, *supra* note 14.
(i) the income and assets of the offender;
(ii) the amount of the victim's loss or the offender's gain; and
(iii) the difficulty of detection of the offense.

(d) The legislature should provide that sentencing courts, in imposing fines, are required to take into account the documented financial circumstances and responsibilities of an offender.

(i) An offender's ability to pay should be a factor in determining the amount of the sanction. Sentencing courts, in imposing a fine on an individual, should consider the offender's obligations, particularly family obligations.

(ii) Sentencing courts, in imposing a fine, should not undermine an offender's ability to satisfy a civil judgment, or sentence, requiring an offender to make restitution or reparation to the victim of the offense.

(iii) Sentencing courts, in imposing fines upon organizations, should not duplicate sanctions imposed under statutory provisions, such as antitrust laws or securities laws, for government or private civil actions for equitable relief, money damages, or civil penalties that have the same deterrent or remedial purpose as the sanctions of the criminal law.

(iv) Sentencing courts, taking into account the financial circumstances of an offender, should require the offender to pay the full amount of a fine forthwith or to pay the amount in scheduled installments.

(e) The legislature should authorize a sentencing court to retain jurisdiction over an offender sentenced to a fine until the fine is paid or the sentence is rescinded.

(f) The legislature should place responsibility for enforcement of fines on a designated public official. The legislature should authorize that official to collect a fine by use of any method available to enforce a civil judgment for a sum of money and, in appropriate cases, to seek a court order holding a delinquent offender in civil or criminal contempt.

**History of Standard**

The current Standards take a more aggressive view toward the use of fines as criminal sanctions than the prior edition. Former Standard 18-2.7 indicated that fines should be limited only to "appropriate" offenses as designated by the legislature. The prior edition suggested
that "fines should not be routinely imposed on most offenders" and that the deterrent value of fines existed only where "the defendant has gained money or property through the commission of the offense."

Related Standards

None.

Commentary

Paragraph (a) states that the sanction of a fine should be available in all cases, for both individual and organizational offenders. Compared to European countries, fines are underused in America.¹ Professors Morris and Tonry have noted that this is both odd and unfortunate in a society driven by market forces in so many other ways.² When used appropriately, fines can advance punitive objectives on an incremental scale, and can also further the goals of general and specific deterrence. Thus, except in circumstances where incapacitation of the offender is a paramount objective, the fine can do much of the work needed in many sentencing systems.

For organizational offenders, the fine has long been the sanction of choice. In the years since the second edition of the Standards, there has been growing recognition that fines historically imposed on organizations have been too small to deter organizational criminality.³ There has thus been movement in the law toward higher fine schedules for organizational offenders. There has also been much creative work aimed toward devising effective nonfine sanctions for organizations—a development endorsed by these Standards.⁴ Such efforts, however,

¹. See Sally T. Hillsman & Judith A. Greene, The Use of Fines as an Intermediate Sanction 125, in SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992). Germany, for example, has pursued a conscious policy to substitute fines for prison sentences of six months or less. NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION 118–19, 144–45 (1990).

². Id. at 111 (1990) (arguing that fines should be the primary punishment for all but the most serious offenses).

³. It is especially difficult to create effective financial disincentives through fines when the risk of detection of the relevant criminal behavior is small. See John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 390–91 (1981).

⁴. The recently enacted federal sentencing guidelines for organizational offenders illustrate both the traditional reliance on the fine as the paramount sanction for organizations and the more recent willingness to experiment with alternative sanctions such
are at an early stage. The fine is likely to remain a primary organizational sanction for the foreseeable future.

Paragraph (b) states that the legislature should not provide a minimum fine for any offense. This is consistent with the general philosophy of the Standards that case-specific penalties should not be prescribed by the legislature, but should be established through a system of presumptive sentences and judicial discretion. As developed below, the measured and effective use of the fine depends on a case-by-case assessment of the offender’s financial circumstances and ability to comply with the sanction once imposed. This is particularly true in the case of means-based fines, authorized in subparagraph (c)(i). A legislatively fixed fine runs the risk of being too high for many offenders, too low for others, and appropriate for few or none.

Paragraph (c) provides that the sentencing agency, as with all sanctions, should guide sentencing courts in the appropriate use of fines, either standing alone or in combination with other sanctions. Subparagraphs of (c) elaborate on the content of that guidance, which may take the form of presumptive sentences or provisions inviting courts to deviate from the presumptive sentence in appropriate cases.

Subparagraph (c)(i) states that the income and assets of the offender may be used as factors in setting the amount of a fine. This provision endorses the system of means-based fines used in a number of European countries and some American jurisdictions. The theory of the means-based fine is straightforward: Because the financial circumstances of offenders vary enormously, a flat fine amount will carry widely varying punitive and deterrent force.

The means-based fine, in contrast, calibrates the fine amount to an offender’s income and assets. The most popular arrangement is presently the “day fine,” which calculates fines under a formula incorporating the offender’s expected daily earnings. Thus, for a low-wage

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as corporate probation and community service. See U.S.S.G. ch. 8.

5. See Standards 18-3.14, 18-3.17, 18-3.18, and Commentaries (Standards dealing with compliance programs for organizations, community service, and acknowledgment sanctions). The sanction of criminal forfeiture, not addressed in these Standards, is also an important sentencing option for the organizational offenders. Cf. Standard 18-3.16 and Commentary, infra.

6. Petty offenses are not governed by this Standard. See Standard 18-1.1(a).

7. See Hillsman & Greene, supra note 1, at 129–34 (reporting findings of pilot day fine project in Staten Island); Morris & Tonry, supra note 1, at 143–44 (discussing day fine systems in Europe and America).
offender, the absolute amount of the fine may be small in comparison with some other offenders, but will represent an amount the offender can realistically be expected to pay, and one that will carry a meaningful punitive impact in the offender's financial life. Paradoxically, because of its enforceability, a means-based fine smaller in amount than a traditional fine may hold an enhanced punitive effect.

One mechanism for implementing a system of means-based fines is the "fine unit." Under this approach, which bears resemblance to sanction units generally, a given offense can be assigned a sanction expressed in a total number of units, applicable to all offenders. To arrive at the fine amount, the unit total is multiplied by a dollar figure that is adjusted for individual offenders based on their financial circumstances. Thus, in a simple day-fine system, a 30-unit fine could represent thirty days' wages for all offenders who have committed a specified crime. For an average wage earner, the 30-unit fine would be something less than $2,000. For an affluent white-collar offender, the resulting fine would be much higher—but still payable—while set in an amount sufficient to effectuate the deterrent and punitive purposes of the sanction.

For crimes with a financial component, including many white-collar and organizational offenses, it may be appropriate for the sentencing agency to fashion presumptive fines that respond to the amount of loss or gain involved in the offense. At a minimum, offenders should not be permitted to retain the proceeds of their crimes. While restitution can also further this goal, it is not always available or pursued. In some jurisdictions a sanction of criminal forfeiture exists to effect, among other ends, disgorgement of proceeds. Because of substantive disagreements that could not be resolved in the drafting process, however, these Standards contain no separate provision devoted to the subject of criminal forfeiture. One position, asserted by those who

8. See Standard 18-3.12(a) and Commentary.
9. Under the Standards, restitution is available only when there are identifiable victims of the offense. Standard 18-3.15(a).
11. One controversial provision held that criminal forfeitures should not be mandatory. Another was that such forfeitures should bear a "reasonable relation" to the gravity of the offense. A third area of concern was a cluster of provisions seeking to protect the interests of third parties who had some claim to forfeitable assets but were without knowledge of the offender's criminal acts. See Draft Standard 18-3.17 (Criminal Justice
opposed a forfeiture Standard, was that forfeiture in the criminal context may be understood as a subspecies of the fine. Ultimately this argument carried the day.\textsuperscript{12} Thus, under the Standards, an economic sanction aimed at disgorgement of ill-gotten profits, or a more severe economic sanction designed to bear proportionality to such profits, is taxonomically a "fine" rather than a "forfeiture."\textsuperscript{13}

The goals of punishment and deterrence usually require that fines be set to exceed the expected benefit of committing the crime, sometimes by a considerable margin. Subparagraph (c)(ii) provides that such concerns may properly be taken into account by the sentencing agency. Subparagraph (c)(iii) recognizes that it may also be useful to consider the difficulty of detection of an offense in setting the amount of a presumptive fine. To give a simple example, the sentencing agency may believe that a fine of $100 is required to deter a particular offense, provided the offender is reasonably certain of being apprehended and convicted. If the risk of detection were to fall off appreciably, say 50 percent, then a fine of $200 would be needed to produce an equivalent discouragement. Subparagraph (c)(iii) acknowledges that, at least for some offenses and offenders, such a thought process in setting fine severity is appropriate.

Fines, standing alone, may provide insufficient punishment for some offenders. Professor Coffee has argued that a "deterrence trap" exists for organizational crimes with a very high expected yield and a very low probability of detection. In such circumstances the amount of fine mathematically necessary to offset the expected return of criminal conduct may be much more than the offender can afford to pay.\textsuperscript{14} Recognizing this problem, which exists for individual as well as organizational offenders, the Standards advocate a regime of composite sentences, where fines and other sanctions may be used in combination

\textsuperscript{12} In many jurisdictions, forfeiture of assets connected to criminal conduct is effectuated through civil proceedings. Some opponents of a forfeiture Standard argued that it might be interpreted to restrict the availability of forfeiture through civil process.

\textsuperscript{13} Existing forfeiture laws often go further than this and contemplate seizure of "tainted" assets by the government, including instrumentalities of the offense or criminal enterprises used to conduct the offense. The third edition of the Standards does not speak to such economic sanctions.

\textsuperscript{14} See Coffee, \textit{supra} note 3, at 389–93. Professor Coffee sees this as a particularly significant problem for organizational offenders because additional deterrence cannot be pursued through the use of incarcerative sanctions.
with one another.\textsuperscript{15} While factors such as gain, loss, and risk of apprehension may be relevant factors in setting fine amounts in some cases, a sentencing system should not assume that such calculations, standing alone, will adequately satisfy all societal objectives of punishment in every case.

Paragraph (d) provides that, in every case of imposition of a fine, the legislature should require that the financial circumstances and responsibilities of the offender be taken into account by the sentencing court. The relevant facts can be difficult to establish, particularly on the government’s part; in contrast, the needed information is readily available to the offender. The Standards therefore place the burden on the offender to document an alleged condition of financial hardship.

Subparagraph (d)(i) identifies the offender’s ability to pay as a factor that should be taken into account every time a fine is imposed. Under federal constitutional law, an offender may not be imprisoned for failure to pay a fine in the absence of a capacity to do so.\textsuperscript{16} On a policy level, the assessment of a fine beyond the offender’s ability to pay serves no useful end, and promotes a regime of unenforceability and futility. When an imposed fine greatly exceeds the offender’s ability to pay, the message communicated to the offender is that no one expects it to be satisfied. This has contributed to woeful collection patterns and may send an unintended signal that the offender need not take other sentence requirements seriously.\textsuperscript{17}

In evaluating ability to pay, subparagraph (d)(i) specifies that it is the offender’s net capacity that matters, after consideration of financial obligations, particularly the offender’s family obligations.

Subparagraph (d)(ii) makes the important point that fines should be set with an eye toward the sanction of restitution or reparation, and that restitutionary remedies, whether enforced criminally or civilly, should have priority over the imposition and collection of fines. The premise, adopted throughout the Standards, is that the interests of

\textsuperscript{15} See Standard 18-3.11(a).
\textsuperscript{17} See, e.g., State v. Newman, 623 A.2d 1355, 1362 (N.J. 1993) (“The court should be cognizant of the futility of imposing any fine or restitution when the defendant does not or probably will not have the ability to pay. . . . [In addition,] i) imposing a sentence of restitution that requires payment of more than a defendant can afford would frustrate the goal of rehabilitation.”).
victims in financial recovery should stand ahead of the interest of the state in collecting economic sanctions or other costs and assessments.\textsuperscript{18}

Subparagraph (d)(iii) contains a principle most applicable to the fining of organizations, that such fines should not duplicate financial penalties already assessed in a civil forum which have the same deterrent or remedial purpose served by the imposition of criminal fines. This provision seeks no more than to avoid double counting. Especially in the domains of organizational and white-collar crime, parallel criminal and civil remedies often exist. When overlapping laws serve overlapping purposes, their combined effect should be integrated rather than cumulated.\textsuperscript{19}

Subparagraph (d)(iv) provides that a fine may be ordered paid forthwith or, in consideration of the offender’s financial circumstances, paid in scheduled installments. This relates to the broader provision in subparagraph (d)(i) that fines should be structured to be payable by the offender on realistic terms. Where possible, it is desirable to require immediate payment, if for no other reason than to simplify the problems of enforcement later on. For a similar reason, shorter rather than longer schedules of payment are preferable, but the goal of simplified collection can only be pursued in light of the offender’s real ability to pay.

Paragraphs (e) and (f) focus directly upon the problem of enforcement of payment of fines. In most jurisdictions inadequate enforcement mechanisms exist.\textsuperscript{20} This deficiency is important enough to demand attention at the legislative level. As with other sanctions, paragraph (e) specifies that the legislature should authorize the sentencing court to retain jurisdiction over an offender until the fine is discharged. Thus, one ultimate enforcement option is sentence revocation under Part VII of the Standards. The routine business of fine enforcement, however, should be entrusted to a designated public official with institutional incentive to sustain ongoing collection efforts. Paragraph (f) states that the legislature should so provide. The official should be empowered to

\textsuperscript{18} See also Standards 18-3.15, 18-3.22 and Commentary.

\textsuperscript{19} In some instances the terms of subparagraph (d)(iii) may be constitutionally mandated under the Double Jeopardy Clause. See United States v. Halper, 490 U.S. 435 (1989).

pursue payment through resort to any method available for the enforcement of a civil judgment. In appropriate cases where the offender has the capacity to make payment but has not done so, the official should be authorized to seek an order in civil or criminal contempt in the courts. It would be consistent with this provision for a jurisdiction to delegate some or all of such functions to a private collection agency.

Standard 18-3.17 Community service

(a) The legislature should authorize sentence of an individual or organization to perform a specified community service without compensation.

(b) The legislation should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform a specified community service for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the community service sanction.

   (i) Offenders should be ordered to perform community service only in programs of public agencies or non-profit organizations.

   (ii) Sentencing courts selecting the particular community service to be included in an individual offender's sentence may, but need not, specify work possibly beneficial in rehabilitating an offender.

   (iii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers or employees of the organization to work for a public agency or non-profit organization for the period of the sentence.

21. Professors Morris and Tonry argue that the chief reason for underenforcement of fines is the absence of any one agency in charge of collection; their position is one source of paragraph (f) above. MORRIS & TONRY, supra note 1, at 131-32, 135.

22. Id. at 136-40 (collection efforts might best be delegated to the private sector—to "finance companies with long experience in such matters").
History of Standard

The prior edition of the Standards made reference to community service as one among a number of "intermediate sanctions" that jurisdictions might seek to develop. Former Standard 18-2.4(a)(iii) (2d ed. 1979). The current Standards, consistent with their general philosophy of ascribing greater importance to the full array of criminal sanctions, treat community service in a separate Standard.

Related Standards

None.

Commentary

Paragraph (a) provides that the sanction of community service should be available in all cases, for both individual and organizational offenders. Community service is an economic sanction closely related to the fine in that it exacts payment from an offender in the form of labor rather than money or property. Like the fine, community service can advance goals of punishment and deterrence through the deprivation of resources an offender could otherwise devote to greater financial comfort. Like fines, community service orders do little, standing alone, to incapacitate offenders when that is considered an important objective. The sanction is especially useful in cases where a fine would otherwise be imposed, but the offender lacks the means or earning power to make required fine payments. It can also be appropriate where the offender possesses a special skill or ability to provide in-kind public service.

Under paragraph (b), the legislature should authorize sentencing courts to retain jurisdiction over offenders sentenced to a term of community service, subject to the same maximum periods established

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1. Of course, the sanction of community service can be combined with other sanctions that do promote an incapacitative purpose, such as home confinement or intermittent confinement.

2. For extensive discussions of community service orders as sanctions see Ken Pease, Community Service Orders, in 6 Crime and Justice: An Annual Review of Research (Michael Tonry & Norval Morris eds., 1985); Douglas C. McDonald, Punishment Without Walls (1986); Norval Morris & Michael Tonry, Between Prison and Probation at 150-75 (1990).
for sentences to compliance programs.\(^3\) As with other nonprison sanctions, enforcement of community service orders is needed if the sanction is to serve its purposes and if offenders are to be conditioned to take the sanction seriously. Continuing jurisdiction is needed to facilitate enforcement; under paragraph (b), noncompliance with the terms of a community service sanction can result in sentence revocation proceedings.\(^4\) Some jurisdictions may find it desirable to empower designated officials to monitor and enforce compliance.\(^5\)

As with all sanctions, it is important that the sentencing agency provide guidance to sentencing courts regarding the appropriate use of community service, as the only sanction or as one of a combination of sanctions imposed on offenders. Paragraph (c) so provides, and its subdivisions expand upon the content of guidance that may be provided. Such guidance may direct courts to the use of community service as part of a presumptive sentence or, in appropriate circumstances, as part of a departure sentence. It is necessary to address the interchangeability of community service with other sanctions, particularly the fine. For example, one day of community service might well be considered the equivalent of one "unit" of payment in a day-fine system.\(^6\)

Subparagraph (c)(i) states that community service should be rendered under the auspices of public or nonprofit agencies. It is inappropriate for an economic sanction to be designed for private benefit, with the exception of restitution or reparation under Standard 18-3.15. Community service is best understood as a "fine on time" employed toward community interests.\(^7\)

Subparagraph (c)(ii) asserts that, in fashioning a community service sanction, rehabilitation need not be a dominant goal. Programs designed with the reform of the offender principally in mind are

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3. See Standard 18-3.13(b). The length of maximum term will vary with the parameters of the program and the practicalities of its administration. Professors Morris and Tonry have reported, for example, that enforcement of community service orders has proven difficult for terms of service greater than 240 hours. MORRIS & TONRY, supra note 2, at 168–69.

4. Violation of a community service sentence should not automatically result in the imposition of an incarcerative sanction. See Part VII of the Standards.

5. Compare Standards 18-3.15(f) and 18-3.16(f) (legislature should place responsibility for enforcement of restitution and fines on designated public official).

6. See Standard 18-3.16(c)(i) and Commentary. The difficult issues of selection and interchangeability of sanctions are discussed in Standards 18-3.11 and 18-3.12.

7. MORRIS & TONRY, supra note 2, at 150.
collected under Standard 18-3.13. Community service, on the other hand, is a financial sanction that extracts work of value. If rehabilitation can be served at the same time, all other things being equal, that is a desirable end. Subparagraph (c)(ii) thus instructs the sentencing agency to allow, but not require, sentencing courts to consider the possibility of rehabilitation when selecting one program of community service over another.

Subparagraph (c)(iii) focuses on community service as an organizational sanction. Under the general provisions of this Standard, organizations may usefully be sentenced to perform community service when they possess special capabilities that can support the operations of a public agency or nonprofit organization, or where the organization lacks the financial wherewithal to pay a traditional fine. In addition, this subparagraph notes that particular managers or employees of the organization may have expertise that can be deployed through community service if, at the organizational offender's expense, they are placed "on loan" to work for a public or nonprofit entity.

4. Acknowledgment Sanctions

Standard 18-3.18 Acknowledgment sanctions

(a) The legislature should authorize sentence of an individual or an organization to perform a specified acknowledgment sanction without compensation.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual or organization sentenced to perform an acknowledgment sanction for the period specified in the sentence, subject to the same legislatively established maximum periods applicable to sentences to a compliance program.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the acknowledgment sanction.


9. See Brent Fisse, Community Service as a Sanction Against Corporations, 1981 Wis. L. Rev. 970.
(i) Sentencing courts selecting the particular acknowledgment sanction to be included in an offender's sentence may, but need not specify a sanction possibly beneficial in rehabilitating the offender.

(ii) Sentence of an organizational offender may provide that the organization, at its expense, supply managers, employees of the organization, or agents hired from outside the organization to perform the acknowledgment sanction for the period of the sentence.

**History of Standard**

This Standard is new. A partial precursor in the second edition was former Standard 18-2.8(a)(iv), which provided that, in the sentencing of organizations, one sentencing alternative should be the requirement of "notice of conviction" to victims or other persons who may have civil claims against the organizational offender. The present Standard is broader conceptually, but includes the idea of notice of conviction. Also, it is applicable to individual and organizational offenders.

**Related Standards**

None.

**Commentary**

Paragraph (a) provides that acknowledgment sanctions should be available in all cases, for both individual and organizational offenders. Acknowledgment sanctions include court-ordered communications to the public at large, or to particular classes of persons, of information about offenders' convictions and other facts about their offenses. See Standard 18-2.2(a)(iii). The sanction can take a number of forms and can be designed to serve a number of purposes. Organizational offenders, for example, can be required to place paid advertisements announcing the fact of their convictions, the particulars of their crimes, and the availability of restitutionary remedies for victims.1 Such

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adverse publicity can have the punitive effect of causing harm to the organization through institutional embarrassment, the loss of good will, and lost profits. To the extent these are unwanted consequences, the prospect of an acknowledgment sanction may serve to deter other organizational offenders. To the extent that organizational constituencies, such as shareholders or employees, are alerted to facts concerning the organization's criminality, the goal of reform may also be advanced. In addition, in the above illustration, widespread publicity may help locate victims previously unknown to the authorities, effectuating the goal of restitution.

There has been limited experimentation of late with acknowledgment sanctions imposed on individuals, and some concerns have grown out of that experience. At least two states, for example, have instituted requirements that convicted sex offenders, either following or in lieu of a period of incarceration, must register with authorities in the locality of their residence. In one publicized case, neighbors of a convicted child molester in Washington State burned down the offender's home, shortly before the offender's release from prison, after being notified by the police of the offender's crime. In California, appellate courts have struggled to decide if similar registration requirements constitute cruel and unusual punishment for some sex offenses.

One concern evoked above is that acknowledgment sanctions can provoke a public reaction—indeed a public hatred—disproportionate to the offender's desert. While this will not always occur, and reason-

2. Shareholders may decide to intervene in the management of the organization. Employees' future behavior and the compliance culture of the organization may be influenced by knowledge of past criminal behavior and by the message implicit in the adverse publicity that such behavior does not always go undetected and unpunished.

3. The idea of acknowledgment sanctions for individuals is hardly new. Early in our history, penalties involving a dimension of public ridicule, such as the use of the stocks or public corporal punishment, were commonplace. Hawthorne's famous 'scarlet letter' was not a creature of fiction. See Lawrence M. Friedman, Crime and Punishment in American History 39–40 (1993).


5. See People v. King, 20 Cal. Rptr. 220 (Cal. App. 1993) (requirement upheld where acts of indecent exposure found to have been sufficiently serious and disturbing to victims); In re King, 157 Cal. App. 3d 554 (Cal. App. 1984) (requirement struck down as cruel and unusual where indecent exposure found to have been a "minor" indiscretion). See also Note, Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional? 93 Dick. L. Rev. 759 (1989).
able people may differ as to what is or is not an appropriate public response, the unpredictable effect of acknowledgment sanctions from community to community presents the risk of unduly harsh, arbitrary, and disparate effects on different offenders. In addition, the identification of an individual as a convicted criminal can impede that person's reintegration into law-abiding society. Thus, in pursuit of a punitive or deterrent object, an ill-considered application of an acknowledgment sanction can undermine the societal objective of rehabilitation. Even when these concerns do not rise to constitutional dimension, they should be considered in the prudential weighing of costs and benefits by legislatures, agencies, and courts in developing a plan for the best use of a criminal sanction.

The sparseness of the remainder of this Standard is in part due to the experimental status of acknowledgment sanctions, and the drafters' view that the exploration should continue, especially in the realm of organizational punishment. It is too early to place hard boundaries around the sanction, or to trumpet its virtues in all possible forms and variations. As with other sanctions considered in this chapter, paragraph (b) provides for the sentencing court's continuing jurisdiction during the term of performance of acknowledgment sanctions; there is little point in imposing punishment without a meaningful mechanism for enforcement. An offender's failure to meet the obligations of an acknowledgment sanction can result in sentence revocation proceedings under Part VII below.

Paragraph (c) identifies the agency performing the intermediate function as an important actor in studying the appropriate use of acknowledgment sanctions, and providing guidance to sentencing courts across the jurisdiction. Subparagraph (c)(i) specifies that rehabilitation can be a desirable goal in the imposition of acknowledgment sanctions, but it is not a necessary condition. As explained above, purposes of punishment, deterrence, and reparation can also underlie use of the sanction.

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6. For instance, a well-to-do offender can purchase greater privacy, and greater insulation, from community sentiment than an offender whose financial resources require him to live in close quarters with his neighbors.

7. Some acknowledgment sanctions for individuals may not prove similarly problematic. For example, a requirement that an offender meet the victim of the offense (at the victim's election) in order to better understand the impact of the crime and render an apology might serve important rehabilitative and reparative goals.
Paragraph (c)(ii) notes that, in the sentencing of organizational offenders, it may be appropriate to designate persons, inside or outside the organization, who will perform an acknowledgment sanction. For example, if a corporation is ordered to publicize occasions of wrongdoing, the court may specify that an outside advertising agency be retained, at the offender's expense, to carry out the sanction. Alternatively, the court may require the corporation to designate agents within the organization who will bear responsibility for complying with the sanction.

5. Intermittent Confinement Sanctions

Standard 18-3.19 Intermittent confinement in facility

(a) The legislature should authorize sentence of an individual offender to commitment in a facility on an intermittent basis that permits the offender to leave the facility for employment, education, vocational training, or other approved purpose, but requires the offender to return to the facility for specified hours or periods, such as nights or weekends.

(b) The legislation should authorize the sentencing court to retain jurisdiction over an individual sentenced to intermittent confinement for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of intermittent confinement.

History of Standard

This Standard expands upon former Standard 18-2.4(a)(i), which included “commitment on an intermittent basis to a local facility” as one possible intermediate sanction that jurisdictions might authorize. The present edition is more definite in its statement that the legislature should authorize such sanctions, and specifies a role for the sentencing agency in developing their use.

Related Standards

None.
Commentary

Paragraph (a) provides that the sanction of intermittent confinement in a facility should be available in all cases involving individual offenders. The sanction presupposes that, for some offenders, societal goals of sentencing can best be served by intermittent periods of confinement, permitting the offender to leave the facility for employment, education, vocational training, or other approved purposes. A common arrangement of this kind is work release, which allows offenders freedom to go to a jobsite during the day, but requires them to return to custody in the evenings and on weekends. A less restrictive alternative is a "weekenders" program that permits offenders to live at home and go to their jobs during the workweek, but demands residence in an incarcerative facility on weekends. Yet another form of intermittent confinement that should be considered allows offenders to live at home but requires them to report to designated "day reporting centers" for work or to participate in specialized programs offered at those centers.

It should be apparent that one feature of intermittent confinement is the ability to modulate the severity of the sanction through more or less intensive programming. In the examples given above, a work release program involves relatively lengthy stretches of confinement, interrupted only by the workday. Toward the other end of the continuum, a day-reporting center can involve relatively short periods each day that must be spent in the institutional setting. Thus, for jurisdictions concerned with the punitive impact of criminal penalties, the sanction of intermittent confinement presents a wide range of severity values that can be tailored to individual cases. Particularly in instances where it is thought the sanction of total confinement would overpunish a defendant, or would be prohibitively expensive, a sanction from the many possible intermittent confinement programs may be selected to serve retributive goals.

For jurisdictions that look toward utilitarian purposes, intermittent confinement sanctions can be designed to advance rehabilitative, incapacitative, deterrent, and restorative objectives. One theory of such sanctions is that they do not isolate the offender completely from the

1. For obvious reasons, this and other confinement sanctions are not available for organizational offenders.
outside world, which can include the workplace, home, friends, and family, so that over time the offender can be better prepared for a smooth transition to law-abiding society. Rehabilitation may thus be served, in some cases, by a sentence only to intermittent confinement; in other cases, a term of intermittent confinement may usefully be appended to a term of total confinement as composite sanctions.³

The goal of incapacitation is advanced differentially by various programs of intermittent confinement. During the time an offender spends in custody there is a clear incapacitative benefit. For example, an offender convicted of spousal abuse who is in a work release program is removed from the home during off-work hours. It may be that the offender has no tendency toward abuse during the workday, so that a targeted effort at disablement will prove effective. In addition, the regular supervision available in the intermittent confinement setting may carry incapacitative benefits beyond the institutional walls. Returning to the above example, it may be discovered that the offender abuses his wife only when intoxicated. If the intermittent confinement program includes frequent monitoring for substance abuse, and succeeds in enforcing periods of sobriety, the program can help prevent circumstances that might otherwise contribute to new offenses.

The deterrent force of intermittent confinement sanctions is probably best related to their punitive effect. If an offender's freedom is limited in painful ways, it is to be expected that at least some offenders will alter their future behavior to avoid repeat punishment. Also, to the degree sanctions of intermittent confinement are perceived in the community to hold punitive force, general deterrence may be advanced.

Finally, intermittent confinement sanctions can carry considerable advantages in terms of restitution or reparation to crime victims. By and large, the earning power of offenders is much greater outside as opposed to inside prison walls. If an offender's liquid assets are insufficient to make restitution to the victim at the time of sentencing, as is often the case, the victim's only hope of compensation is that the offender will have an income stream in the future. To the degree intermittent confinement sanctions can accommodate and encourage the gainful employment of the offender, the prospects of restitution are enhanced.

³. See generally Standard 18-3.11(a) and Commentary (concerning the importance of making composite sanctions available to sentencing authorities).
Because the sanction of intermittent confinement can be configured to serve a number of societal purposes, and because the underlying policy choices must be made by the legislature and sentencing agency for each jurisdiction, this Standard does not attempt to formulate rules for the use of the sanction. Under paragraph (c), the sentencing agency should study the role to be played by various intermittent confinement sanctions in the jurisdiction, and should provide guidance to sentencing courts in the sanction's appropriate use. The agency might in particular attend to the statement in Standard 18-3.12(a)(ii) that "[s]anctions other than total confinement may serve to punish and incapacitate offenders" when developing policy for the use of intermittent confinement programs. As with other sanctions, paragraph (c) states that the legislature should authorize the sentencing court to retain jurisdiction over offenders sentenced to a term of intermittent confinement. The policy here, as elsewhere, is that a meaningful enforcement mechanism must exist in order for criminal sanctions to further their goals and be taken seriously by offenders. If an offender violates the provisions of an intermittent confinement sanction, sentence revocation procedures under Part VII of this chapter should be available.

Standard 18-3.20 Home detention

(a) The legislature should authorize sentence of an individual offender to remain at home except for specified periods when the offender may leave for employment, education or vocational training, or other approved purpose.

(b) The legislature should authorize a sentencing court to retain jurisdiction over an individual sentenced to home detention for the term specified in the sentence.

(c) The agency performing the intermediate function should guide sentencing courts in the appropriate use of home detention.

(d) Use of electronic monitoring devices as part of a sentence to home detention is appropriate, but the availability of such devices should not be a prerequisite for such sentences. The ability of an offender to pay the costs of such a device should not be considered by sentencing courts in determining whether to use the sanction of electronically monitored home detention.

History of Standard

This Standard is new.

Related Standards

None.

Commentary

Paragraph (a) provides that the sanction of home detention should be available in all cases involving individual offenders. Home detention, which found increasing use in the 1980s and into the 1990s, is a close variant on intermittent confinement. As with intermittent confinement, an offender's period of "incarceration" may be interrupted by approved activities such as work, education, or training. Unlike intermittent confinement, however, the offender's detention takes place in his own residence rather than a governmental facility. The sanction of home detention can be deployed to serve all of the societal goals of intermittent confinement, with the qualification that the nature of supervision available and the sanction's punitive quality are necessarily altered when confinement periods are served in the home. In trade-off, the costs associated with home confinement can be much lower than for the maintenance of residential facilities or even day-reporting centers.

As presumed in paragraph (d), home detention is sometimes accompanied by the use of an electronic monitoring device, such as an ankle bracelet, by which the presence of the offender in the home can be verified. A simpler "electronic monitoring" system can be effected by telephone alone: a probation officer, for example, can simply place calls to the offender at random hours to determine the offender's whereabouts. Still other home confinement programs operate with no tech-


2. Some of these differences can be beneficial, depending on the reasons for use of the sanction. For example, studies report that some offenders establish closer family ties during sentences to home detention than they had formed previously. It is unlikely that a similar rehabilitative benefit could be traced to time spent inside institutional walls. See Terry L. Baumer & Robert I. Mendelsohn, Electronically Monitored Home Confinement: Does It Work? 63, 65, in SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992).
nological monitoring at all. In some such programs, offenders are ordered to stay at home subject to checks such as occasional visits by the caseworker.

As with other sanctions surveyed in this chapter, adequate enforcement of the terms of a home detention sanction is necessary to see that the sanction realizes its goals, and is not treated lightly by offenders. Paragraph (b) thus states that the legislature should authorize sentencing courts to retain jurisdiction over offenders sentenced to home detention. Violators may become subject to revocation process under Part VII, below.

As with intermittent confinement, the Standards do not articulate finely gauged principles for the use of home detention. This task should be discharged by the sentencing agency in each jurisdiction in light of the societal purposes of sentencing chosen by the legislature and agency. Paragraph (c) preserves the central role of the agency in the ongoing development of the home detention sanction.

Paragraph (d) adds the important point that, while the use of electronic monitoring strategies can be an appropriate part of home detention programs, the availability of the sanction should not be made to turn upon such things as whether an offender has a phone in his home and whether or not the offender can afford to pay the costs of electronic monitoring devices. Otherwise, the predictable use of the sanction would be limited only to those offenders of some financial means. As with all provisions in this chapter, an offender’s poverty should not contribute to the imposition of a sentence of greater severity than would otherwise be meted out.3

6. Total Confinement

Standard 18-3.21 Total confinement

(a) The legislature should authorize sentence of an individual offender to a term of total confinement.

(b) A legislature should not prescribe a minimum term of total confinement for any offense.

(c) The agency performing the intermediate function should guide courts in the appropriate use of the sanction of total confinement.

(d) The legislature should provide that individuals sentenced to total confinement be committed to the custody of the department or bureau charged with operation of the prison or jail system for the term of their confinement.

(e) The legislature should provide that individuals sentenced to total confinement receive substantial "good time" credit toward service of their sentences. The legislature should determine a specific formula for "good time" credit.

(f) The legislature should provide that the department or bureau with custody of an individual must determine the individual's release date by giving credit for:

(i) time spent in custody prior to trial or plea, during trial, pending sentence, pending appellate review, and prior to the arrival at the institution to which an offender has been committed.

(ii) time spent in custody under a prior sentence if the prior sentence has been set aside and the individual has been sentenced again for the same offense or for another offense based on the same conduct. In the event of a reprosecution, credit should include all time spent in custody, in accordance with paragraph (i) as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same conduct.

(iii) time spent in custody upon arrest on a different charge if the charge on which the individual has been sentenced grew out of conduct that occurred prior to the arrest and that time has not been credited toward another sentence.

When an individual has been sentenced to consecutive terms of total confinement, credit toward the remaining sentence should be given for time spent in custody under a sentence that has been set aside as a result of appeal or postconviction review without reprosecution or resentence for that offense or for another offense based on the same conduct.

(g) If the aggregate of total confinement sentences imposed does not satisfy the requirement of adequate determinacy in sentencing, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released. The legislature should direct the board to take into account, in setting guidelines for presumptive
dates of release or in considering the release date of a specific individual, the provisions in this standard.

**History of Standard**

The third edition's treatment of total confinement differs in a number of ways from the prior edition's. First, the former Standards advocated a system of relative indeterminacy in incarcerative sentences. Former Standard 18-4.1 stated that the legislature “should exercise caution in curtailing indeterminacy” and recommended retention of an “early release mechanism independent of the sentencing court.” The present Standards would allow for early release only in jurisdictions that fail to create an adequately determinate sentencing structure. Further, the prior Standards retained the indeterminate device of maximum and minimum terms of total confinement, and suggested that the “proportion of indeterminacy in the sentence [should] increase as the sentence’s length increases.” In contrast, this edition’s conception of presumptive sentences does not allow for widely divergent maximum and minimum terms, and treats disparity as undesirable for sentences of all lengths.

The second edition endorsed the idea of an “extended sentence” for dangerous or habitual offenders, where sufficient proof of future dangerousness was assembled. The current Standards disfavor sentences based on such projections of future conduct.

Former Standards 18-2.1(e) and 18-2.5(b), in black letter, expressed views concerning the appropriate overall levels of incarceration in this country, circa 1979. For this edition, the drafters believed that such issues, which change year by year, should be addressed in the Introduction and Appendix rather than in a black-letter Standard.

Paragraph (e) of this Standard, concerning good time credit, departs from the prior edition, which expressly took no position on that subject.

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1. See generally former Standards 18-2.5, 18-4.1 through 18-4.3, and 18-4.7 (2d ed. 1979).
2. See Standards 18-3.21(g) and 18-2.5.
3. Former Standards 18-4.2 (2d ed. 1979) (Maximum term); 18-4.3 (Minimum term); 18-4.1(b) (General principles; indeterminacy).
7. See former Standard 18-4.7(g) (2d ed. 1979).
Paragraph (f) of this Standard, regarding credits against sentences to total confinement, is a streamlined restatement of former Standard 18-4.7.

**Related Standards**

The conditions necessary for the imposition of a sanction of total confinement are set out in Standards 18-3.12(c) and 18-6.4(a). Paragraph (b) of this Standard should be read in conjunction with Standard 18-3.11(c).

**Commentary**

Paragraph (a) provides that the legislature should make the sanction of total confinement available in all cases involving an individual offender. Given the scope of this chapter, the statement in paragraph (a) is circular: As set out in Standard 18-1.1(a), the chapter does not extend to those minor offenses for which only nonincarcerative sanctions are provided.\(^8\)

Paragraph (b) continues long-standing ABA policy that the legislature should not prescribe mandatory terms of total confinement for any offense. The length of incarceration for individual offenders is better addressed through shared efforts of the sentencing agency, which can consider severity issues from a systemic perspective, and sentencing courts, which can exercise individualized discretion in appropriate cases. It is a fundamental precept of the Standards that fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the system to respond to case-specific factors.\(^9\)

Beyond this, experience with mandatory minimum terms of total confinement has demonstrated that the goal of uniformity in sentencing is ill served by such laws. There is uncontroverted evidence that prosecutors’ charging discretion, the vicissitudes of the plea bargaining process, and the heightened reluctance of juries to convict when penal-

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8. The Standards’ scope includes offenses typically classified as felonies and misdemeanors. Although such classifications and the relevant penalty structures differ across jurisdictions, the drafters intended the Standards to address sentencing for offenses carrying maximum incarcerative penalties of six months or more. Standard 18-1.1(a).

ties are inflexibly severe, all contribute to patterns of irregular enforcement of mandatory minimum provisions. A recent study of such federal laws conducted by the United States Sentencing Commission reached the further disturbing conclusion that uneven enforcement works particularly to the disadvantage of nonwhite offenders. Paradoxically, in practice, the seeming blanket uniformity of mandated terms exacerbates the worst features of disparity in the system.

One argument offered in favor of mandatory minimum sentencing laws is that they can control judicial discretion when, in the view of the legislature, the courts would otherwise be too lenient in sentencing decisions. Much of this argument evaporates, however, in the system of determinate, presumptive sentences advocated by these Standards. Presumptive sentences established by the sentencing agency, with the oversight of the legislature, set forth baseline penalty levels for all offenses. The experience in all state guidelines systems is that judges follow such guidance in the vast majority of cases. Further, as a legal matter, the courts' departure power is not unconstrained, and is subject to appellate review. Thus, systemic decisions regarding appropriate harshness of penalties can be implemented and enforced, while still leaving space for cases that demand individualized treatment.

In drafting the new edition of these Standards, the Task Force and Standards Committee recognized that most or all American jurisdictions have sentencing provisions inconsistent with the terms of paragraph (b). Indeed, the current trend appears to be in the direction of enacting additional mandatory minimum sentencing laws. As observed

10. See United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System (Special Report to Congress, August 1991) (finding a lack of uniform application and unwarranted disparity in sentencing under the more than 60 federal statutes containing mandatory minimum penalties); Michael Tonry, Mandatory Penalties, in 16 Crime and Justice: A Review of Research (Michael Tonry ed., 1992) (surveying history of mandatory sentencing provisions).

11. United States Sentencing Commission, supra note 10, at ii, 76–82. On the subject of race-based and other disparities, the Commission reported:

Disparity may be entering the federal criminal justice system through mandatory minimums in two ways: defendants who appear to be similar are charged and convicted pursuant to mandatory minimum provisions differentially depending upon such factors as race, circuit, and prosecutorial practices; and defendants who appear to be quite different with respect to distinguishing characteristics (e.g., role and nature of the offense) receive similar reductions in sentences below the mandatory minimum provisions.

Id. at 89.
by Professor Tonry, the political and symbolic appeal of such measures can overwhelm the empirical and historic evidence that they do not serve their expected ends.\textsuperscript{12} For the Standards' drafters, the sharp divide between policy analysis and the current political atmosphere posed the following question: Can the ABA announce a "standard" for criminal justice that few or no jurisdictions now follow? In most settings such a concern would militate against the adoption of black-letter policy. In the case of mandatory minimums, however, the drafting groups concluded that no credible defense of such laws can be offered, and their acknowledged political and symbolic benefits do not overcome the operational defects exposed by long experience.

Paragraph (b) must be read alongside Standard 18-3.11(c), which provides: "The legislature should not mandate the use of the sanction of total confinement unless the legislature can contemplate no mitigating circumstance that would justify a less severe sanction." Standard 18-3.11(c) contemplates that for a very narrow group of crimes, the legislature may provide that \textit{some} period of incarceration is a necessary part of the overall sentence, without fixing a required length of term. Where such commands are made, the sentencing agency and courts establish the duration of total confinement. The sentencing agency, however, would not be free to create a presumptive sentence without a component of total confinement, and the sentencing court could not fashion a departure sentence lacking any term of total confinement.

Paragraph (c) highlights the role of the sentencing agency in providing guidance to sentencing courts in the appropriate use of total confinement.\textsuperscript{13} Elsewhere the Standards explore in some detail the concerns that should influence the agency in promulgating such guidance. Many of these concerns drive judicial decision making, as well.\textsuperscript{14} Standard 18-3.12(c) outlines necessary conditions for imposition of any term of total confinement.\textsuperscript{15} Standard 18-3.12(a) and (b) speak more generally to policies relating to the selection of some types of sanctions

\textsuperscript{12} Tonry, \textit{supra} note 10, at 270.
\textsuperscript{13} Similar provisions exist for all other sanctions discussed in this chapter. \textit{See} Standards 18-3.13(c) (compliance programs for individuals), 18-3.14(c) (compliance programs for organizations), 18-3.15(c) (restitution or reparation), 18-3.16(c) (fines), 18-3.17(c) (community service), 18-3.18(c) (acknowledgment sanctions), 18-3.19(c) (intermittent confinement in a facility), and 18-3.20(c) (home detention).
\textsuperscript{14} Standard 18-6.4 traces the intellectual steps a sentencing judge should take before pronouncing a sentence that includes a term of total confinement.
\textsuperscript{15} The conditions of Standard 18-3.12(c) are echoed in Standard 18-6.4(a).
over others in presumptive sentences.\textsuperscript{16} On the issue of sentence severity, Standard 18-2.4 states that "[s]entences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."\textsuperscript{17} Standard 18-2.3 recognizes the factor of cost in overall confinement policy, and states that "the aggregate of sentences to total confinement should not exceed the lawful capacity of the prison and jail system of the state."\textsuperscript{18} Similarly, for states with sentencing commissions, Standard 18-4.4(c)(i) directs the legislature to require that "the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations."\textsuperscript{19}

Paragraph (d) provides that, as a matter of statutory law, individuals sentenced to total confinement should be committed to the custody of the department or bureau charged with operation of the prison or jail system. As with all other sanctions, there is a need to designate the governmental agency with ongoing responsibility for supervision of an offender during the term of his sentence. Unlike other sanctions, however, the unique degree of control associated with total confinement demands that jurisdiction over the offender be transferred from the sentencing court to correctional authorities.

Under the view of determinacy advocated by this chapter, sentences served should bear close proximity to sentences imposed.\textsuperscript{20} Unwarranted disparities in individual punishment, and serious systemic distortions, can occur if release decisions from total confinement eventuate in widely divergent sentences served. Despite this concern, the Standards' drafters recognized that institutional discipline and morale

\textsuperscript{16} For example, Standard 18-3.12(a)(ii) states that the sentencing agency should recognize that "[s]anctions other than total confinement may serve to punish and incapacitate offenders."

\textsuperscript{17} Sentencing courts are directed to the same precept in Standard 18-6.1(a).

\textsuperscript{18} Standard 18-2.3(e). This is not to say that states may not adopt confinement programs that expand existing prison and jail capacities. Such policies are permissible under these Standards so long as the legislature appropriates the necessary resources. See Standard 18-2.3 and Commentary.

\textsuperscript{19} Cost concerns are best addressed on the systemic rather than the case-specific level. Thus, there is no analogue to the resource-sensitivity provisions of Standards 18-2.3 and 18-4.4 in the Standards applicable to judicial discretion.

\textsuperscript{20} See Standards 18-2.5 and 18-4.4(c).
require that incarcerated inmates have palpable incentive to cooperate with prison and jail officials. Paragraph (e) therefore asserts that the legislature should provide for substantial “good time” credit toward service of sentences to total confinement. While the word “substantial” is not quantified in black letter, the drafters thought that potential good time credit in the range of 15 to 25 percent would satisfy the requirement. To preserve the integrity of sentences imposed, and limit the possibility of disparate release decisions, paragraph (e) further states that the legislature should determine a specific formula for the awarding of good time credit.

Paragraph (f) addresses a panoply of situations in which the effective length of a current sentence to total confinement should be adjusted to take account of time the offender has previously served in custody. The legislature should provide that the department or bureau assuming custody of the offender make such calculations in setting a release date.

The Standards have long asserted that there should be no distinction in treatment between time served in custody before and after conviction or sentencing. All incarcerative experiences of offenders stemming from the current offense should be counted toward service of any final sentence pronounced by the sentencing judge. Subparagraph (f)(i) reaffirms this view. Subparagraph (f)(ii) extends similar reasoning to circumstances in which an offender’s conviction or sentence has been overturned on review, but where the offender eventually receives a new sentence for the original offense conduct. Such scenarios can occur in a number of ways: A reviewing court may invalidate a sentence and remand for resentencing; alternatively, a reviewing court may invalidate a conviction and remand for further proceedings that result in reconviction for the same offense or for a different offense arising from the same criminal conduct—again presenting the offender for a resentencing. Subparagraph (f)(ii) is intended to reach the full variety of processes that can produce a new sentence for conduct that had given rise to a prior sentence.

Subparagraph (f)(iii) extends to situations where an offender has been incarcerated subsequent to the instant offense conduct, but where the custody was based on arrest for a different charge. In some cases, under subparagraph (f)(i), such periods of confinement will be credited against a total confinement sentence for the other charge. Where such credit has not been given, however, subparagraph (f)(iii) would award

credit against the instant sentence. This is sensible for a number of reasons. From the offender’s experiential point of view, incarceration is incarceration, regardless of the formal legal basis for its imposition at any moment in time. Further, it is not unknown for pretrial detention to be predicated on charges different than those reflected in the ultimate conviction and sentence. It elevates form over substance to ignore such periods of custody, when they occur after the offense of conviction, simply because the eventual prosecution embarked in an alternate direction. Finally, from a public policy perspective, the purposes of sentencing are overserved if the actual length of an offender’s confinement exceeds that deemed justified by the sentencing court. This is both an unnecessary use of resources and a violation of the principle of parsimony embodied in Standard 18-2.4.

The final provision of paragraph (f) applies to circumstances where an offender has been sentenced for multiple offenses and one or more of the convictions or sentences is overturned on review. In such circumstance, if that reprosecution or resentencing does not occur on the challenged counts, credit should be awarded against any remaining sentence of total confinement for convictions untouched on review. As a practical matter, this provision has import only for consecutive sentences, which are disfavored by the Standards and should occur infrequently. Where multiple convictions give rise to a consolidated sentence, as recommended in Standard 18-3.7, or a concurrent sentence under traditional practice, the time served by an offender for an invalidated sentence will already have been credited against the sentence left intact on review, irrespective of the final provision of paragraph (f).

Paragraph (g) is addressed only to jurisdictions that fail to create a sentencing system that meets the basic requirement of determinacy in Standard 18-2.5. Briefly stated, that Standard defines adequate determinacy in terms of the ability of systemic actors to predict, control, and manipulate future sentencing patterns with reasonable accuracy, and in terms of the success of the system in imposing sentences that are reasonably uniform, so that unwarranted disparities in individual

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22. It does not make sense, on the other hand, to bestow credit for periods of incarceration that occurred before the instant offense. Such a policy would allow offenders to "bank" confinement credits against future charges.

23. See Standards 18-3.7, 18-6.5 and Commentary.
sentences are avoided. Because the determinacy Standard is foundational to the overall functioning of the sentencing system, jurisdictions that fail to comply with Standard 18-2.5 will operate in nonconformity with the bulk of the Standards contained in this chapter. Still, such jurisdictions now exist in substantial numbers. For states that adhere to the traditional system of indeterminate sentencing, or follow determinate schemes that fail to satisfy the components of Standard 18-2.5, the legislature should authorize an administrative board, such as a board of parole, to decide when individuals sentenced to total confinement should be released.

The logic of paragraph (g) is that, where jurisdictions lack “front-end” control over the use of scarce prison resources, as achieved through an effectual determinate sentencing system, recourse must instead be made to “back-end” control. Historically, adjustments to overcrowding have occurred through parole release or emergency release mechanisms. Many states today, when correctional facilities cannot support sentences imposed, must resort to such back-end measures. The Standards Committee, while clearly opposed to regimes of indeterminate sentencing, recognized that, in such systems, a release authority with substantial discretion over the length of sentences served is an indispensable player in the sentencing structure.

Standard 18-3.22 Costs, fees, and assessments

(a) The legislature may provide that an offender may be charged with reasonable court costs and, in an appropriate case, with reasonable costs associated with a correctional program or sanction included in that offender’s sentence. The legislature should characterize such assessments as separate from offenders’ sentences.

(b) The agency performing the intermediate function should provide that sentencing courts should take into account offenders’ financial circumstances in determining whether to assess costs and the amount of costs assessed.

(c) The agency should ensure that sentencing courts, in assessing such costs, do not undermine an offender’s ability to satisfy a

24. For a fuller discussion, see Standard 18-2.5 and Commentary.
25. On the fundamental importance of the determinacy Standard, see Standards 18-2.5, 18-2.6 and Commentary.
civil judgment, or sentence, requiring the offender to make restitution or reparations to the victim of the offense. The agency should determine whether assessments of such costs should be subordinated to sentence provisions for economic sanctions other than restitution or reparation.

(d) The agency should ensure that sentencing courts, in determining the amount of economic sanctions other than restitution or reparation, take into account the amount of costs assessed or to be assessed.

(e) The legislature should place responsibility for enforcement of cost assessments on a designated official. The legislature should authorize that official to enforce an assessment of costs by any method available to enforce a civil judgment. Non-payment of assessed costs should not be considered a sentence violation.

History of Standard

This Standard is new.

Related Standards

None.

Commentary

This Standard addresses the imposition of reasonable court costs on offenders and, in appropriate cases, the imposition of reasonable costs associated with sanctions included in offenders' sentences. Paragraph (a) states that the legislature, in the exercise of its best judgment, may provide for such assessments, although they should not be classified as a part of offenders' sentences. Such costs, fees, or assessments are not designed to serve retributive or consequentialist goals of punishment; rather, they are compensatory for public expenditures made necessary by the prosecution, conviction, and sentencing of offenders.

1. Information concerning correctional fee programs can be found in Peter Finn & Dale Parent, Making the Offender Foot the Bill: A Texas Program (U.S. Dep't of Justice, October 1992); Dale Parent, Recovering Correctional Costs Through Offender Fees (U.S. Dep't of Justice, June 1990). Professors Morris and Tonry endorse such fees but, like these Standards, assert that restitution to victims should take priority. Norval Morris & Michael Tonry, Between Prison and Probation 235–36 (1990).

2. The costs considered in this Standard bear some resemblance to the economic sanction of restitution. See Standard 18-3.15. Here, however, the government is compen-
Paragraph (a) recognizes this as a legitimate policy objective, but one sounding more in civil than criminal law. Accordingly, as set forth in paragraph (e), the failure to pay assessments made under this Standard should result in civil enforcement proceedings, but not sentence revocation proceedings.

The Standard permits, but does not mandate, legislation aimed toward the collection of court costs and correctional fees. In theory, the drafters had little objection to such assessments in cases where the offender has the ability to pay and the assessments will not interfere with other important goals of the criminal law, such as victim restoration. In practice, the Standards Committee recognized that the imposition of small amounts in court costs is automatic following conviction in many jurisdictions; further, the Committee was made aware of a number of promising programs around the country for the collection of correctional fees. Particularly in conjunction with programs of intermittent confinement, or compliance programs, where the offender is permitted to work in the community, a number of jurisdictions have collected correctional fees from offenders on a regular timetable. In some jurisdictions, such programs have become self-supporting to a substantial degree because of income from correctional fees. Such results carry obvious benefits to the public fisc, and also help encourage the development of community-based programs.

The major uncertainties about the collection of costs and fees under this Standard spring from the practical reality that few offenders have the resources to satisfy financial assessments with ease, and the imposition of costs and fees, in addition to economic sanctions that may be imposed under Standards 18-3.15 through 18-3.17, may overwhelm offenders' ability to make payment in many cases. Paragraphs (b) through (d) reflect policy judgments that stem from such difficulties.

Paragraph (b) provides that the sentencing agency should require courts to weigh offenders' financial circumstances before assessing

sated not as a victim of crime but as a prosecuting and sentencing authority that has incurred expenses while performing its public functions. The Standards Committee considered, and rejected, a provision for assessments of the government's costs of investigation and prosecution of offenders. While such an idea has some theoretical appeal, only a tiny number of offenders could hope to pay such assessments. Moreover, and more important, the law in most jurisdictions does not provide that defendants who are acquitted of crimes, or otherwise exonerated, may recover their costs of defense. In the absence of symmetrical treatment, the drafters thought it would be greatly unfair to impose the costs of prosecution on convicted offenders.
costs and fees. This provision bears a relationship to the Standard’s position that economic sanctions should be levied, and payment schedules structured, in light of realistic determinations of offenders’ ability to pay.\textsuperscript{3} If such account is not taken, the court’s order is an exercise in futility that cannot be enforced, and may be expected either to demoralize the offender or communicate a message that court requirements are not to be taken seriously.\textsuperscript{4}

Paragraphs (c) and (d) recognize that assessments of costs and fees interact with economic sanctions, and vice versa. Paragraph (c) states a clear and important policy judgment that the collection of costs and fees should always be subordinated to goals of victim restitution. This is consistent with the general view of the Standards that restitution should be first in line among the various economic sanctions.\textsuperscript{5} In the setting of correctional fees, the impact of paragraph (c) should not be regarded lightly. The apparently successful correctional fee programs that now exist do not, insofar as the drafters can determine, make victim restitution a first priority. The ability of such programs to maintain current collection levels, and advance a strong restorative regime as well, remains in doubt.

The second sentence of paragraph (c) alludes to a further complication of priorities. The Standards stake out a clear position that restitution should come ahead of court costs and correctional fees, but express no view as to the relative position of such assessments as against other economic sanctions such as fines and forfeitures. This is a matter of policy that can fairly be resolved in different ways. Paragraph (c) states that the sentencing agency should propound such a resolution. If the policy of a jurisdiction is to prefer economic sanctions over costs and fees, the chances of collecting substantial dollar values in costs and fees are reduced. At some point, and this is a matter for study in each state, the administrative expenses of collection programs may cease to be justified in light of small returns.

Paragraph (d) further emphasizes the interconnections between assessments under this Standard and economic sanctions. From the point of view of the offender, and enforcement potentialities, the gross amount of all economic sanctions, plus all assessed costs and fees, represents one total package of financial impact. In fixing economic

\textsuperscript{3} See Standards 18-3.13(c)(iv), 18-3.15(c)(ii), and 18-3.16(d)(i).
\textsuperscript{4} See Standard 18-3.16(d)(i) and Commentary.
\textsuperscript{5} See Standard 18-3.15 and Commentary.
sanctions, therefore, the sentencing agency should direct courts to consider costs and fees that will also be assessed. Paragraph (d) restates earlier Standards that provide, in general terms, that courts should be guided to weigh the financial circumstances of offenders when fashioning economic sanctions. The drafters thought elucidation useful here, however, on the theory that anticipated costs and assessments might understandably be overlooked by sentencing courts in the absence of a specific reminder.

Paragraph (e) continues the Standards' emphasis on the need to attach meaningful enforcement mechanisms to court orders issued as part of the sentencing process. While costs and fees are not part of criminal punishment per se, they are legal pronouncements that government and offenders should be conditioned to treat with seriousness. As with economic sanctions, the Standards Committee believed it desirable for the legislature to designate a responsible public official to oversee the collection of monies due under this Standard. In the Committee's view, paragraph (e) could alternatively be satisfied through the hiring of a private contractor to pursue collection efforts on the government's behalf. As explained above, the enforcement mechanisms available should include those for collection of a civil judgment; sentence revocation proceedings should not follow from nonpayment of court costs or correctional fees.

6. An exception is made for restitutionary awards. Under Standard 18-3.15(c)(ii), sentencing courts should order full restitution in every case but may create payment schedules that allow for an offender's financial circumstances.

7. See Standards 18-3.15(f), 18-3.16(f), and Commentary.
PART IV.
THE INTERMEDIATE FUNCTION
A. General

Standard 18-4.1 Basic responsibilities of the agency performing the intermediate function

(a) Implementation of legislative policy determinations within the statutory framework of the criminal code requires a state-wide agency to develop a more specific set of provisions that guide sentencing courts to presumptive sentences and in the appropriate use of aggravating and mitigating factors, offenders’ criminal history, and offenders’ personal characteristics. This intermediate function is crucial to effective administration of a criminal justice system in a way that meets the established societal objectives, makes optimal use of available resources, and results in sentences that are reasonably determinate.

(b) The agency performing the intermediate function should be the information center for all elements of the criminal justice system. The agency should collect, analyze and disseminate information on the nature and effects of sentences imposed and carried out. The agency should develop means to monitor, evaluate, and predict patterns of sentencing, including levels of severity of sentences imposed and relative use of each type of sanction. Information gathered by the agency is necessary to the legislature’s performance of the legislative function, to the agency’s performance of the intermediate function, and to the courts’ performance of the judicial function. The agency’s responsibility to provide information concerning the sentencing system extends to members of the bar and to the general public.

History of Standard
This Standard is new.

Related Standards
This Standard, and all of Part IV, builds upon the concept of the intermediate function as introduced in Standard 18-1.3.
Commentary

This Standard gives definition to the concept of the "intermediate function" in sentencing systems. This term, new with the third edition, was chosen to describe the work done "in between" the legislature's statutory commands and the case-by-case decisions of sentencing judges. Every jurisdiction should create a permanently chartered agency to perform the intermediate function, either in the form of a sentencing commission or an equivalent body in the legislative or judicial branch.\(^1\) The Standards recommend the sentencing commission, but recognize that other models of a successful vehicle of a sentencing agency could be developed.\(^2\)

Standard 18-4.1 outlines two major areas of responsibility for the sentencing agency. Paragraph (a) speaks to the agency's contributions to structuring the decision-making process for the sentencing of offenders. Paragraph (b) assigns to the agency extensive functions of information gathering, evaluation, and dissemination.

Paragraph (a) highlights the agency's responsibility to develop sentencing provisions within the framework of the criminal code that will advance the legislature's broad policy directives for the sentencing system. Almost universally, criminal offenses exist only where defined by the legislature. Each offense should also be accompanied by a legislatively fixed maximum punishment as to each available sanction.\(^3\) Typically, statutory maxima are set at high levels so that the range of statutorily authorized penalties is wide indeed. One critical function of the sentencing agency, as intermediary between legislature and the courts, is to give structure to the decision-making process for selecting particular sentences within the expansive range allowed by the code.

The agency performs this role through the creation of presumptive sentences and other provisions for the guidance of sentencing judges, including provisions relating to aggravating and mitigating circumstances, and the effect of offenders' prior criminal histories and

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2. Standard 18-1.3(b) provides that "[t]he intermediate function is performed most effectively through a sentencing commission." The drafters found much promise in the sentencing commission model as it exists in states such as Minnesota, Washington, Pennsylvania, Oregon, and North Carolina. See generally Michael Tonry, Sentencing Commissions and Their Guidelines, in 17 Crime and Justice: An Annual Review of Research (Michael Tonry ed., 1993) (cross-jurisdictional survey of sentencing reforms, including commission-based reforms).
personal characteristics. Through such measures, courts across the
jurisdiction can approach sentencing decisions from a common baseline
and can employ similar steps of logic and analysis in adjusting
sentences away from the presumptive baseline when required.

Paragraph (b) stresses the need for greatly improved information
and evaluation mechanisms for the sentencing system, and makes the
sentencing agency the "nerve center" for such efforts. The agency
should collect, analyze, and disseminate information on the nature and
effects of sentences imposed and carried out; further, it must develop
means to monitor, evaluate, and predict patterns of sentencing. As
elucidated in paragraph (b), adequate information is necessary to every
responsible decision maker in a sentencing system. The legislature
requires feedback on the operation of the system in order to determine
whether basic policy changes, or other amendments to the statutory
scheme, are needed. Further, the legislature and agency can make intel­
ligent modifications to presumptive sentences, and other provisions for
the guidance of sentencing courts, only in light of an understanding of
existing trends in sentencing and the likely impact of changes in the
law. Finally, sentencing courts often require quality information about
the sentencing system in order to make decisions in individual cases.
For example, it will often be essential for a sentencing judge to have
evaluative information about available community-based programs
before selecting a package of sanctions for a particular offender.

In essence, the Standards reiterate the forceful call for a permanent
sentencing commission or equivalent agency first made by Marvin
Frankel in 1972. While no longer a "new" idea, Judge Frankel's sugges­
tion retains its urgency in most parts of the country. To date, a signif­
ican t minority of jurisdictions have created a continuing sentencing
agency, but many states have failed to do so, or have chartered only

4. See Standards 18-3.1 through 18-3.5. The agency should not perform this task in
isolation. As stated in Standard 18-4.3, the agency should work in collaboration with the
legislature in developing guidance for sentencing courts. In some jurisdictions, the agen­
cy's work product must win affirmative approval of the legislature before taking effect;
in other jurisdictions, a legislative veto device is used. In addition, the agency should
periodically revise its provisions in light of what sentencing courts have been doing.
Thus, for example, if an agency observes that sentencing judges are departing frequently
from the agency-created presumptive sentence, the agency may seek to amend its
sentencing provisions to incorporate the reasons given by the courts for such departures.
See Standard 18-4.3 and Commentary.

5. Marvin E. Frankel, Lawlessness in Sentencing, 41 U. CIN. L. REV. 1 (1972); Marvin E.
temporary commissions. If there is a cornerstone of the third edition of the Standards, it is the conclusion that a permanent sentencing agency is an indispensable part of every criminal justice system.

B. The Intermediate Function and a Sentencing Commission

Standard 18-4.2 Establishment of sentencing commission

(a) If a jurisdiction elects to establish a sentencing commission, the legislature should authorize the commission as a permanent body. The legislature should authorize appointment of commission members and the chair by the governor with the advice and consent of the senate or by the presiding judge of the highest state court. The legislature should provide that the commission be composed of lay persons and persons with varying perspectives and experience within the criminal justice system and with sentencing processes, including at least one representative of the judiciary, prosecuting authorities, defense bar, and correctional and probation agencies. In composing the commission, consideration should be given to the community’s ethnic and gender diversity.

(i) Members of the commission should serve for a term of years long enough to ensure continuity and efficient functioning of the commission, but short enough to allow for the regular infusion of new perspectives and experience.

(ii) Members of the commission should be selected for their knowledge and experience and their ability to adopt a systemic, policy-making orientation. Members should not function as advocates of discrete segments of the criminal justice system.

(b) The legislature should designate the commission’s responsibilities to include the following:

(i) promulgation and periodic revision of presumptive sentences and other provisions to guide sentencing discretion;

(ii) ongoing data gathering and research relating to sentencing policies and practices, including studies regarding compliance with the provisions promulgated by the commission, rates of disparities in sentencing, and the past and projected impact of the provisions promulgated by the commission;

(iii) periodic reports to the legislature and the public regarding the commission’s data gathering and research, and reports responsive to any particular queries posed by the legislature to the commission;

(iv) periodic recommendations to the legislature regarding changes in the criminal code or to the rule making authority regarding changes in the rules of criminal procedure;

(v) provision of information to the bar and the public regarding sentencing provisions promulgated by the commission and sentencing policies and practices;

(vi) development of manuals, forms, and other controls to attain greater consistency in the contents and preparation of presentence reports;

(vii) monitoring compliance with procedural rules, particularly as applicable to administrative and correctional personnel engaged in the collection and verification of sentencing data;

(viii) service as an educational agency for judges, probation officers, and for other personnel; and

(ix) administration of periodic sentencing institutes or seminars to discuss problems relating to sentencing and to develop improved criteria for the imposition of sentences.

(c) Adequate staff assistance for the commission is essential and should include persons familiar with recent developments in empirical criminology.

(d) The commission’s empirical research capacity should be given highest priority and should be adequately funded by the legislature.

History of Standard

This Standard is an enlarged version of former Standards 18-3.4 (Composition of the guideline drafting agency) and 18-3.5 (Other functions of the guideline drafting agency) (2d ed. 1979). It is consistent with those earlier Standards, but supplements their provisions based on the experience of state commission-based systems since 1980.
18-4.2 Criminal Justice Sentencing Standards

Related Standards

This Standard is applicable by analogy to legislative or judicial agencies created to carry out the intermediate function under Standard 18-4.5 or 18-4.6.

Commentary

Standards 18-4.2 through 18-4.4 speak in detail to jurisdictions that elect to create a sentencing commission as the agency to perform the intermediate function in their sentencing systems. Standard 18-1.3(b) recommends such an approach, although Standards 18-4.5 and 18-4.6 provide alternative models of legislative and judicial agencies that can play similar intermediary roles between legislature and sentencing courts. Those jurisdictions that opt for a legislative or judicial agency can nonetheless borrow many of the specific suggestions offered in Standards 18-4.2 through 18-4.4.

Paragraph (a) begins with the central observation that sentencing commissions should be chartered as permanent bodies. Sentencing policy and practice are continually evolving subject areas. The legislature lacks both the time and expertise to stay apprised of the workings of each segment of the sentencing system as circumstances change and as knowledge about the system's operation accumulates. One principal justification of an agency to carry out the intermediate function is the ability of such an agency to make self-corrections over time, and to react to changes in law enforcement and correctional priorities.

As of this writing, a number of jurisdictions have operated with permanent sentencing commissions for some years. Although collective evaluation of disparate commissions is a risky enterprise, all have proven largely successful in translating legislative policy into more specific sentencing provisions that have exerted meaningful influence on aggregate patterns of sentencing. Further, commissions have

1. The first, and influential, call for a permanent sentencing commission was MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973). See also Marvin E. Frankel & Leonard Orland, Sentencing Commissions and Guidelines, 73 GEO. L.J. 225 (1984). Both works retain currency for jurisdictions that have not chartered commissions or equivalent agencies.

2. See Michael Tonry, The Success of Judge Frankel's Sentencing Commission, 64 U. COLO. L. REV. 713 (1993) (arguing that while one may quarrel with the policy objectives of some commissions, they have succeeded in effectuating intended policy choices).
proven adaptable over time to the changing policy directions of their home jurisdictions. Beyond merely reacting to change, commissions have influenced policy debate through their ability to make credible projections of the impact of amendments to the criminal code or sentencing guidelines.

In contrast, a number of states have created only temporary sentencing commissions to work for a defined period of years. Such an approach leaves the intermediate function unfulfilled in the long run, and guarantees that the commission’s work product, however helpful as an initial matter, will become obsolete with the passage of time. All permanent commissions have found that there is an ongoing need to respond to shifting conditions in the sentencing system, whether reflected in changes in political atmosphere, the volume and types of cases entering the system, or decisions by courts indicating that the commissions’ provisions for sentencing are not working smoothly. Just as the legislature and the courts have ongoing, active roles to play in the administration of sentencing laws, the commission must also remain an active and interactive participant over the long haul.

The remainder of paragraph (a) speaks to the composition of a commission. The legislature should seek to attract a diverse group of highly qualified commission members. Membership should be conceived as a position of honor and responsibility, comparable to a judicial or cabinet-level appointment. As such, the legislature should provide for selection by the governor, subject to the advice and consent of the senate, or by the presiding judge of the state’s highest court.

3. In Washington State, for example, the sentencing commission has functioned during periods of planned prison expansion as well as periods in which stabilization of prison populations was a chosen objective. Commissions in Pennsylvania and Minnesota have also performed the intermediate function in times of varying legislative climate. See Leonard Orland & Kevin R. Reitz, Epilogue: A Gathering of Sentencing Commissions, 64 U. COLO. L. REV. 837 (1993).


5. Further, a temporary charter prevents the commission from developing a consistent track record of success, acceptance, and credibility within a jurisdiction.

Experience and common sense both militate in favor of a commission membership of varying perspectives on the problems of sentencing. Politically, the commission’s proposals are more likely to win acceptance among different criminal justice constituencies when they have had a voice in the commission’s operations. Alternatively, where important groups such as prosecutors or the defense bar are made to feel excluded from the process, the commission’s reform proposals are likely to fail entirely or be enacted in an atmosphere of controversy and hostility.\(^7\) Quite apart from such political realities, however, it is logical to suppose that a better and more workable set of sentencing provisions will result from consensus-seeking discussions that include different viewpoints. Just as professional diversity is important to the quality of a commission’s work product, paragraph (a) counsels that consideration should be given to the gender and ethnic diversity of a community when composing the membership of a commission.

Subparagraph (a)(i) recommends that commission members serve for a term of years sufficient to provide continuity and stability to the commission, but that the designated terms should be short enough to allow for the infusion of new blood into the commission’s deliberations. The Standards do not specify a time period, although a length of term within the range of three to six years could satisfy the twin concerns of stability and periodic turnover voiced by subparagraph (a)(i). Likewise, the Standard does not speak to the possibility of successive terms of membership. While these are not precluded, both the appointing authority and the affected commission member should attend to the policy concerns of subparagraph (a)(i) when contemplating a successive appointment.

Subparagraph (a)(ii) states an aspiration concerning the attitude and perspective that members should bring to their work on a sentencing commission. While members are selected for their knowledge and experience in discrete sectors of criminal justice, the issues that come before a commission are systemic in scale. Observers have noted that sentencing commissions produce their most credible products when they aim toward consensus positions rather than an adversarial resolution of issues.\(^8\) To capture this spirit, subparagraph (a)(ii) states that

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commission members should not view their role as "advocates" for particular constituencies of the criminal justice system.

Paragraph (b) catalogues at some length the many tasks that should be assigned to a sentencing commission by the legislature. Subparagraph (b)(i) speaks to the commission's responsibility for the preparation and revision of presumptive sentences and other provisions to guide the discretion of sentencing courts. The means of carrying out this responsibility are given specific content in Standards 18-4.3 and 18-4.4, below.

Subparagraphs (b)(ii) through (b)(ix) speak to a number of functions a commission should perform as the "information center" of the sentencing system. These include the gathering and evaluation of information about the sentencing system, drafting of regular reports and recommendations to the legislature, dissemination of information to the bar and public, preparation of manuals and forms, monitoring for compliance with procedural rules, service as an educational resource for judges, probation officers, and other personnel, and administration of periodic sentencing institutes. One theme of the specific provisions of paragraph (b) is that the commission should be engaged in ongoing dialogues with the legislature and judiciary. As the "intermediate" agency between the legislative branch and the court system, the commission needs to stay closely in touch with the concerns of both groups.

Paragraphs (c) and (d) underscore the importance of adequate funding support for the personnel needs and research capacity of a sentencing commission. The commission is the pivot point of sentencing policy in its jurisdiction; the quality and reliability of its impact projections and other work products are integral to its ability to function effectively. Given the amount of public monies every jurisdiction spends on the execution of sentences, it makes eminent fiscal sense to provide adequate funding to the agency that develops projections and plans for the allocation of correctional resources.⁹

Standard 18-4.3 Creation of provisions to guide sentence discretion

(a) Presumptive sentences and other criteria to guide judicial sentencing discretion should be the product of cooperative effort

⁹ For a discussion of the role of a sentencing commission or other sentencing agency in resource allocation decisions, see Standards 18-2.3, 18-4.4(c), and Commentaries.
by the legislature and the sentencing commission. The legislature should make a clear delineation of responsibility between itself and the commission with respect to the promulgation of sentencing policy.

(b) A new commission’s first task, prior to the creation of sentencing provisions, should be a detailed empirical study of prior sentencing patterns in the jurisdiction. Projections regarding the impact of any proposed sentencing provisions should be developed. The legislature should require that the provisions promulgated by the commission reflect legislatively determined policy goals and judgments; presumptive sentences and related provisions should not be merely the product of reproducing or averaging prior sentencing practice.

(c) Proposed amendments to existing sentencing provisions should be drafted and evaluated in light of data regarding experience under the provisions in effect, and projections of future sentencing patterns under the proposed amendments.

(d) The commission should be required to observe the standards and procedures that apply generally to administrative agencies in rulemaking proceedings. Informal consultation with interested public groups and other criminal justice agencies should be encouraged.

**History of Standard**

This Standard is largely new. The second sentence of paragraph (b) reiterates former Standard 18-3.1(c)(iv) (2d ed. 1979). Paragraph (d) derives from the first two sentences of former Standard 18-3.3(a).

**Related Standards**

This Standard is applicable by analogy to legislative or judicial agencies created to carry out the intermediate function under Standard 18-4.5 or 18-4.6.

**Commentary**

This Standard speaks to processes that should be created and followed for the development of presumptive sentences and other provisions to guide the discretion of sentencing courts.¹ The first

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¹ The best general work on the overall functioning of sentencing commissions is ANDREW VON HIRSCH, KAY A. KNAPP & MICHAEL TONRY, THE SENTENCING COMMISSION
sentence of paragraph (a) identifies the promulgation of such provisions as a matter for cooperative effort by the legislature and sentencing commission. The Standard stops short, however, of defining firm institutional roles that must be assigned in each jurisdiction; the second sentence of paragraph (a) states merely that the legislature should make a "clear delineation" of responsibility as between itself and the commission.

The Standard thus permits distribution of authority in a number of ways. For example, legislation might provide that the commission's proposed sentencing provisions will take effect at the end of a prescribed period unless the legislature acts to amend or disapprove them. (This might be called a "legislative veto" mechanism.) Alternatively, the statute could provide that commission proposals gain force of law only following affirmative approval by the legislature. (An approach of "legislative approval.") Third, the legislature might choose to delegate independent rulemaking authority to the commission to promulgate and amend sentencing provisions, subject to legislative oversight. (A "delegation" mechanism.) All three arrangements, and especially the legislative veto and legislative approval devices, have been implemented by states with sentencing commissions. Any of the three, or an alternative allocation of responsibility, could be instituted in conformity with this Standard.

The Standards Committee wavered between endorsing either the legislative approval device or the legislative veto, and in the end decided to take no express position. Both structures have ostensible advantages. The approval system lends the imprint of active ratification by a democratically elected body to the policies embodied in the commission's proposals. In states that have used this structure, however, criticisms have been raised that the commission's effectiveness is hampered. The commission functions merely as an advisor to the legislature; further, the recruitment of qualified commission members may be hampered when the commission has no free-standing authority. The veto system, while preserving close legislative supervision, is said to give greater responsibility to the commission and lend

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a measure of "political insulation" to the development of sentencing policy. For example, it is claimed that legislatures can experience great short-term pressure to "get tough on crime"; it is further claimed that the more deliberative and lower-profile processes of a commission can help resist short-term impulses, and can produce better long-term decision making. For some of the Standards' drafters, however, the idea of political insulation was a suspect goal; for others, there were doubts that the legislative veto mechanism was adequate to advance the goal. Ultimately, paragraph (a) leaves the question open.

Paragraph (b) stresses the importance of understanding the past sentencing practices in a jurisdiction before introducing change in the form of new structured sentencing provisions. A new commission should make this a first priority. The development of a retrospective database gives insight into existing patterns of cases entering the system and the historic responses of judges and correctional authorities to those cases, in the absence of guidance from a commission. The retrospective database allows the commission to make credible projections regarding the impact of new structured sentencing provisions on the system as a whole. More important, detailed historic information allows the commission to gauge the future impact of small or targeted adjustments in proposed sentencing provisions. For example, a commission might wish to weigh the merits of more or less severe penalties for a specific class of drug offenses. Given reliable background information concerning the expected number and severity of such offenses (and the criminal histories of people convicted of such crimes), the commission might develop impact projections for sentence outcomes under various scenarios, as follows: A presumptive incarcerative sentence of $x$ months will produce $y$ demand for prison beds; if the presumptive sentence is lowered by two months, the reduced drain on prison space can also be calculated; if the presumptive sentences are altered so that half of the offenders (with less serious criminal histories, perhaps) are assigned to community-based sanctions, the expected use of prison and nonprison resources can be forecast. Under paragraph (b), such projections should be appended to every proposal developed by a new commission.

Finally, paragraph (b) states that the legislature should require that the commission's work product reflect legislatively determined policy goals, rather than an attempted reproduction or averaging of prior sentencing practices. In the view of the drafters, it is a fundamental policy error for a new commission to formalize preexisting sentencing
patterns developed in the absence of a systemwide determination of societal goals. One central function of a sentencing commission, or of any agency created to perform the intermediate function, is to bring a high level of expertise to the task of translating legislative objectives into sentencing provisions that will then operate with some uniformity throughout the jurisdiction. Prior to the institution of such an agency, sentencing decisions are the product of a large number of ad hoc policy judgments made by sentencing courts. Studies have demonstrated that individual sentencing judges pursue policies that are inconsistent with those of other judges, and can impose widely divergent sentences in similar cases. An attempt to reproduce or average the outcomes of an indeterminate sentencing structure is thus an abdication of the commission's role to help bring coherence and rationality to punishment decisions. Further, it is unlikely that such a strategy can succeed in ensuring that sentencing outcomes match available or funded resources, or that available resources are deployed in the most advantageous manner. By definition, the case-by-case adjudicative process cannot comprehend expansive issues of anticipated funding levels, priorities in the use of facilities, and future resource availability. Thus, the reiteration of such atomized decisions will of necessity neglect systemic concerns that are central to the mission of a sentencing commission.

Paragraph (c) parallels some of the content of paragraph (b), but speaks to the process of amendment of sentencing provisions developed by the commission. One virtue of a permanent sentencing agency is its ability to make continuing adjustments to the sentencing system, in light of changing conditions, changing policies, or the accumulation of information about how the system is operating. No jurisdiction has ever experienced stasis in criminal justice for prolonged periods. Due to changes such as those occurring in population, demographics, economic conditions, and culture, rates of offending, arrest, and prosecution are highly mutable, as are the societal notions of an appropriate criminal justice response. Paragraph (c) thus envisions the need for regular and periodic amendments to sentencing provisions. The amendment process should bear similarity to the original task of developing such provisions: Account should be taken of past sentencing

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4. See Standard 18-2.3 and Commentary.
5. On the subject of the evolution of criminal justice policies in this country, see generally LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993).
practices and the best possible projections should be made of the likely impact of proposed amendments.

Paragraph (d) recommends legislation providing that a sentencing commission, in creating sentencing provisions, should observe the standards and procedures that apply generally to administrative agencies in rulemaking proceedings. Specifically, mechanisms for advance dissemination of the commission's proposals, public comment, and public hearings are highly desirable. Given the number of actors who participate in the sentencing process, and the broad constituencies outside the system that take an interest in sentencing policy, the acceptability and workability of a commission's proposals depend in large measure on an inclusive procedure at the drafting stage. The commission needs to know where support and objections lie, in part so its final sentencing provisions are based on the fullest information possible, and in part so that the legal effect of the provisions will not be resisted in application after their adoption. To this end, the Standards also encourage informal consultation between the commission and interested public groups and other criminal justice agencies. The particularly complex and controversial enterprise of the sentencing commission, placed "in the middle of" various energetic actors and governmental bodies, demands that the commission do what it can to coordinate with other participants in the criminal justice system rather than isolate itself from such interchange.

Standard 18-4.4 Structure of provisions to guide sentence discretion

(a) The legislature should authorize the sentencing commission to transform the legislatively determined policy choices into more particularized sentencing provisions that guide sentencing courts to the levels of severity of presumptive sentences, within statutory limits, that are appropriate for ordinary offenders.

(b) The legislature should require the commission to indicate the types of sanctions that constitute the presumptive sentence for particular offenses. The legislature should further require the commission to specify the presumptively appropriate level of severity for each sanction.

(i) The sentencing provisions should direct sentencing courts to the types of sanction and severity of sanction determined with reference to the offense of conviction and the degree of culpability of the ordinary offender.
(ii) For the sanctions of fine, intermittent confinement, or total confinement, the presumptive level of severity may be expressed in terms of a range. Sentencing courts, taking into account the material facts regarding the offense and the offender, should have broad discretion in determining sentences within the stated ranges. Ranges of presumptive sentences should be fixed so that sentences imposed are adequately determinate.

(iii) The sentencing provisions should indicate to sentencing courts the extent of adjustments in sentences appropriate to take into account an offender’s criminal history.

(iv) The legislature should permit sentencing courts to impose a sentence of lesser or greater severity or types of sanctions different from the presumptive sentence if the court finds substantial reasons for so doing. Such circumstances are present:

(A) When a court finds a mitigating or aggravating factor that on balance justifies the court’s determination, or

(B) When a court, sentencing an individual offender, finds a social, economic, physical, or mental characteristic of the offender, indicative of circumstances of hardship, deprivation, or handicap, that justifies imposition of a less severe sentence.

(c) The legislature should require the commission to determine presumptive sentences for the sanction of total confinement with the expectation that, apart from credit for good time, the sentences imposed will determine the length of sentences served.

(i) The legislature should provide that the commission may not promulgate sentencing provisions that will result in prison populations beyond the capacity of existing facilities unless the legislature appropriates funds for timely construction of additional facilities sufficient to accommodate the projected populations.

(ii) The legislature should provide that the commission may amend its sentencing provisions to reduce the length of presumptive sentences for the sanction of total confinement to relieve prison overcrowding. The amended provisions, when promulgated, should be applied to offenders still serving sentences of total confinement as well as to newly sentenced offenders.
18-4.4 Criminal Justice Sentencing Standards

History of Standard

Former Standard 18-3.1 (2d ed. 1979) recommended the promulgation of "sentencing guidelines" by a "guideline drafting agency." The current Standard is more open-ended than its previous incarnation, and has been written to incorporate many of the structural features of determinate sentencing systems that have come into existence since the drafting of the second edition. On a cosmetic level, the current Standards do not specify that provisions created to guide sentencing discretion should be called "guidelines." More substantively, the current Standard omits considerable detail concerning the setting of "maximum" and "minimum" guideline sentences, see former Standard 18-3.1(c)(ii), and does not incorporate a "just deserts" theory of sentence severity. See former Standard 18-3.1(c)(iv) ("Guidelines should seek to reflect a current community consensus about the relative gravity of offenses."). Under Standard 18-2.1(a), the adoption of a policy of just deserts is an option for any jurisdiction, but not one specifically recommended by the Standards.

Related Standards

This Standard is applicable by analogy to legislative or judicial agencies created to carry out the intermediate function under Standard 18-4.5 or 18-4.6.

Commentary

This Standard outlines a recommended structure for provisions created by the sentencing commission for the guidance of sentencing courts. In broad brush, the Standards as a whole envision that a sentencing agency, in partnership with the legislature, will promulgate a scheme of presumptive sentences for ordinary cases and offenders, and will also fashion rules of decision for cases that are not ordinary and should be met with punishment other than the presumptive penalty. Paragraphs (a) and (b) restate this general principle and lend more specific content to its application in a commission-based system.

1. The Criminal Justice Section Council asked that references to the word "guideline" be avoided in the black-letter Standards to avoid any appearance that the Standards endorse the current federal sentencing guidelines system.
2. See Standards 18-3.1 through 18-3.5.
It should be noted that this Standard speaks in terms of the functional properties of sentencing provisions, without demanding that they take any particular shape, such as that of a sentencing guidelines grid. As the third edition was being prepared, the dominant approach to determine sentencing reform in the United States was sentencing guidelines. Outside of the federal system, guideline reforms circa 1994 have met with broad acceptance in their home jurisdictions, and there is a slow but steady pattern of emulation of guideline structures at the state level. Thus, it can be said that the Standards were drafted with an approving eye toward such reforms, and attempt to borrow the best features of the most successful state guideline experiments. Even so, the Standards Committee was unconvinced that sentencing guidelines were the only workable and desirable format for the expression of presumptive sentences. It is possible, for example, that presumptive sentences could be stated in narrative form, with no guideline cells or axes. The guideline grid may, with experience, prove inadequate to the task of expressing presumptive sentences for nonprison sanctions. Given that sentencing guidelines are less than fifteen years old in this country, and given the great ferment and experimentation under way in the field of sentencing reform, the drafters concluded that the functional aspects of determinate, presumptive sentences for ordinary offenders should be given emphasis under the Standards.

Paragraph (a) states that presumptive sentences should be expressed in terms of levels of total severity, within statutory limits, for ordinary cases. Paragraph (b) adds a further—and considerable—layer of complexity: Presumptive sentences should also address the array of sanctions available for the sentencing of offenders, and should be expressed both in terms of the types of sanction that are included in the presumptive penalty, and the severity levels that are attached to those sanctions. One widespread criticism of existing determinate sentencing schemes is their failure to give structure to the use of nonpri-


During the drafting of the Standards, no adequate plan for including the full range of sanctions within a presumptive sentencing system had been implemented by any jurisdiction, although numerous jurisdictions were actively working toward such a plan. Here and elsewhere, therefore, the Standards call for a continuation of such efforts, and recognize that they are essential to effectuation of goals such as sentence uniformity and the optimum allocation of correctional resources, in addition to other societal goals that may be operative in individual jurisdictions.

Subparagraph (b)(i) states that presumptive sentences should be determined with reference to the offense of conviction and the degree of culpability of the ordinary offender. Criminal punishment should not be based on offenses for which the defendant has not been convicted, even if evidence at the sentencing hearing suggests that other crimes were committed. Also, the commission should formulate presumptive sentences based on a conception of an ordinary offender who has committed a specific offense. While the idea of "ordinariness" is artificial in a metaphysical sense, it gains meaning through experience. An ordinary offender should be representative of the numerical majority of offenders who are convicted of a particular crime; an ordinary offender is one for whom the judge finds no "substantial reasons" to deviate from the presumptive sentence. One deliberate bias of a presumptive sentencing system, instituted in pursuit of uniformity and the reduction of race and class disparities in sentencing, is that offenders should be treated as ordinary unless a good reason to do otherwise appears, and can be stated and defended. As explained below, the Standards create ample latitude for the individualization of sentences;

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6. See Kay A. Knapp, Allocation of Discretion and Accountability in Sentencing Structures, 64 U. COLO. L. REV. 679, 699 (1993) ("State commissions have not advanced very far in structuring, or in implementing comprehensive and realistic truth in sentencing standards regarding the array of non-imprisonment sanctions"); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION 39 (1990) ("To date . . . even the best sentencing guidelines do no more than set standards governing the decisions whom to imprison and, for the prison-bound, for how long.").


8. Under Standard 18-2.1, jurisdictions may vary in the societal objectives they seek to further in the sentencing of offenders.


10. See Standard 18-3.1 and Commentary.
the starting point, however, should be one of uniformity among offenders.

Subparagraph (b)(ii) acknowledges the common device of expressing presumptive sentences, particularly those for fines and confinement, in terms of a sentencing range. The Standards do not insist upon the creation of sentencing ranges, but recognize that many jurisdictions have found them useful. The predominant reason for such a device is that ranges supply a degree of flexibility to the sentencing court without requiring that the court meet the legal standard and procedural burden of justifying a nonpresumptive penalty. Thus, as set out in the second sentence of the subparagraph, sentencing judges should be allowed especially broad discretion when imposing punishment within a defined presumptive range.\footnote{11 Under the Standards, however, a sentence within a presumptive range is subject to appellate review. See Standard 18-8.2(a).}

The final sentence of subparagraph (b)(ii) speaks to the permitted breadth or narrowness of sentencing ranges for those jurisdictions that choose to have them. Here again, the Standards do not set down formulaic requirements. For instance, the drafters do not insist that jurisdictions create sentencing ranges that deviate, from top to bottom, by no more than 25 percent of the midpoint of the range. Such an approach may be acceptable to some jurisdictions but not in others. Instead, the Standards provide that presumptive ranges, where they exist, should be fixed so that sentences are adequately determinate. This functional requirement must be read in conjunction with Standard 18-2.5. In order to achieve adequate determinacy, a sentencing range must be narrow enough to allow for accurate predictions of sentencing outcomes, the manipulation of sentencing patterns, and the avoidance of unwarranted disparities in imposed sentences.

Subparagraph (b)(iv) provides that the legislature should permit sentencing courts to impose a sentence of lesser or greater severity than the presumptive sentence, or types of sanctions different from those indicated in the presumptive sentence, if the court finds substantial reasons for so doing. The "substantial reasons" language is borrowed in part from the departure law currently in force in a number of jurisdictions. Legislation or guidelines in Minnesota, Washington, and Oregon, for example, provide that departure sentences may be imposed by the court when "substantial and compelling" reasons exist that
justify an unusual sentence. The Standards, through deletion of the word “compelling,” endorse a departure authority somewhat more permissive than that articulated in existing state systems.

The departure power is a central structural device for balancing the sentencing discretion exercised respectively by commissions and courts. Accordingly, its broad parameters should be outlined in legislation, as subparagraph (b)(iv) provides.

Within the overarching “substantial reasons” standard, grounds for departure should be further regulated by the legislature, commission, and courts. The legislature or commission should designate aggravating or mitigating factors that are appropriate bases for departure. Subparagraph (b)(iv)(A) recognizes that such factors, balanced against each other, can support deviation from the presumptive sentence. In addition, there may be social, economic, physical, or mental characteristics of the individual offender, indicative of circumstances of hardship, deprivation, or handicap, that justify imposition of a less severe sentence than the presumptive sentence. Subparagraph (b)(iv)(B)
recognizes that such concerns are also appropriate grounds for departure.

All existing guideline jurisdictions give sentencing judges some discretion to impose departure sentences based on aggravating or mitigating circumstances not specifically enumerated by the legislature or commission, subject to the constraints of the umbrella departure standard. Where such nonenumerated concerns amount to substantial reasons not to impose a presumptive sentence, the Standards would allow for this approach. Such judge-made departure factors, however, should be subject to appellate review.

The courts' ability to deviate from presumptive sentences is subject to a number of constraints outside the contours of the departure power itself. The most notable of these bear mention: Courts may not base a departure sentence—or any sentence determination—on the offender’s race, gender, sexual orientation, national origin, religion or creed, marital status, or political affiliation or belief. Offenders' personal characteristics having no bearing on culpability are precluded from consideration except under certain conditions. A sentence may not be based on the judge's conclusion that the "real offense" committed by the offender differs from the offense of conviction. And on the broadest level, courts lack authority to render departure decisions that conflict with, or have no basis in, the policy goals chosen by the legislature to drive the sentencing system. Depending on such fundamental policy choices, some jurisdictions may see fit to prohibit some considerations at sentencing that would be permissible in other jurisdictions.

17. This is typically done within provisions governing aggravating and mitigating factors by including a statement that the named factors are not meant to be exhaustive. See, e.g., MINN. STAT. ANN. § 244 cmt. II.D.2 ("The following is a nonexclusive list of factors which may be used as reasons for departure: . . .") (emphasis in original); WASH. REV. CODE ANN. § 9.94A.390 ("The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences."); OR. ADMIN. R. 253-08-002(1) ("the following nonexclusive list of mitigating and aggravating factors may be considered in determining whether substantial and compelling reasons for a departure exist").

20. Standard 18-3.4(b) & (c).
21. Standards 18-3.6 and 18-6.5(a).
22. See Standards 2.1 and 6.1(a).
Paragraph (c) focuses on special issues relating to presumptive sentences for total confinement. First, such sentences should be designed with the expectation that, apart from credit for good time, the sentence imposed by the sentencing court will determine the length of sentences served. This is consistent with the Standards' general view that a determinate sentencing system should not operate with an early release authority such as a parole board. The drafters recognized, however, that the prospect of substantial good time credit is thought necessary by many corrections officials for control of inmate populations.

Subparagraphs (c)(i) and (ii) emphasize, in the context of total confinement, the commission's role of matching sentencing outcomes to available or funded resources. Under subparagraph (c)(i), the legislature should provide that the commission may not promulgate sentencing provisions that will overfill existing capacities unless the legislature has appropriated funds for the timely construction of needed facilities. This is not a mandate that prison populations cannot grow. Rather, the Standard requires that such expansion occur only when planned and paid for. The avoidance of nonpurposeful, nonfunded escalations in imprisonment seemed of particular importance to the Standards Committee, given the explosion in incarceration over the past two decades. Subparagraph (c)(i) thus places responsibility in the legislature to impose a resource-matching constraint on the commission.

23. See Standard 18-3.21(g) (legislature should create an administrative board to make release decisions, such as a board of parole, only if the sentencing system does not satisfy the Standards' requirement of determinacy in sentencing).
25. See generally Standard 18-2.3 and Commentary.
27. In the absence of clear legislative direction, the Minnesota Commission developed a self-imposed resource-matching constraint in the early years of its existence. See Dale G. Parent, *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* 6 (Daniel J. Freed ed., 1989). It is best not to leave such an important matter to commission discretion, however. Despite statutory language that the federal sentencing commission "shall take into account the nature and capacity of the penal, correctional, and other facilities and services available," and shall formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," 28 U.S.C. § 994(g), the federal commission has never sought to match sentencing outcomes to available or funded correctional resources. See

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Subparagraph (c)(ii) provides a mechanism for the commission to respond to prison overcrowding. Although a presumptive sentencing system can alleviate much of the risk of overcrowding, it cannot eliminate it entirely. For example, the number of cases entering the sentencing system can increase over time, confounding the commission's projections based on past experience. Alternatively, the resource-matching function can be disrupted by the enactment of mandatory penalty provisions by the legislature. The Standards thus contemplate that, in rare circumstances, commissions may fail in their attempt to allocate sentence outcomes to available resources. In the absence of an early release authority, such as a parole board, an alternative mechanism for adjusting prison populations is needed. Subparagraph (c)(ii) suggests that retroactive modification of presumptive sentences of incarceration is the best available approach. In contrast to a parole board, the commission can make systemwide judgments about classes of offenders who should serve their original terms in full, and those who may be released at an earlier date. The second sentence of subparagraph (c)(ii) states that such "release" decisions should be linked to determinations of what presumptive sentences should be in the first instance. Thus, amendments to the sentences of those already serving terms of total confinement should track the amended presumptive terms for newly sentenced offenders.

C. The Intermediate Function in the Absence of a Sentencing Commission

Standard 18-4.5 Legislative agency to perform the intermediate function

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may elect to perform the intermediate function through an arm of the legislative branch.


28. The Standards oppose the device of legislatively imposed mandatory terms of total confinement. See Standards 18-3.11(c), 18-3.21(b), and Commentary. One ground for such opposition is the disruption of the commission's functions as described above.
(b) To assist the legislature in performing the intermediate function, the legislature should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The legislature should also charge that body with performance of all aspects of the intermediate function.

(c) The legislature should distinguish clearly between statutory provisions that carry out the legislative function, which should be controlling authority in sentencing proceedings, and provisions that carry out the intermediate function, which should be subject to exercise of discretion by sentencing courts.

History of Standard

This Standard is new.

Related Standards

The provisions of Standards 18-4.2 through 18-4.4, addressed to jurisdictions that choose to create a sentencing commission, are applicable by analogy to jurisdictions that elect to effectuate the intermediate function through a legislative agency.

Commentary

The Standards recommend that the intermediate function be performed by a permanent sentencing commission not chartered within any single branch of government. To date, the independent commission model has been the most explored and most successful structure for the creation of structured sentencing provisions and for the development of information systems about sentencing. The Standards recognize, however, that other institutional arrangements are

1. See Standards 18-1.3(b) and 18-4.2.
possible for carrying out the intermediate function. Standard 18-4.5(a) would thus permit the creation of an agency in the legislative branch to shoulder the responsibilities that would otherwise be assigned to a sentencing commission.

Paragraph (b) provides that such a legislative agency should, like a sentencing commission, be given permanent existence, and should be constituted to have comparable knowledge, experience, competence, and diversity. In giving form to a legislative agency to perform the intermediate function, the provisions of Standards 18-4.2 through 18-4.4 should be applied by analogy.

Paragraph (c) anticipates a singular problem that could arise in a jurisdiction that chose to effectuate the intermediate function through a legislative agency. It is possible that confusion could arise concerning the legal force of sentencing provisions created by such an agency. The provisions should not be understood to have the inflexible effect of statutory commands such as mandatory minimum penalty laws. Indeed, whether promulgated by a legislative agency, a sentencing commission, or another kind of agency altogether, the core idea of presumptive sentences is that they interact with, and leave room for, judicial discretion in appropriate cases. If a jurisdiction chooses to work through a legislative sentencing agency, the enabling legislation should distinguish clearly between the legal effect of the agency's work product and that of the legislature as a whole.

**Standard 18-4.6 Judicial agency to perform the intermediate function**

(a) If a jurisdiction elects not to establish a sentencing commission, the legislature may delegate the intermediate function to the highest state court or a state-wide judicial conference. The intermediate function may be performed, in part, by rules of court.

(b) To assist the highest state court or judicial conference in performing the intermediate function, the supreme court should establish a permanent body, comparable in knowledge, experience, competence, and diversity to a sentencing commission, to advise on the substance of the guidance to sentencing courts. The court or conference should also charge that body with performance of all aspects of the intermediate function.

(c) The supreme court or courts of appeal should have the authority to modify judicially created guidelines in the normal course of the courts' appellate review of sentences imposed.
History of Standard

The prior edition recommended formation of a "guideline drafting agency" in the judicial branch of government. Former Standard 18-3.1(a) (2d ed. 1979). In light of positive state experience since 1980 with commissions chartered outside the judiciary, the current edition does not continue that recommendation, but also does not foreclose the possibility of a successful judicial sentencing agency.

Related Standards

The provisions of Standards 18-4.2 through 18-4.4, addressed to jurisdictions that choose to create a sentencing commission, are applicable by analogy to jurisdictions that elect to effectuate the intermediate function through a judicial agency.

Commentary

The Standards recommend that the intermediate function be performed by a permanent sentencing commission not chartered within any single branch of government.1 The Standards recognize, however, that other institutional arrangements are possible; Standard 18-4.6(a) would thus permit the judicial branch to carry out the responsibilities otherwise assigned to a sentencing commission. Paragraph (a) states that, if a jurisdiction elects not to establish a commission, the legislature may delegate the intermediate function to the highest state court or a statewide judicial conference. The intermediate function may be performed, in part, by rules of court.

Paragraph (b) provides that, to assist the highest state court or judicial conference, the supreme court should establish a permanent judicial agency with comparable knowledge, experience, competence, and diversity to that of a sentencing commission. The agency should be charged explicitly with performance of all aspects of the intermediate function. In giving form to such a judicial agency, the provisions of Standards 18-4.2 through 18-4.4 may be applied by analogy.

Sentencing provisions promulgated by such an agency might not be submitted to the legislature before going into effect, but would be subject to ratification by the state supreme court or judicial conference.

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1. See Standards 18-1.3(b) and 18-4.2.
For the sake of efficiency and flexibility, the supreme court or courts of appeal should have authority to modify judicially created guidelines in the normal course of the courts' appellate review of sentences imposed. Paragraph (c) so provides. In addition, the supreme court or judicial conference, with the assistance of the judicial sentencing agency, should make periodic study of and amendments to the overall scheme of presumptive sentences.²

² Cf. Standard 18-4.2(b)(i).
PART V.
SENTENCING PROCEDURES

A. Information Base

Standard 18-5.1 Information for sentence determination and system accountability

(a) The legislature and the agency performing the intermediate function should ensure that, in all cases, adequate information is developed, through presentence investigations or other means, to enable sentencing courts and members of the bar to perform their sentencing responsibilities.

(b) The legislature and the agency should ensure that basic information is collected on all cases in which sentences are imposed to enable monitoring and evaluation of the operation of the sentencing system.

(c) The highest state court should ensure that regular educational programs are conducted to inform sentencing courts and members of the bar about community or statewide programs and facilities that may be utilized in sentences of offenders.

History of Standard

This Standard is new.

Related Standards

None.

Commentary

Two overriding principles underlie Part V(A). First, rational and consistent sentencing decisions can be achieved only if sentencing courts have reliable information that contains an accurate and relatively uniform body of facts about all offenders. Good sentencing decisions depend upon good information. Second, the legislature and the agency
performing the intermediate function must be informed about the courts' sentencing decisions in order intelligently to carry out their respective roles. Sound policy choices, effective planning for the sentencing system, and development of appropriate guidance for sentencing courts all depend upon good information.

Presentence investigations and reports are the primary method of obtaining and communicating information for sentencing in individual cases. Standards on these matters are found in Standards 18-5.2 through 18-5.8. While presentence reports can be a useful source of information about actual sentencing patterns, Standard 18-5.21 calls for a short, standardized set of sentence reports that contain information about sentences imposed in a standardized form so that data can be easily consolidated.

Sentencing is one of the most difficult and demanding tasks assigned to trial judges. Prior editions of these Standards have recognized the value of regular and extensive judicial education programs devoted to this subject. These ought to include special programs to orient new judges in the proper exercise of their sentencing discretion and to familiarize them with the standards promulgated by the agency performing the intermediate function to guide them in making sentencing decisions. All sentencing court judges, whether newly appointed or experienced, should be briefed regularly on programs and facilities available for use as part of sentencing. Unless judges are fully aware of the nature and quality of custodial and noncustodial facilities and programs, their sentences will not make optimal use of the range of resources that may exist. As sentencing systems incorporate more effective use of economic and community-based sanctions and facilities for intermittent confinement, sentencing judges must be familiar with these programs and facilities in order to use them appropriately. Issues that sentencing courts are finding perplexing or in need of more coordinated resolution are matters that may be considered in the setting of judicial education.

Judicial education is identified here as a responsibility of the highest court of the state. In most jurisdictions, that court or the chief justice of that court has the authority to establish programs of judicial education. Although some programs on sentencing should be designed and presented exclusively for judges, other programs on this subject might be in a bench-bar format that allows exchange of information and views among judges, prosecutors, and defense counsel, and representatives
of the agency performing the intermediate function in a manner that would not be possible in courtroom proceedings.

Prosecutors and defense counsel have important responsibilities in the sentencing phase of criminal proceedings. These responsibilities are fully canvassed in the chapters dealing generally with the prosecution function and the defense function. These Standards should be read in conjunction with the provisions in this part of Chapter 18.

B. Presentence Reports

Standard 18-5.2 Requirement of report

(a) The rules of procedure should authorize sentencing courts, upon their own motion or upon request of either party, to call for a presentence investigation and a written report of its results.

(b) The rules of procedure should require such investigation and report in all cases except that:

(i) The investigation and report may be omitted in a case if the offender waives them, with the consent of the prosecutor, and the court finds that it has sufficient information to sentence the offender.

(ii) The rules of procedure may provide exceptions for sentencing in cases where the costs of investigations and reports exceed possible benefits in the sentencing process.

Any sentencing court that lacks sufficient information to perform its sentencing responsibilities should have the power to order a presentence investigation and report.

History of Standard

This Standard is based upon Standard 18-5.1(a) and (b) of the second edition. The prior edition made presentence reports mandatory in cases where a possible sentence was total confinement for one year or more, where the defendant was less than 21 years old, or where the defendant was a first offender, unless the defense waived the preparation of a report and the court found that it had sufficient information on which to determine sentence.

Related Standards

None.
Commentary

The presentence report evolved from a document historically prepared as a precondition to probation but is now seen as a basis for informed sentencing to any authorized sanction. If sentencing decisions are to be appropriately individualized, sentencing courts must have accurate and adequate information about each individual offender.

Prior editions of the Standards stopped short of adopting the view that a presentence investigation and report be mandated in every criminal case. This Standard requires investigation and report in all cases unless a principled reason for exception exists. The Standard contemplates that the requirement should be effected by standing rule of court, but the requirement may be appropriate for statutory enactment. The Standard recognizes two valid types of exceptions to a general requirement.

For certain categories of offenses and offenders or of sentences, the costs of conducting investigations and preparing reports may exceed the benefits of the information to the sentencing process. In such categories, an exception to the general requirement may be appropriate. Even within categories excepted from the general requirement, a sentencing court should have the power to order an investigation and report in a particular case, either on its own motion or at the request of the prosecution or defense.

In cases within the general requirement of an investigation and report, these may be omitted by court order in a particular case if the offender and prosecutor agree and the sentencing court finds that it has sufficient information. The rationale for this exception is that there are alternative ways to inform courts. Sentencing information can and should be marshalled and presented to courts by counsel for the parties. Counsel duties extend to sentencing proceedings. When counsel have done their work properly, it may be superfluous to invoke the machinery of the government agency charged with investigating and preparing presentence reports in order to adequately inform sentencing courts.

The Standard does not adopt the view that a presentence report be dispensed with routinely when sentence has been negotiated between the prosecution and defense. Sentencing courts, which are ultimately responsible for sentences imposed, may need presentence reports in order to decide whether to accept or reject the terms of the parties' negotiation.
The Standard does not refer to limitations of resources as a valid reason for dispensing with presentence reports. Under the broad principle of Standard 18-2.3(b), a legislature should appropriate the funds necessary for adequate presentence investigations and reports. On the other hand, courts should be prudent in their information requests. Depending upon the nature of the cases, adequate presentence investigations and reports may differ in depth and scope. Standard 18-5.4(b) describes the contents of a "full" presentence report, but that does not imply that this is a model for all presentence reports. Under guidance from the agency performing the intermediate function, sentencing courts should be authorized to determine the appropriate content of investigations and reports in accordance with the courts' views of their needs for information.1

Standard 18-5.3  Substantiation of information

The rules of procedure should provide that:

(i) Information in the presentence report should be limited to material facts which the preparer of the report, upon diligent inquiry, believes to be accurate and which, if challenged, can be substantiated;

(ii) The preparer of the report should be available to answer questions concerning the content of the report and the sources of information at a presentence conference and at the sentencing hearing;

(iii) If any material information in the report is challenged by either the prosecution or the defense, the preparer of the report is responsible to assist in determining whether the information can be sufficiently substantiated.

History of Standard

This Standard is based upon Standard 18-5.1(c) of the second edition.

1. Under circumstances of very limited resources, it may be better for courts to allocate available resources to the more important cases than to spread these resources thinly over all cases. When resources are so limited, requirement of reports in all cases may result in incomplete and unverified presentence reports on which sentencing courts should not rely. Such a requirement may also result in inordinate delays between determination of guilt and sentence imposition, one consequence of which is to aggravate the persistent problem of overcrowding in institutions for confinement of unsentenced offenders.
Related Standards

None.

Commentary

This Standard addresses two troublesome aspects of presentence investigations and reports: inclusion of too much material and inclusion of material of dubious accuracy. Only factual information material to sentencing decisions should be included in presentence reports. Only factual information that the preparers of reports can substantiate should be included in presentence reports.

The limitation to material facts rejects the idea that the purpose of a presentence report is to provide a sentencing judge with a verbal picture of the "whole person." The belief that a presentence report should make an offender "come alive as a human being" has enjoyed some support among persons preparing such reports, but this leads to almost anything being includable in reports. Determination of materiality of information should not be delegated to preparers of presentence reports. The agency performing the intermediate function, together with sentencing courts, should define the nature and extent of factual investigation and reporting so that the contents of reports are limited to facts that sentencing courts may take into account in sentencing decisions.

The limitation to factual reports that can be substantiated rejects the idea that presentence reports may contain so-called raw intelligence, gossip, subjective impressions, multiple hearsay accounts, and reports from unreliable or unknown sources. Agencies preparing presentence reports sometimes obtain information from prosecutors' case files or files of other law enforcement agencies, sources whose records may not distinguish unsupported rumors or assertions from communications having indicia of reliability. Judge Frankel noted many years ago:

With varying limits of time, energy and concern for potential injury to people and relationships, the officer [preparing a report] will make inquiries of schools, employers, associates, neighbors, pastors, friends, enemies. All kinds of untested assertions and impressions, not always impersonal or lacking in ulterior purposes, may in this way filter into the officer's ken and his resulting report.¹

A more acerbic critic put the point this way: "We have . . . a system of trial by jury and sentencing by yenta."²

The concerns in this Standard for materiality and verifiability of information are related and may often overlap. Presentence investigations that extend beyond the search for facts material and relevant to courts' sentencing determinations are likely to search for kinds of information as to which the sources may be of very questionable reliability.

In jurisdictions that permit so-called real offense sentencing, the issues addressed in this Standard take on heightened concern. Standards 18-3.6 and 18-6.5(a) provide that a sentence should be determined on the basis of the offense of conviction and not on other offenses as to which the defendant has been neither charged nor convicted. If, notwithstanding these Standards, sentencing courts may treat such other offenses as material to sentence determinations, and if information about such offenses is deemed appropriate for inclusion in presentence reports, preparers of the reports certainly must be strictly accountable for their sources and for the ability to substantiate the offenders' alleged responsibility for the reported offenses.³

Standard 18-5.4 Contents of report

(a) The rules of procedure should require that agencies preparing presentence reports adhere to standards, developed by the agency performing the intermediate function, relating to the contents, preparation, and substantiation of presentence reports. The rules should require that all reports be made in writing.

(b) The rules should permit a sentencing court to vary the scope of reports in accordance with the court's determination of the information it needs to perform its sentencing responsibilities. A full presentence report may contain:

(i) A description of the offense of conviction, together with any aggravating or mitigating factors;

(ii) A description of any prior criminal convictions or juvenile adjudications of the offender;

³ In a jurisdiction that allows real offense sentencing, the procedural requirements generally appropriate for sentencing hearings might be substantially different from those set forth here. See Standard 18-5.18 and Commentary.
(iii) A description of personal characteristics of an individual offender, even though not material to the offender's culpability, that may be taken into account in determination of the sentence;

(iv) Information about programs or resources, such as treatment centers, residential facilities, vocational training services, educational and rehabilitative programs, and other programs that might be incorporated in an individual offender's sentence;

(v) Information assessing the physical, psychological, economic, or social effects of the offense on any person against whom the offense was committed;

(vi) A description of the authorized types of sanctions and the ranges of severity, and reference to the guidance applicable to sentencing in the case;

(vii) An assessment of the impact of possible sanctions and collateral consequences upon an organizational offender, including employees, creditors and other third parties who would be directly affected by the sanctions;

(viii) A summary of the most significant aspects of the report and, if the sentencing court has so requested, a recommendation as to the appropriate sentence.

(c) A statement prepared by a victim under Standard 18-5.10 should be included as an attachment to the presentence report.

History of Standard

This Standard is based upon Standard 18-5.1(d) of the second edition. Paragraph (c) is new.

Related Standards

None.

Commentary

This Standard provides a model or suggested format for "full" presentence reports. It should be emphasized that no single format will serve adequately for all categories of offenses and offenders. Therefore, a standardized form should not be imposed on all cases. The scope and depth of inquiry should be geared to the nature and facts of the cases. In some categories of cases, such as those involving misdemean-
ors and first offenders whose crimes do not suggest that they are a danger to public safety, a less than "full" or "short-form" report may be sufficient.

The premise of this Standard is that the scope of investigations and reports should be confined to categories of information material to sentencing courts' decisions. See Standard 18-5.3. The seven subdivisions of a model "full" report are drawn from the categories of information which, under these Standards, may properly be considered.

With regard to the offense of conviction, one section of the report may describe the offense and aggravating and mitigating factors concerning that offense. See Standards 18-3.6 and 18-3.1 through 18-3.3. Information about any other offense, of which the offender to be sentenced has not been convicted, should not be included in a presentence report. See Standard 18-3.6. A report may properly contain other facts about an individual offender's personal characteristics, even though not relevant to culpability, but the scope of this type of information should be carefully limited to conform to the principle of Standard 18-3.4. That Standard allows courts to use such information only if (i) it is information about an offender's financial circumstances and will aid a court in determining the amount or terms of an economic sanction, (ii) it is information indicative of an offender's hardship, deprivation, or handicap which may lessen the severity of sentence that otherwise would have been imposed, or (iii) it is information useful to the selection of the types of sanctions to be imposed on the offender without changing the general overall severity of the sentence as a whole. Certain types of information, specified in Standard 18-3.4(d), may not be used in sentencing for any purpose. Consistent with these limitations on judicial consideration, preparers of presentence reports should eschew including information about individuals' personal characteristics that would not be material to sentencing courts' decisions.

A presentence report should contain an offender's criminal history. See Standard 18-3.5.

**Standard 18-5.5 Timing of investigation and report**

(a) The rules of procedure should provide that a presentence investigation must not be initiated until there has been a determination of guilt, unless the defendant, with the advice of counsel, has consented to such action.

(b) When a presentence investigation has been initiated prior to determination of guilt, the rules should provide that:
(i) In a case being tried, adequate precautions must be taken to assure that nothing disclosed by the investigation comes to the attention of the prosecution, the defense, the court, or the jury prior to a determination of guilt;

(ii) In a case in which a defendant has offered a plea of guilty, on request of the defense or the prosecution, the court should be authorized to examine the report prior to determining whether to accept the plea.

History of Standard

This Standard is based upon Standard 18-5.2 of the second edition.

Related Standards

None.

Commentary

Four reasons have been noted for delaying the preparation of a presentence report until after determination of guilt. First, any investigation represents an invasion of a defendant's privacy that is unwarranted if the defendant should be acquitted. Second, preparation of an adequate presentence report usually requires participation of the defendant, which may be inhibited by a defendant's well-grounded concern for possible self-incrimination. Third, since information included in a presentence report would be, for the most part, inadmissible as evidence in a proceeding to determine guilt, delay in preparation of the report ensures that determination of guilt will not be made on an impermissible foundation. Finally, the expenditure of resources to prepare presentence reports only on convicted offenders avoids the waste in those cases in which a defendant is acquitted, dies, or flees the jurisdiction before conviction.²

1. "Determination of guilt" in paragraphs (a) and (b) is intended to include both adjudication after trial and adjudication after a plea of guilty.

2. Experience with preverdict preparation of presentence reports has not been encouraging. See Barbara A. Shapiro & Catherine Clement, Presentence Information in Massachusetts Superior Court, 10 Suffolk U. L. Rev. 49, 52–53 (1975) (defendants and others resist preverdict investigations to greater extent than postverdict investigations; 85% of probation officers expressed preference for system of postverdict investigations).
These rationales are not fully applicable when defendants consent to earlier preparation of presentence reports. If a defendant intends to plead guilty and believes that the presentence report will support an argument for a sentence primarily composed of a compliance sanction, consent would be appropriate. The Standard contemplates, however, that defendants may consent in other circumstances.

If a defendant has consented to preparation of a presentence report prior to determination of guilt and a report has been prepared, subparagraph (b)(ii) provides that a court may read a presentence report prior to accepting a plea of guilty if either the defense or the prosecution requests the court to do so. This may be advantageous in circumstances where entry of a guilty plea is part of an agreement between the parties that includes a provision regarding the sentence to be imposed. See Standards 18-3.9 and 14-3.3(b).

**Standard 18-5.6 Confidentiality of presentence report**

(a) The rules of procedure should provide that a presentence report not be made part of a public record and should be available only to the following persons or agencies under the conditions stated:

(i) The report should be available to the parties.

(ii) The report should be available to the sentencing court for the purpose of assisting it in determining the sentence.

(iii) The report should be available to all judges who participate in a sentencing council consideration of the case.

(iv) The report should be available to reviewing courts where material to an issue on which an appeal has been taken.

(v) The report should be available to the department or bureau responsible for supervision of offenders or with custody of individual offenders.

(vi) Reports should be available to sentencing guideline commissions or other bodies charged with performance of the intermediate function.

(b) Upon order of court, reports should be made available to persons or agencies having a legitimate professional or academic interest in the information likely to be contained therein. Examples of such persons or agencies would be a physician or mental health professional appointed to assist the court in sentencing, an examining facility, a correctional institution, or a probation or parole department.
18-5.6  Criminal Justice Sentencing Standards

**History of Standard**

This Standard is derived from Standards 18-5.3 and 18-5.4 of the second edition. The second edition provided that, in special circumstances, portions of presentence reports could be withheld from the defense. This Standard, together with Standard 18-5.7, provide that presentence reports should be disclosed in full to defendants.

**Related Standards**

None.

**Commentary**

The willingness of persons to respond fully and candidly to preparers of presentence reports is affected by the expectation as to the ultimate distribution of those reports. Among the sources from whom information may be sought about individual defendants are the defendants themselves, members of their families, and others who may have significant information, relevant to sentencing, about the defendants' private lives. It is in the public interest to encourage disclosures of information by the assurance that the information will not be made available generally to the public. Offenders have a right to privacy on matters not connected to the offenses of which they have been convicted. No legitimate interests are served by making the contents of presentence reports routinely a matter of public record. To the extent that sentences are determined on the basis of information contained in presentence reports, the findings of fact on which sentencing courts rely will be part of the public record of sentencing proceedings. See Standard 18-5.18.

Subparagraph (a)(i) provides that presentence reports should be available without restriction to both defense and prosecution. Prior editions of these Standards espoused the view that, in very limited circumstances, less than full disclosure to defendants was justifiable. For many years, the matter of defendants' access to presentence reports was one of sustained attention and controversy. A developing consensus for full disclosure was noted as emerging at the time of the promulgation of the second edition of the Standards. In part this resulted, no doubt, from greater definition of the appropriate contents of presentence reports and greater professionalism in the manner of their preparation. This edition supports the principle of disclosure to defendants without limitation.
Any practice of nondisclosure permits factual errors to creep into reports. Defendants cannot contradict matters in reports unless they have knowledge of them. In addition to correction of factual errors, disclosure reduces the possibility of reports containing biased or otherwise impermissible materials. Expectation of disclosure to the defense is likely to have a beneficial disciplining effect on the quality of presentence reports, since the preparers have responsibilities in verification of the contents of the reports. See Standard 18-5.3.

Prosecution access to presentence reports stands on an equal footing with defense access. While this issue is not controversial, laws governing disclosure of reports are sometimes silent on this point. The principle is too important to leave to implication. Prosecutors cannot meet their responsibility to participate in the sentencing process without having the relevant information.

It almost goes without saying that the presentence reports should be available to sentencing courts and to appellate courts reviewing sentences. Of course, reports should be made available in a manner that does not incorporate them into the open records of the cases.

Past editions of the Standards have espoused the principle that presentence reports have utility, beyond the determination and imposition of sentence, to persons and agencies charged with duties with regard to execution of sentences. This position is restated in subparagraph (a)(iv). So, too, presentence reports may be useful in the critique and possible revision of sentencing guidelines. Accordingly, subparagraph (a)(v) adds a new provision validating disclosure to sentencing guidelines commissions and other agencies performing the intermediate function.

Paragraph (b) authorizes disclosures of presentence reports to certain persons or agencies only upon the affirmative order of an appropriate court. In normal circumstances that would be the court for which a report was prepared. The Standard does not purport to be inclusive of all circumstances in which it may be proper to grant requests for access to presentence reports. For example, this Standard does not address the issue of disclosure of a presentence report in another criminal proceeding in which the subject of the report may appear as a witness. Disclosure should be permissible, when relevant for purposes of impeachment, if the court in that proceeding so orders. Also, the Standard does not address circumstances in which relevant portions of a presentence report, upon court order, may be disclosed to a victim who intends to appear as a witness at a sentencing hearing.
Standard 18-5.7 Disclosure of report to parties

(a) The rules of procedure should entitle the parties to copies of the written presentence report and any similar reports.

(b) The rules should provide that the information made available to the parties must be disclosed sufficiently prior to the sentencing hearing to afford a reasonable opportunity for challenge and verification of material information in the report.

(c) All communications to a court by the agency responsible for preparing the presentence report should be in writing and subject to the right of the parties to know the content of the report. The rules should prohibit confidential sentencing recommendations.

History of Standard

This Standard is derived from Standard 18-5.4 of the second edition. That edition provided for withholding of portions of presentence reports from defendants in certain cases. This Standard does not recognize any exception to the right of defendants to full access to presentence reports.

Related Standards

None.

Commentary

This Standard addresses two important matters subsidiary to the right of the parties to examine presentence reports. Disclosure, to be meaningful, must be timely. That point is made in paragraph (b). Further, however, complete disclosure of presentence reports requires that the reports be in a form that preserves their contents. That point is made in paragraph (c).

To permit adequate opportunity for challenge and verification of information in presentence reports, disclosure to the parties must take place reasonably prior to sentencing hearings. Disclosures at sentencing hearings or shortly before those hearings will give rise to the necessity for continuances that disrupt expeditious judicial administration.

The requirement that presentence reports be in written form is to assure that the contents of reports are reliably preserved. A confidential
oral report to a court, outside the presence of the parties, would plainly violate this Standard. Reference to "writing" is not intended to preclude reports compiled and transmitted by use of electronic word processing provided that the information is retained and stored.

**Standard 18-5.8** Disputes regarding information in report; stipulations; presentence conferences

(a) The rules of procedure should require each party to notify the opposing party, the court, and the preparer of the presentence report in writing of any part of the report which the party intends to controvert or supplement. Such notice should be required at a time sufficiently in advance of the sentencing hearing to permit the preparer of the report to make an appropriate response.

(b) The rules should permit the parties to stipulate to a resolution of challenges to information in the report. The rules should provide that the resolution of any issue by stipulation must be preserved as part of the record of the sentencing proceedings.

(c) The rules should authorize a sentencing court to conduct a presentence conference to consider the possibility of a stipulation of the parties as to challenged information in the presentence report.

**History of Standard**

This Standard is based upon Standard 18-5.5(b) and (c) of the second edition.

**Related Standards**

None.

**Commentary**

A procedural system must address the possibility that information included in, or omitted from, presentence reports will be a matter of controversy between the defense and prosecution. This Standard proposes elementary procedures for raising and resolving such questions properly and expeditiously.
Paragraph (a) requires timely notice by either party that a part of a presentence report will be controverted. Although paragraph (a) does not dictate the specificity of notice, an effective procedural rule would require that the party indicate with clarity the information in the report deemed erroneous or the information that is proposed to be added to the report.

Paragraph (b) suggests that the parties should seek to resolve disputed issues of fact and that their resolution of the issues be reported to the court. The Standard emphasizes that the record of such agreements must be presented to the court in a manner that preserves it as part of the record of the sentencing proceeding. This can be done in the form of a stipulation or other equivalent means.

If the parties are unable to resolve disputed issues of fact, court-conducted presentence conferences may facilitate defining and narrowing the areas of dispute if not altogether resolving them. Presentence conferences may serve to clarify other matters that may be material to sentence determinations, particularly consideration of the possible sanctions that may be appropriate. These conferences may be of great importance for identifying the availability and suitability of sanctions other than total confinement. Since the idea of presentence conferences is still fairly new, the rules of procedure ought to make explicit provision for this procedural stage. That is the thrust of paragraph (c).

The presentence conferences contemplated could be informal and, of course, would precede sentencing hearings under Standards 18-5.17. At such a conference counsel may address the relevant dispositional issues before the sentencing judge has reached even a tentative conclusion as to the nature of the sentence to be imposed, both as to level of severity and as to choice among types of sanctions.1 The Standard does not require that defendants must be present at these conferences, although their presence may be useful in some cases. A defendant's right of allocution will be independently preserved at the sentencing hearing.

1. See John Hogarth, Sentencing as a Human Process 262 (1971). Professor Hogarth found that sentencing judges, much like other decision makers, interpret data according to their preexisting attitudes toward offenders or their initial impressions upon reading presentence reports. Professor Hogarth suggested, therefore, that a procedure be followed which supplements written communication with informal dialogue between the court and counsel.
C. Victims' Rights in Sentencing

Standard 18-5.9 Notice to victims

(a) The rules of procedure should establish a mechanism for providing notice to victims of offenses of all important steps in the sentencing process. Notices should include information about victims' rights to participate in sentencing proceedings.

(b) If a victim is dead or unable to participate in sentencing proceedings, victims' rights should be afforded to the victim's heirs or guardian.

History of Standard

This Standard is new.

Related Standards


Commentary

This Standard and others in this chapter reflect heightened concern for victims of crime and recognition of victims' rights that became manifest in the past decade. The particular rights of victims defined in this subpart are merely procedural. In the course of sentencing proceedings, victims should be accorded the basic right to know what is happening and, if they wish, to participate actively by making what has come to be known as victims' impact statements.

1. In the context of sentencing in capital crimes, under the law of some states, victims' statements and arguments based upon those statements may be made to juries considering whether to recommend or impose death sentences. The constitutionality of this practice was upheld in Payne v. Tennessee, 501 U.S. 808 (1991), overruling Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989). As stated in Standard 18-1.1(b), these Standards do not address issues of capital punishment. In other contexts, the Standards disapprove of a jury's role in sentencing determinations. See Standard 18-1.4(a).
Paragraph (a) specifies that victims should be given notice of all important steps in the sentencing process. The Standard provides that the rules of procedure should specify how and by whom victims are to receive the notices. If a jurisdiction establishes or recognizes an agency that is a victims' advocate office, that agency may be charged with responsibility to keep track of sentencing proceedings and to send appropriate notices to victims. In the absence of such an agency, the task could be assigned to the office of the court clerk that schedules sentencing proceedings, to the prosecutor's office, or to other public office.

The participation envisioned by this set of Standards is a victim's statement to the sentencing court regarding the effects of the offense on the victim and the victim's family. See Standards 18-5.10 and 18-5.11.

Victims' impact statements are not the appropriate way to establish the factual bases for restitution or reparation sanctions. The predicate for these sanctions should be established by counsel for the prosecution and defense in a manner adequate to the need of sentencing courts to make the material findings of fact. For this purpose, a victim may be deposed or called as a witness at the sentencing hearing. Victims' rights to make statements under this and the following Standards is independent from, and irrelevant to, restitution or reparation.

The Standards speak generally in terms of rights of victims, but do not attempt to define how broadly that concept should be construed. In most offenses, the identity of the victims will be unambiguous.

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2. A National Institute of Justice study, The Criminal Justice Response to Victim Harm (Brian Forst & Jolene C. Hernon, 1984) found that victims expressed more satisfaction with the criminal justice system if they had knowledge of the cases' outcomes and if they felt that they had influenced the dispositions of the cases. In general, victims placed more emphasis on being informed than on participating in the process. This was confirmed in a subsequent study, under the auspices of the National Institute of Justice, of experience in California:

The vast majority of victims surveyed for this project did not use the allocution right. In fact, in less than 3 percent of the cases did the victim appear. . . . In general, victims are more interested in information about their cases than they are in the right to participate. Some victims, in fact, exercised the allocution right at sentencing primarily to find out what was going on in their cases.

Paragraph (b) extends the meaning of "victim" in circumstances where the victim is an individual who has died or become incapacitated.

Further thought and effort are clearly needed to develop more fully how to protect the interests of victims of crime and how to permit victims to participate in sentencing proceedings. In recognizing certain minimal procedural rights, these Standards build on current practice and experience. Even these minimal procedural protections need to be better defined. This is a subject on which further reform can be expected.

**Standard 18-5.10 Victims' statements prior to sentencing hearings**

(a) The rules of procedure should authorize victims to make statements concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require offices that prepare presentence reports to receive statements written by victims and to attach the statements to presentence reports.

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3. One evolving issue is whether, and under what circumstances, a prosecutor may be permitted to explain or disclose some portion of the contents of a presentence report to a crime victim. See Standard 18-5.6(b) and Commentary.

4. A 1987 study by the National Institute of Justice concluded:

There is no doubt that victims deserve much greater attention and assistance than they have received in the past or are currently receiving. Victims' participation in the prosecution of crimes raises complex legal and social issues. If victim participation is to be more than symbolic, additional resources will have to be invested in the criminal justice system and a number of existing procedures changed. Victims' rights cannot be grafted onto the existing system without generally remaining simply cosmetic, nor can they be made potent without creating profound changes throughout the entire system.


The authors of a 1994 study of victims' satisfaction with impact statements concluded:

Basic research is needed to ascertain the proportion of victims who want to participate more fully in the justice process and to determine who these victims are. It is necessary also to find out how victims want to participate. Is it enough to keep them informed? To allow them to be in court during sentencing? To prepare written impact statements? To permit them to allocute? What victims want might or might not be compatible with the aims of the justice system and the rights of the accused. However, until we understand what victims want, we cannot debate their proper role in the justice process intelligently.

History of Standard

This Standard is new.

Related Standards


Commentary

Victims should have the opportunity to describe, in their own words, the effects of offenses on them and their families. The effects may be physical, psychological, economic, or social. Permitting victims to say how offenses have affected them is a valuable practice in itself, but under the procedure envisioned by these Standards the statements of victims will be communicated to and considered by sentencing courts.

Paragraph (b) contemplates that a victim's statement will be acquired by the office that is preparing the presentence report and will be attached to that report when it is submitted to the court. The most likely form of such statements would be writings, but recorded oral statements could be used instead. Some victims may be able to compose statements without assistance, but others are likely to need help. The most appropriate office to assist victims in preparing statements would be a victims' advocate office, if one exists. The Standard is drafted carefully to indicate that preparers of presentence reports should not be charged with this responsibility. Representation of victims, even in this informal way, is a partisan function that is inconsistent with the preparers' role as neutral public officials acquiring, verifying, and reporting to courts information material to sentencing determinations.

Standard 18-5.11 Victims' statements at sentencing hearings

(a) The rules of procedure should ensure that victims are permitted to make oral statements at sentencing hearings concerning the physical, psychological, economic, or social effects of the offense on the victim or the victim's family.

(b) The rules should require that, on motion of either party or on the court's own motion, the sentencing hearing be continued to
permit the parties reasonable opportunity to respond to new issues of fact raised by the victim's statement.

History of Standard
This Standard is new.

Related Standards

Commentary
Under these Standards, victims' statements may be communicated to sentencing courts either as a part of presentence reports or as part of the sentencing hearing. Whether a victim wishes to make a statement at all is the victim's choice. So, too, is the choice whether to make the statement in a form that can be attached to a presentence report or in open court. Paragraph (a) declares that the rules of procedure for sentencing hearings should authorize victims to make statements regarding the effects of the offenses on themselves and their families. The Standard does not specify when, in the course of sentencing hearings, victims should be invited to address the court. Presumably at a time chosen by the sentencing judge, the judge would ask whether the victim of the offense is present and wishes to speak.

Some victims may inform the court in advance of the intent to make a statement, but the Standard does not contemplate that notice to the court or to the parties be required.

As described more fully in the next Standard, victims should be allowed to make statements without being placed under oath. The Standard does not expect or require victims to appear with counsel. It is not appropriate for government counsel to act as advocates for victims who choose to make oral statements in sentencing hearings. If a victim appears with his or her own counsel, the Standard does not consider how counsel may assist the victim in making a statement. The Standard does not specify what, if any, limitations or constraints may be properly imposed on victims' in-court statements.¹

¹ Understandably, some victims, when addressing sentencing courts, will make emotional, even intemperate statements. Some may wish to speak longer than is appro-
While the Standards provide that victims should have the alternatives of making statements before sentencing hearings or at sentencing hearings, the former procedure is obviously preferable. Statements attached to presentence reports will be before sentencing judges as they prepare for sentencing hearings. For many persons, the necessity to appear in court may be inconvenient; moreover, addressing the court without the assistance of counsel may not be comfortable for a lay person, and a victim’s oral statement may not be coherent and effectively communicated.

**Standard 18-5.12 Evidentiary effect of victims’ statements**

(a) A victim should be permitted to make a statement prior to or at the sentencing hearing without being put under oath as a witness.

(b) Information in a victim’s unsworn statement should not be used as the basis for a finding of fact by the sentencing court.

(c) The right of a victim to make an unsworn statement should not preclude a victim being called as a witness at the sentencing hearing.

**History of Standard**

This Standard is new.

**Related Standards**

None.
Commentary

The Standard contemplates that victims may address the sentencing court at sentencing hearings in a manner that corresponds to defendants' right to allocution. It is not proper to treat victims as witnesses and to allow them to speak only under oath or affirmation. Victims' statements under this Standard are not intended for evidentiary purposes. Standard 18-5.18(a), which provides for findings of fact by sentencing courts, requires courts to make those findings on unchallenged factual information in presentence reports or on evidence adduced at trial or in the sentencing hearing. Victims' unsworn statements are not a proper basis for such fact-finding, and paragraph (b) of this Standard so provides.¹

Victims may have information of material importance to sentence determinations. If the sanction of restitution or reparation may be incorporated into a sentence, the victim's testimony and documents in the victim's possession may be essential to the case.² Even if the restitution or reparation sanction is not contemplated, a victim may have important sentencing information, such as knowledge of aggravating or mitigating factors, that the prosecution or defense may wish to present to the court. Paragraph (c) provides that such information can be presented to sentencing courts by victims' testimony. Either the prosecutor or defense counsel may call a victim as a witness at a sentencing hearing and elicit material testimony, under oath or affirmation. Consistent with this provision, the testimony of a witness may be taken at a deposition and that deposition may then be introduced in the sentencing hearing. In the event a victim is called as a witness during sentence proceedings, the victim is subject to cross-examination under Standard 18-5.17(a)(i).

¹. This Standard is not consistent with the Uniform Victims of Crime Act promulgated in 1992 by the National Conference of Commissioners on Uniform State Laws. Section 216(a) of that Act permits victims to make statements at sentencing hearings only if the statements are made under oath.

². These Standards do not consider whether victims have the right to intervene in criminal prosecutions when the issue of restitution or reparation is before the sentencing courts.
D. Sentencing Proceedings

Standard 18-5.13 Designation of sentencing judge

The rules of procedure should provide that the judge who presided in the guilt determination phase of a case should, if feasible, be the judge to preside in sentencing proceedings.

(i) If guilt was determined after a trial, the judge who presided at the trial should preside in sentencing proceedings unless there are compelling reasons in a specific case to provide otherwise.

(ii) If guilt was determined by plea, the judge who accepted the plea should preside in sentencing proceedings unless the system of rotating assignment of judges in a multi-judge court makes that unfeasible.

History of Standard

This Standard is based upon Standard 18-6.1(a) and (b) of the second edition.

Related Standards

None.

Commentary

The logic of requiring the trial judge to impose sentence is obvious; the trial judge is already familiar with the facts of the case and is likely to have a substantially more informed perspective than that which a different judge might obtain from reading a presentence report and presiding over sentencing proceedings. Whatever purposes are adopted for the sentencing system, the circumstances of the offenses will be centrally relevant to sentencing determinations based on aggravating or mitigating factors. Where more than one defendant is involved in a case, the trial judge will generally be in the best position to appreciate the relative roles of the several participants in the offense.

In cases where a plea is accepted, the same considerations substantially apply. Courts, required to conduct inquiries into the nature and
quality of the decisions to enter a guilty plea, will frequently ascertain information about the gravity of the offense and the offender’s culpability that may be relevant to sentencing.¹

This Standard is intended to express concern with the concept of a specialized sentencing court to which all or certain groups of offenses would be channeled for sentencing. Establishment of such a tribunal might curtail sentencing disparities, but that can be effected through other means.

**Standard 18-5.14  Time of sentencing**

(a) The rules of procedure should ensure that sentencing proceedings take place as soon as practicable following determinations of guilt. Stated time limits, subject to extensions for cause, should be incorporated in the rules. A sentencing proceeding may be deferred to permit consolidation of multiple offenses.

(b) The rules should ensure that the calendar of sentencing proceedings is under the active control of the sentencing court.

**History of Standard**

This Standard is new.

**Related Standards**

None.

**Commentary**

Constitutional law and procedural rules guarantee defendants the right to a speedy trial. This Standard, extrapolating from that principle, provides that the sentencing stage of a prosecution should follow promptly after determination of guilt. Pursuant to this provision, rules

¹. It should be acknowledged that the principle of subparagraph (ii) facilitates to some extent the practice of “judge shopping”; if a defendant appears before a number of judges at various stages of prosecution, the defendant may choose to enter a plea of guilty when the judge before whom he or she is appearing is the judge by whom the defendant wishes to be sentenced. This practice only arises when there are substantial differences in sentencing among the judges of the court so that defendants might seek to be sentenced by a “lenient” judge.
of procedure should impose time limits on the postconviction presentence stage of cases. The rules should provide, of course, for exceptions where cause exists for postponement of sentence imposition.

One occasion for deferral of sentence imposition, noted in paragraph (a), is the circumstance of fashioning sentence for an offender who is being prosecuted more or less contemporaneously for several offenses. Standard 18-5.16 provides that outstanding convictions should be consolidated before a single judge for determination and imposition of a single sentence that takes into account the multiple offenses of which the defendant has been convicted.

**Standard 18-5.15 Notice of possible departure from presumptive sentence**

(a) The rules of procedure should require the parties, at a stated time before the sentencing hearing, to give notice in writing of intent to request the sentencing court to impose sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction. The notice should state the grounds of the request.

(b) The rules should require a sentencing court, considering on its own initiative imposition of sanctions of lesser or greater severity or types of sanctions different from the presumptive sentence for the offense of conviction, to notify the parties and allow a reasonable time for response.

**History of Standard**

This Standard is new.

**Related Standards**

None.

**Commentary**

To assure focused adversarial development of the factual and legal issues material to sentence determination, the procedural rules should require that a party give timely notice of intent to seek a sentence other than the presumptive sentence for the offense of conviction and the
grounds for the proposed departure. A notice requirement is necessary to allow both parties adequate opportunity to prepare for the sentencing hearing. In many cases, one or both parties are likely to be satisfied with sentences that conform to the presumptive sentences. In those cases where another type of sanction or a more or less severe sentence is to be advocated, neither party should be surprised at the sentencing hearing.

Paragraph (b) addresses the situation in which the sentencing court sua sponte proposes to consider a sentence other than the presumptive sentence. Until the practice of active adversarial initiative on issues of fact and law regarding sentence determination becomes firmly established, counsel for the parties may tend to defer to sentencing courts. If the parties have not given notice of intent to request a sentence other than the presumptive sentence but the sentencing court wishes to consider a sentence that departs from the presumptive sentence, the court should inform the parties prior to the sentencing hearing so that they may respond to the court's concerns.

The principle of paragraph (b) was upheld by the U.S. Supreme Court in Burns v. United States, 501 U.S. 129 (1991). Although the issue in Burns was framed in terms of the right of defendants to notice, the Supreme Court declared that the defendant and the prosecution should enjoy equal procedural entitlements.

**Standard 18-5.16 Consolidation of multiple offenses for sentencing; disposition of other charges**

(a) The rules of procedure should provide that all outstanding convictions within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction be consolidated for sentencing in a single sentencing proceeding.

(b) The rules should permit a sentencing proceeding to be deferred to permit prompt disposition of other charges pending against the offender within the jurisdiction of the sentencing court or any other court of coordinate or inferior jurisdiction and, if convictions ensue, consolidation of all convictions under (a).

(c) The rules should provide that, notwithstanding other venue requirements, a sentencing proceeding may be deferred to permit an offender, charged with other offenses within the jurisdiction of the sentencing court or any other court of coordinate or inferior
jurisdiction in the same state, to enter a plea of guilty to some or all of those charges in the sentencing court for purposes of consolidation of offenses in the sentencing proceeding.

(i) The rules should provide that permission to plead guilty in the sentencing court shall not be allowed without the written consent of the official responsible for prosecution of the charge.

(ii) The rules should provide that submission of a guilty plea under these circumstances is a waiver by the defendant of venue provisions that would otherwise apply and, where formal charges have not yet been filed, a waiver of the right to a formal charge.

History of Standard

This Standard is based upon Standard 18-6.2 in the second edition.

Related Standards

None.

Commentary

This Standard reasserts the principle that sentences for different offenses, contemporaneous in time, should be integrated into a single sentence. This principle was declared in Standards 18-4.5 and 18-4.6 of the original edition and brought forward as Standard 18-6.2 of the second edition. The most direct way to integrate sentences for multiple offenses is a single consolidated sentencing proceeding. Such a practice advances the public interest by assuring that one sentencing court will be apprised of all instances of current criminal conduct by the defendant and can determine the level of severity of sentence and the types of sanctions that are appropriate for the composite offenses.

Paragraph (c) adds an important and necessary procedural rule that overrides venue requirements that may impede consolidation of outstanding prosecutions in a single court. Frequently, when a defendant has been convicted and sentencing procedures have commenced, the defendant may face untried charges pending in one or several other courts within the state. If a defendant were to plead guilty to charges pending before other courts within the state, all of the convictions would be consolidated for a single sentence by the court receiving the pleas.
It is intended, under this provision, that a court be able to accept pleas to any offenses within the same jurisdiction provided that the offenses are of a type over which the sentencing court or a court of jurisdiction inferior to the sentencing court would have had lawful power to entertain the prosecutions if the conduct had occurred within its territorial limits. A state judge sitting in a court of general jurisdiction in judicial district A would be authorized to accept pleas to offenses alleged to have occurred in judicial districts B and C, including minor offenses normally heard by a court of lesser jurisdiction. In the converse situation, a court with power to try only minor offenses would not be permitted to accept pleas to felony charges.

Paragraph (c)(i) requires consent by the prosecutor otherwise responsible for prosecution of a charge to which a defendant wishes to plead guilty under this provision. This requirement might lead to sheer bureaucratic disruption and delay in accomplishing the desired integration of sentences, but it seems wise nonetheless. Unanticipated guilty pleas and speedy sentencing proceedings could impair investigations in which the defendant would have been a material witness. Defendants might seek improperly to use the provision as a forum-shopping device, such that sentencing for the most grave of their offenses would be done in a court far removed from those offenses.

Administrative and, perhaps, judicial review should be available to consider the reasons underlying a prosecutor's refusal to consent to a consolidation of offenses under this provision. The Standard, referring to the official responsible for prosecution of the charge, does not mean only a front-line prosecutor, but could well be interpreted to mean also a higher-ranking state official with general law enforcement duties, such as an attorney general, whose perspective on the multiple offenses would span the entire state.

Standard 18-5.17  Sentencing hearing

(a) The rules of procedure should provide that counsel for both parties, the offender, and the victim have the opportunity to present submissions material to the sentence to the sentencing court.

1. Under this provision, a federal district court would be authorized to accept pleas to any federal offense regardless of where the offense was alleged to have occurred.
2. The first edition of the Sentencing Standards provided: "A veto by an elected official to protect a proprietary interest in a case is not compatible with the spirit of the device which is suggested." Standard 5.2, Commentary at 237 (1st ed. 1969). This was reiterated in the commentary to former Standard 18-6.2 (2d ed. 1979).
(i) Both parties should be permitted to present evidence and information, to confront and cross-examine witnesses for the other side, and to offer rebuttal evidence and information to that adduced by the other side, contained in the presentence report, or otherwise presented to the sentencing court.

(ii) Both parties should be permitted to present argument on (A) the relevance and accuracy of any evidence or information presented to the sentencing court, (B) the application to the sentence determination of statutes and guidance by the agency performing the intermediate function, and (C) the type of sanction and the level of severity of sanction appropriate to the sentence determination.

(iii) The victim should be permitted the right to make an unsworn statement.

(iv) The offender should be permitted the right of allocution.

(b) The rules should require the prosecutor and the defense counsel to disclose to the court any agreement, in connection with a plea of guilty or nolo contendere, that included a provision on the sentence.

**History of Standard**

This Standard is based on Standards 18-6.3 and 18-6.4 of the second edition.

**Related Standards**

None.

**Commentary**

The premise of this Standard is that sentencing proceedings should be conducted openly and formally with due regard for the essential elements of due process in our adversary system of justice. Sentencing hearings provide both parties with the opportunity to be heard on issues of fact and law. Primary responsibility in this regard rests, of course, on counsel for the parties.

**Procedural Standards for Sentencing Hearings**

This Standard is not intended to state the minimal procedural standards which the states and federal government must observe to satisfy
the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States. Constitutional jurisprudence does not define sound public policy. The Supreme Court of the United States has not yet interpreted the Constitution's due process clauses to have significant effect on sentencing proceedings.¹ This Standard addresses the procedural issues of sentencing hearings on the level of rules of criminal procedure which, properly, are not designed merely to restate minimal requirements of constitutional law.

The formality requirement for sentencing hearings responds to the inherent risk of factual error. Information in presentence reports is obtained and compiled by preparers of those reports, public officials acting in an inquisitive mode unbounded by rules of evidence or procedure. The fact-finding process in the stage of report preparation is informal, not subject to the disciplinary effects of adversary proceedings, where information is introduced into the record only by decisions of counsel for the parties, and not conducted under evidentiary rules designed to assure accuracy and completeness, and to limit information to that which is relevant and material.² Defendants' criminal histories are derived from government records, which often have errors and omissions. Where guilt has been determined by trial, evidence material to sentencing in the trial record must be marshalled and presented in the court, even if the sentencing judge also presided at the trial. For example, evidence adduced at a trial may tend to show the existence of mitigating or aggravating factors. However, the issues of fact


². Standard 18-S.18(a)(ii) provides that the sentencing court may treat as accurate any unchallenged information in a presentence report. It is, however, good practice for sentencing courts to obtain explicit acquiescence from counsel for both parties to parts of presentence reports not otherwise challenged in the submissions of counsel.
presented for purposes of guilt determination are not the issues of fact that arise for purposes of sentencing. Evidence from trial records must be shaped and focused in a manner appropriate to sentence determinations.

These Standards, as in prior editions, stop short of providing that sentencing proceedings be conducted under exactly the same evidentiary and procedural standards that apply to criminal prosecutions. Mandating sentencing proceedings under those criteria would involve, no doubt, significant delays and added costs incommensurate with the needs of the sentencing function. Our system of justice reflects extraordinary concern to avoid convictions of innocent persons. What these Standards seek is sufficient procedural formality and regularity to assure that sentences are determined and imposed with appropriate due process of law.3

The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms. There is an important symbolic aspect to the requirement of due process. Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interests of victims, and the interests of persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.

**Duties of Counsel**

In sentencing hearings, counsel for both parties can and must be vigilant to detect and correct factual distortions or errors in proceedings so structured that courts make, and are perceived to make, findings of fact in accordance with the fundamental characteristics of our system of justice. This Standard, by its own terms, does not speak to the professional duties of prosecutors and defense counsel in sentencing hearings. However, the Standard presumes that counsel for both

3. The rights of confrontation and cross-examination of witnesses, fundamental in the guilt-determination stage, are not appropriate to sentencing proceedings, where substantial information is conveyed to courts in presentence reports. See Becker, supra note 1. For similar reasons, rules of evidence excluding hearsay cannot be applied. In some circumstances, however, it may be appropriate to require preparers of presentence reports to testify under oath and to be subject to cross-examination.
parties will act competently and with appropriate zeal to their roles in sentencing hearings. Counsel should approach sentencing hearings with the same diligence devoted to the proceedings for determination of guilt. Contested proceedings as to guilt occur in a fraction of criminal prosecutions, but sentencing is an issue in every case.

Subparagraph (a)(ii) emphasizes that part of sentencing hearings should be consideration of the types of sanctions and levels of severity of sanctions appropriate to the cases before the courts. Sentencing courts are obligated to exercise their discretion within the guidelines established by the agency performing the intermediate function and to impose sentences with the statutory limits established by the criminal code. The rules of procedure should permit counsel for both parties to submit information and argument on these matters. Specification of the duties of counsel at sentencing hearings, particularly duties of counsel for defendants, should highlight this as an important aspect of counsel’s function. See Standard 3-6.2(a) (3d ed. 1993).

**Victims’ Statements**

The rights of victims to participate in the sentencing phase of prosecutions are recognized in these Standards in several ways. The Standards contemplate that victims may provide information to the preparers of presentence reports. See Standard 18-5.10. Under Standard 18-5.4(c), preparers of presentence reports must include a victim’s statement as an attachment to the presentence report. To the extent that a victim conveys information material to sentence determination, a preparer can incorporate that information into the body of the presentence report. Material information in presentence reports not challenged by either party may be relied upon in fact-finding by the sentencing court. See Standard 18-5.18(a)(ii).

The Standards also contemplate that either party may present evidence at sentencing hearings. If a prosecutor or defense counsel wish to do so, either may present the victim as a witness in a sentencing hearing and, under appropriate questioning, elicit sworn testimony from the victim. In that circumstance, of course, the testimony of the witness would be subject to cross-examination by the other party. In making findings of fact, a victim’s testimony would be evidence of record on which a sentencing court could rely. See Standard 18-5.18(a).

Subparagraph (a)(iii) adds a third means for victims to participate, unstsworn oral statements at sentencing hearings. This right to address the court is not dependent upon action by counsel for either party and,
therefore, the rules of procedure must charge sentencing courts with ascertaining whether a victim is present and wishes to speak. Statements at sentencing hearings, not under oath or subject to cross-examination, cannot effectively be contradicted or rebutted. Many would conclude that the potential for injury to the regularity of sentencing proceedings is substantial; others conclude that there are important societal gains in permitting victims to have their "day in court" and that courts' determinations will not be improperly affected by emotional factors. This Standard agrees that victims should have the right to make unsworn statements at sentencing hearings, a right that can be analogized to defendants' right of allocution. The Standards intentionally do not provide, however, that such victims' statements are proper bases for findings of fact material to sentence determinations. See Standard 18-5.18(a).

*Defendants' Allocution*

Subparagraph (a)(iv) continues the common law right of defendants to address sentencing courts directly, generally known as the right of allocution. The right of allocution has ancient origins and is currently recognized by both federal and state law. Its preservation has been encouraged without exception by all recent model codes. The policy behind the right of allocution has more to do with maximizing the perceived equity of the process than with conveying information on which courts may rely in making findings of fact.

*Plea Agreements*

Under paragraph (b), the rules of procedure should impose on the prosecution and defense a duty to disclose any plea agreement that included a provision regarding the sentence. The terms of plea agreements normally will have been disclosed to the court prior to the acceptance of the plea. See Standard 14-1.5. Disclosure at this phase of a case would include any term relevant to sentence. Under Standard 18-5.13(ii), the judge who accepted the plea should be the judge presiding at the sentencing hearing. If, however, a different judge is determining sentence and the prosecution makes an argument as to the terms of a sentence as a result of an agreement with the defense, the court should be made aware of the nature and terms of the agreement.
Standard 18-5.18  Findings of the sentencing court

(a) The rules of procedure should provide that the sentencing court resolve issues of fact material to the sentence to be imposed.
   (i) The standard of proof on all issues of fact should be by a preponderance of the evidence.
   (ii) The court may treat the unchallenged factual information in a presentence report as accurate.
   (iii) The court may consider facts proven at the trial of the offender or facts established on the record of the acceptance of a plea.
(b) The rules should provide that the sentencing court make express findings on all disputed issues of fact material to the determination of the sentence imposed.

History of Standard

This Standard is based upon Standards 18-6.4(c) and 18-6.6(a) and (b) of the second edition.

Related Standards

None.

Commentary

This Standard requires rules of procedure for sentencing hearings that result in factual findings on issues material to sentence determinations. The requirement of findings of fact serves multiple purposes. First, the discipline of thought necessary for a court's reasoned determination of a sentence is fostered by the process of articulation of the factual bases for the judgment. Second, findings of fact are essential to meaningful appellate review of sentences. Third, if the sentencing phase of a case is resumed later, whether as a result of remand following appeal or otherwise, further proceedings are facilitated by having a record of the factual findings on which the original sentence had been imposed. Fourth, sentencing courts' findings may be of considerable value to the agency performing the intermediate function when it carries out its duties to monitor and evaluate patterns of sentencing. See Standards 18-2.7 and 18-4.1(b).
Information material to sentence determinations need not be presented to sentencing courts under ordinary rules of evidence. Information contained in presentence reports, for example, is submitted to courts by the preparers of those reports. Courts may treat as accurate unchallenged factual material contained in presentence reports and may rely upon that information for findings of fact. So, too, sentencing courts may take notice of facts proven at trial or established on the record at the time of acceptance of a guilty plea.

The proper burden of proof on controverted issues of fact arising in sentencing proceedings is critical to the judicial fact-finding function. Under constitutional law mandate, the burden in criminal trials is proof beyond a reasonable doubt. This constitutional requirement has not been extended to sentencing hearings. Persuasive reasons exist for using the same burden of proof in sentencing proceedings and in proceedings for determination of guilt. However, this Standard provides that the proper burden of proof in sentencing hearings is the preponderance of the evidence burden. That has been the stated position of the American Bar Association in earlier editions of the Standards and, absent compelling reason to change, continues to be the position espoused in this edition.

The appropriate burden of proof at sentencing, along with other procedures attendant to sentencing hearings, may have to be altered in jurisdictions that permit the practice of real-offense sentencing. While this Standard was being drafted, one persuasive argument in favor of the preponderance of evidence burden of proof was that Standard 18-3.6 narrows the inquiry at a sentencing hearing to the offense of conviction and excludes consideration of other offenses for which the offender has not been convicted. On this ground, in part, the Standard was not drafted to carry forward into sentencing proceedings the reasonable doubt standard applicable to defined offenses and elements.

1. The constitutional standard of proof beyond a reasonable doubt applies to evidence of facts necessary to prove the elements of an offense. Neither constitutional nor general criminal law has defined what are the essential characteristics of elements of offenses. But see Standard 18-3.3(a) (important factors determining the gravity of offenses should be made elements of the offenses rather than characterized as aggravating factors). Difficult constitutional questions would arise if an offense were redefined to eliminate an "element" and to substitute the same issue as a fact material to sentence determination and a burden of proof less than the reasonable doubt standard were applicable to resolution of controverted sentencing facts. See United States v. Fatico, 458 F. Supp. 388, 403-404 (E.D.N.Y. 1978) (Weinstein, D.J.)
of offenses. If, however, an offender's guilt of offenses is to be adjudicated in the sentencing phase of prosecutions, arguments in favor of a more stringent standard, including constitutionally based arguments, gain considerable force. See Martin, *The Cornerstone Has No Foundation: Relevant Conduct in Sentencing and the Requirements of Due Process*, 3 CON. L.J. 25 (1993) (arguing that the reasonable doubt standard must be applied at sentencing hearings whenever the elements of a statutory offense are in issue). At least one federal court of appeals has held that a burden of clear and convincing evidence must be sustained, as a matter of constitutional due process, whenever the government alleges the commission of unadjudicated offenses that will result in an "extreme departure" from the otherwise appropriate sentence. United States v. Kikimura, 918 F.2d 1084 (3d Cir. 1990 (Becker, C.J.) (also holding that in such cases hearsay evidence may be relied upon only when other evidence demonstrates that the hearsay is "reasonably trustworthy"). Standards 18-5.17 and 18-5.18 assume that an offense-of-conviction approach to sentencing has been adopted. Most or all existing state guidelines sentencing systems follow such an approach; the only sentencing guideline jurisdiction to deviate from this pattern is the federal system. See Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. RPTR. 355, 356–57 (May/June 1992). While the Standards do not specify the procedural alterations necessary in a real-offense jurisdiction, this is a matter of present ferment in federal courts. See Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U.L. REV. 1 (1993); Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 CAL. L. REV. 289 (1992).

**Standard 18-5.19  Imposition of sentence**

(a) The rules of procedure should provide that sentence be imposed in open court in the presence of the offender.

(b) The rules should provide that a sentencing court, when imposing sentence, should state or summarize the court's findings of fact, should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence.
(i) The statement of reasons may be relatively concise when the level of severity and type of sanction are consistent with the presumptive sentence, but the sentencing court should always provide an explanation of the court's reasons sufficient to inform the parties, appellate courts, and the public of the basis for the sentence.

(ii) If the sentencing court imposes a sanction other than total confinement, or in addition to total confinement, the court should ensure that the offender is informed, in detail, of the offender's responsibilities and obligations and, in general, of possible consequences of noncompliance with the terms of the sentence.

(iii) If the sentencing court imposes a sanction of total confinement, the court should inform the offender of the amount of credit the offender is entitled to receive for time already spent in custody and should ensure that the record accurately reflects time served.

(c) The rules should provide that the sentencing court should integrate the sanctions of a current sentence with the remaining operative sanctions under any prior sentence of the offender.

(d) The rules should require the sentencing court to inform the offender of the right to appeal and of the time limits and procedures for initiating an appeal.

(e) The rules of procedure, or other rule of court, should require the attorney representing an offender at a sentencing proceeding to advise the offender regarding possible appeal and to take the necessary steps to protect an offender's decision to initiate an appeal.

History of Standard

This Standard is based upon Standards 18-6.6(a) and 18-6.8 of the second edition.

Related Standards

None.

Commentary

Historically, sentencing courts were not required to and commonly did not state the reasons for their sentencing determinations. Change
in that practice has been one of the most basic and necessary reforms of sentencing. Two decades ago, Judge Marvin Frankel expressed the rationale for change in fundamental terms:

The question "Why?" states a primitive and insistent human need. The small child, punished or deprived, demands an explanation. The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice. . . . The despot is not bound by rules. He need not account for what he does.

Criminal sentences, as our judges commonly pronounce them, are in these vital aspects tyrannical.1

These Standards agree with Judge Frankel's assessment that sentencing courts, when imposing sentence, should state their reasons for selection of the type of sanction and the level of severity of sanction in the sentences imposed.

Paragraph (b)(i) indicates that a concise statement may appropriately accompany a sentence that is within the parameters of the presumptive sentence for the offense. A more extensive statement would be necessary to explain the reasons for a sentence that departs from the presumptive sentence.2 Explanations given by sentencing courts are vital to achievement of appropriate individualization of sentences with a sentencing system that is reasonably determinate and that seeks to avoid unwarranted disparities in sentences imposed.

The sentencing court's statement of reasons for the sentence imposed is, of course, essential to meaningful appellate review of sentences. A statement of reasons for sentence may be especially helpful when a sentence is challenged on appeal as possibly based on an improper factor.3

2. The imposition of consecutive sentences of total confinement, where such sentences are permitted, should be accompanied by a statement of reasons for the selection of consecutive terms. See, e.g., State v. Miller, 527 A.2d 1362, 1367 (N.J. 1987) (remand for resentencing where trial court failed to include separate statement of reasons for imposition of consecutive sentences; "A statement of reasons is a necessary prerequisite for adequate appellate review of sentencing decisions.").
3. "In the present case, a statement of reasons for the sentence would have served as an opportunity to demonstrate to the defendant, his well-wishers, and the public, what undoubtedly was the fact, that the judge was not swayed by the first sentence or by his own earlier impression. . . . Inasmuch as the judiciary, an undemocratic institution in a democratic government, can retain its legitimacy only so long as it is seen to be guided
Terms of sentences should be described with sufficient clarity that persons being sentenced can comprehend them. This is particularly important when, under the sentence, an offender has certain obligations or responsibilities that the offender must meet. At the conclusion of a sentencing hearing, defense counsel should confirm that the offender understands the terms of the sentence, but it is important that the sentencing court make certain that the terms of the sentence are understandable and understood by the person.

The provision in subparagraph (b)(iii) is to assure that at the time of sentencing to a sanction of confinement, the record accurately reflects time that the offender has already been in custody. An offender is entitled to credit for any period of pretrial and presentence confinement. To avoid ambiguity as to the date of release from the sanction of confinement being imposed, the sentencing court should inform the offender of the number of days of credit to be applied against the sentence and, of course, should incorporate that aspect of the sentence in the record. The offender should be apprised of the precise terms and effect of a sentence imposed. The offender must understand the credit aspect of a sentence to confinement before the true impact of the sentence can be appreciated. This is particularly true when the credit to be taken into account is a substantial portion of the sentence imposed. By careful attention to this matter at the time of sentencing, custodial officials will have clear directions on the length of further confinement time to be served. When this matter is resolved clearly at the sentencing hearing, much possible subsequent difficulty is avoided.

Under these Standards, offenders have a broad right to appeal from sentences imposed. See Standard 18-8.1. Procedural rules normally require that a decision whether to appeal must be made and implemented within a relatively short time from the imposition of sentence. The objective of paragraphs (d) and (e) is a matrix of rules of procedure and professional responsibility so that each offender makes a reasoned decision, within the permitted time, regarding possible appeal.

Under paragraph (d), sentencing courts should include, as part of every sentence, information regarding the availability of appellate review, the time within which an appeal must be initiated, and the process for commencing an appeal.

by a sense of justice, the importance of such an explanation should not be underesti-
mated.” United States v. Del Plano, 593 F.2d 539, 543 (3d Cir. 1979) (Adams, C.J.,
concurring).
Sentenced offenders need professional advice on whether to exercise the right of appeal. Paragraph (e) is intended to make clear that defense counsel, even if retained or appointed only for the trial court phase of a prosecution, have the duty to provide their clients with advice regarding possible appeals. The decisions whether or not to take appeals must be made by the clients. If an offender decides to appeal, counsel have the minimal professional responsibility to take the necessary steps to protect the offender’s right to appeal.

**Standard 18-5.20  Record of sentencing proceedings**

The rules of procedure should require a sentencing court to make a complete record of the sentencing proceeding. The record should include the following:

(i) A verbatim account of the entire sentencing proceeding, including all testimony received, statements made by defense counsel, the prosecutor, the offender, or the victim, and the statements of the sentencing court imposing and explaining the reasons for the sentence;

(ii) A verbatim account of such parts of the trial on the issue of guilt, or proceedings leading to the acceptance of a plea of guilty, as are material to the sentencing decision; and

(iii) A copy of the presentence report and of any other reports or documents made available to or used by the sentencing court in determining the sentence.

**History of Standard**

This Standard is based upon Standard 18-6.7 of the second edition.

**Related Standards**

None.

**Commentary**

As in the case of all other proceedings in open court, a record of sentencing hearings should be made and preserved in a manner that the record can be transcribed as needed. The simplest and most efficient means of obtaining this objective is to have a court reporter make a
verbatim record of the entire sentencing hearing through the imposition of sentence. Adequate preservation of a record does not require immediate transcription of the reporter’s notes, but the court should ensure that the untranscribed record is maintained in the possession or control of the court.

The full record of a sentencing hearing must include all materials made available to or used by the sentencing court, whether or not introduced formally into evidence at the hearing. A copy of the presentence report and copies of other reports or documents that the sentencing court received are an essential part of the record.

Preservation of a record of sentencing proceedings is essential to the process of appellate review of sentences. However, the rationale for a complete and permanent record is not limited to appellate review. Issues regarding sentences and sentencing may arise later for many subsequent purposes.

**Standard 18-5.21 Sentence reports**

(a) The rules of procedure should require that, following sentencing in all cases, a designated court official compile a standardized report that includes:

(i) Offense of conviction and the initial charge,
(ii) Characteristics of the offense and victim information,
(iii) Personal characteristics of the offender,
(iv) Disposition by bench trial, jury trial, or plea, and
(v) The sentence imposed.

(b) The rules should establish appropriate measures to protect the privacy of offenders or victims with regard to information, included in sentence reports, that is not otherwise a matter of public record.

**History of Standard**

This Standard is new.

**Related Standards**

None.

**Commentary**

Valid data on the operation of the criminal justice system are vitally important to understanding how the system is actually functioning...
and to consideration and evaluation of proposals to make changes in the system. Currently, such data are very difficult to obtain in nearly all jurisdictions. The objective of this Standard is to create a set of such data through a routine procedure for preparation of a simple, standardized report in every case in which a sentence is imposed. Standardization of the form of such reports is essential to statistical aggregation of the data for analysis of the sentencing system in operation. As declared in Standard 18-2.7, each jurisdiction ought to have a cogent method for systemic review of its sentencing policies and practices. The simple report envisioned in this Standard is the key building block to such a data base.

Preparation of a suitable form for statewide use should be one responsibility of the agency performing the intermediate function. See Standard 18-4.2(b)(ii). An effective monitoring system must include key offense, offender and case processing information. Five basic elements of sentence reports are specified in paragraph (a), but an agency may develop and expand the categories of information to be reported. On the basis of the reports received from sentencing courts the agency will be able to carry out its duty to make periodic studies of sentencing patterns and practices.

Offense characteristics might include statutory differentiations such as the most serious conviction offense and any statutory penalty constraints. Relevant offense characteristics not determined by the statutory offense definition are also important. Among these would be facts as to type of victim (e.g., individual, business, institution), relationship of victim to offender, victim age, weapon use, physical injury, property loss and offense relationship to controlled substances. Offender characteristics would include gender, race, age, chemical or alcohol use or dependence, criminal record, employment, education, literacy, mental health, and prior treatment or other interventions. Case processing information might include initial charge, offense of conviction, plea negotiation if any, and sentence imposed.

Responsibility for preparation of sentence reports should be assigned to identified officials. Preparation of sentence reports may be a responsibility of sentencing judges. In many jurisdictions this task could be efficiently assigned to other court officials so long as the designated officials have the basic information to be reported.

Paragraph (b) cautions that the raw data included in sentence reports may include information about offenders and victims and about other persons that is not a matter of public record. Individuals' privacy
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should be protected against unwarranted disclosures. Sentence reports should be open to persons with satisfactory reasons for access to the raw data only on conditions that take privacy concerns adequately into account.
PART VI.
SENTENCING DISCRETION

Standard 18-6.1 General principles

(a) The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) A sentencing court should be guided in exercise of its sentencing discretion by standards promulgated by the agency performing the intermediate function. Courts should give serious consideration to the goal of avoidance of unwarranted and inequitable disparities in sentences.

History of Standard

Standard 18-2.2(a) of the second edition called for imposition in each case of “the minimum sanction which is consistent with the protection of the public and the gravity of the crime”; this essence of this provision was expressed in the caption as “least restrictive alternative.” Standard 18-3.2(a) provided in (i) that the sentence imposed “should neither exceed a ceiling equal to that level justly deserved by the offender . . . nor fall below a floor level necessary to protect the public from further serious criminal acts by the defendant or to insure that the gravity of the offense is not depreciated”; in (iii) that Standard declared: “Parsimony in the use of punishment is favored. The sentence imposed should therefore be the least severe sanction necessary to achieve the purposes for which it is imposed.”

Related Standards

Standard 18-2.4 provides a Standard on severity for the legislative function.

Commentary

The ultimate function of any system of sentencing is to allocate and control the discretion to determine what sanctions and what level of
severity of sanctions will be imposed on offenders. These Standards recognize this and address the ways in which sentencing discretion is allocated and controlled among the branches of government. In this part, the Standards consider the function of trial judges, whose sentencing task is to decide, case-by-case, what sanctions and what level of severity of sanction to impose on each offender.

Historically, in this country the legislative framework of a criminal code prescribed a few sanctions, typically imprisonment or fine, and set maxima and sometimes minima for each sanction. Within often broad ranges of authorized sentences comprised of these sanctions, trial judges were invested with wide sentencing discretion. The range of possible sanctions was expanded considerably by the judicial practice of suspending sentence of a statutorily authorized sanction, which permitted the concept of "probation" to emerge. The decisions of individual judges, once made, were subject to very limited controls. Often called a system of indeterminate sentencing, such an arrangement permits, indeed requires, a trial judge to decide what level of severity of sentence is appropriate in a particular case; the aggregate of case-by-case decisions of the trial judges results in the overall level of severity of sentences for the jurisdiction.

In a jurisdiction with a number of trial judges, each acting independently, no person or agency determines, as a matter of policy choice, what types of sanction and what levels of severity of sanctions are necessary or proper. Such an arrangement allows each judge to sentence according to her or his parameters of proper levels of sentencing severity. A judge in such a position often acquires a sentencing reputation, for example, of being "lenient" or "tough." That inevitably results in considerable disparity among sentences imposed on similar offenders. The overall pattern of sentences imposed is the happenstance effect of these sentencing decisions.

A key objective of these Standards, since the first edition, has been to address the problems perceived to flow from the allocation of sentencing discretion in an indeterminate sentencing system. Past editions of the Standards have found the resulting levels of severity of criminal sanctions to be too high and the disparities among sentences imposed to be unwarranted. Speaking to sentencing courts, the Standards exhorted judges to exercise their discretion to reduce levels of severity overall and, in particular, to reduce levels of severity of sentences to terms of imprisonment; the Standards further urged courts
to pursue the goal of sentencing equality and to avoid patterns of sentences that would reflect unwarranted disparities.

The Standards now address the allocation of sentencing discretion more fundamentally through policy-driven sentencing standards that utilize presumptive sentences, through the intermediate function to guide and thereby limit sentencing discretion, and through appellate review of sentences imposed within a system of guided discretion. Thus, the Standard declares that the severity level of each sentence should be set in light of legislatively declared societal purposes, but should be no greater than necessary to achieve those purposes. In making decisions in individual cases, trial courts should be guided by standards promulgated by the agency performing the intermediate function. The patterns of sentences that result from such sentencing systems should tend to be in accord with one set of policy choices for the entire jurisdiction. Sentence appeals provide a means to consider individual sentences that fall outside the discretion of a sentencing judge. If patterns of sentences should fail to meet adequately declared societal purposes, the agency performing the intermediate function can modulate the criteria guiding sentencing discretion to bring future sentencing decisions into closer alignment with the objectives.

**Standard 18-6.2  Considering types of sanctions; composite sentences**

(a) A sentencing court should consider all permitted types of sanctions and, subject to the guidance of the agency performing the intermediate function, should select the type of sanction or sanctions that is most appropriate for the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.

(b) In shaping a sentence that is a composite of different types of sanctions, a sentencing court should determine the level of severity for each type of sanction so that the composite sentence is no more severe than necessary to achieve the societal purposes for which it is imposed and does not result in unwarranted and inequitable disparities in sentences.

**History of Standard**

This Standard is new.
Related Standards

Standards relating to legislative authorization as to types of sanctions are found in Part III(B). The Standards categorize sanctions in five groups: compliance programs, economic sanctions, acknowledgment sanctions, intermittent confinement sanctions, and total confinement.

Commentary

With the development of a modern, diverse menu of criminal sanctions, as strongly urged in Part III(B) of these Standards, sentencing courts have the task of choosing the particular type of sanction or set of sanctions that is appropriate in each case. This Standard addresses the manner in which that sentencing discretion should be exercised.

A minimal requirement is that a sentencing court, in every case, should consider all of the types of sanctions that the court is authorized to use as a component of the sentence in that case. The types of sanctions chosen should fit the offense and the offender. The gravity of the crime may suggest one or another type of sanction is appropriate. So, too, an offender’s prior criminal record or lack of record and personal characteristics that may properly be considered can affect the choice of sanction types.

The Standard contemplates that agencies performing the intermediate function will develop useful criteria guiding sentencing courts in the selection among types of sanctions. Standard 18-3.12, which is addressed to those agencies, contains general norms that can be elaborated and particularized in guidance to sentencing courts.

In accordance with Standard 18-3.12, sentencing courts should give priority to the use of compliance program sanctions that have the purpose and effect of promoting offenders’ future compliance with the law. For an offender with the ability to pay an economic sanction, restitution or reparation and fines are available. Individuals without assets or savings but currently employed may be fined according to a system of "day fines" based upon their expected earnings. Offenders without means to pay money may be able to contribute labor in the form of useful community service.

Appropriate use of the sanction of total confinement should be limited to the circumstances set forth in Standard 18-6.4: the offender caused or threatened serious bodily harm in the commission of the offense, other types of sanctions previously imposed upon the same offender did not induce the offender to avoid serious criminal conduct,
or total confinement is necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law. That Standard also recognizes the appropriateness of so-called shock sentences to total confinement for brief periods.

The Standards contemplate that sentences may and often should take the form of composites of more than one type of sanction. A "split sentence," coupling a term of intermittent confinement with a follow-on compliance program, is an example. While composite sentences are desirable and their use may go far to fulfill societal purposes, sentencing courts should be sensitive to the overall impact of the separate parts of composite sentences so that the aggregate sentences do not exceed appropriate levels of severity and do not result in unwarranted and inequitable disparities in sentencing patterns.

Standard 18-6.3 Using presumptive sentences: mitigating and aggravating factors and personal characteristics of individual offenders; criminal history

(a) In determining the sentence of an offender, a sentencing court should consider first the level of severity and the types of sanctions that are consistent with the presumptive sentence. The court should then consider any modification indicated by factors aggravating or mitigating the gravity of the offense or the degree of the offender's culpability, by personal characteristics of an individual offender that may be taken into account, or by the offender's criminal history.

(b) Following guidance of the agency performing the intermediate function, a sentencing court should take into account an offender's acknowledgment of responsibility or cooperation with the prosecution.

History of Standard

This Standard is new.

Related Standards

Standards relating to legislative authorization of the use of presumptive sentencing are found in Part III(A)(1) of these Standards. On guid-
Commentary

These Standards contemplate that sentencing courts, fashioning sentences, will begin at a common baseline, referred to as the presumptive sentence for the offenses involved. A presumptive sentence is the sentence that would be appropriate for an "ordinary" case. Establishment of baseline presumptive sentences is a primary task of the agencies that perform the intermediate function. Presumptive sentences should guide sentencing courts both to the appropriate type or types of sanction and to the appropriate level of severity of sanction for an ordinary offender, one who lacks a relevant criminal record and whose conduct, in commission of the offense, was not such as to involve any aggravating or mitigating factors.

Aggravating and Mitigating Factors

In a particular case, a sentencing court may find, from facts established in the sentencing proceeding, that the sentence imposed should differ from the presumptive sentence because of the nature of the offense. The court may find that the existence of aggravating or mitigating factors increase or decrease the gravity of the offense of conviction from the baseline or ordinary offense. A sentencing court should exercise its discretion in this regard under guidance from the agency performing the intermediate function. See Standards 18-3.2 and 18-3.3.

The agency performing the intermediate function should seek to identify comprehensively the factors appropriately taken into account as aggravating factors. Thus, the agency performing the intermediate function might identify aggravating factors as follows:

(i) An offense involved multiple participants and the offender was the leader of the group.

(ii) A victim was particularly vulnerable.

(iii) A victim was treated with particular cruelty for which an offender should be held responsible.

(iv) The offense involved injury or threatened violence to others committed to gratify an offender's desire for pleasure or excitement.

(v) The degree of bodily harm caused, attempted, threatened or foreseen by an offender was substantially greater than average for the given offense.
(vi) The degree of economic harm caused, attempted, threatened or foreseen by an offender was substantially greater than average for the given offense.

(vii) The amount of contraband materials possessed by the offender or under the offender's control was substantially greater than average for the given offense.

Similarly, the agency performing the intermediate function should seek to identify comprehensively the factors appropriately taken into account as mitigating factors. The agency performing the intermediate function might identify mitigating factors as follows:

(i) An offender acted under strong provocation, or other circumstances in the relationship between the offender and the victim were extenuating.

(ii) An offender played a minor or passive role in the offense or participated under circumstances of coercion or duress.

(iii) An offender, because of youth or physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.

(iv) Another ground exists that, although not amounting to a defense, excuse, or justification, diminishes the gravity of an offense or an offender's culpability.

Not all types of aggravating or mitigating factors can be identified categorically by the agency performing the intermediate function. Sentencing courts, in particular cases, must have the authority to take into account unusual facts, not within categories articulated by the agency, that tend to enhance or diminish the gravity of the offenses in those cases. In exercise of this power, sentencing courts should specify the unique facts that are relied upon to justify different treatment in sentencing in those cases. In part, this is essential to enable appellate courts to provide meaningful review of sentencing decisions. But, in addition, as patterns of sentencing courts' decisions are considered by the agency performing the intermediate function, the agency might expand or modify the guidance it gives to sentencing courts on appropriate aggravating and mitigating factors.

Determination of the weight to be accorded to any aggravating and mitigating factor, under these Standards, is a function for sentencing courts. Standards 18-3.2(c) and 18-3.3(d) provide that the agency performing the intermediate function should not assign specific weights to the factors it has identified. Of course, the agency cannot assign weights to other factors not within its set of categories. This
distribution of power between sentencing courts and the agency performing the intermediate function is vital to the Standards' concept of the proper balance between sentencing determinacy and individualization of sentences. It follows, however, that sentencing courts bear the responsibility to explain with care their reasoning in ascribing weights to aggravating and mitigation factors in their sentence determinations.

**Personal Characteristics of Offenders**

In a particular case, a sentencing court may find, from facts established in the sentencing proceeding, that the sentence imposed should differ from the presumptive sentence because of the nature of the offender. These Standards permit sentencing courts to take into account personal characteristics of offenders, unrelated to culpability for the offenses, including physical, mental, social and economic characteristics, in sentence determinations, but only in accordance with narrowly prescribed limitations. The legislature and the agency performing the intermediate function, in authorizing sentencing courts to use personal characteristics of offenders, should be as clear as possible on the limits of permissible uses of these factors.

A major concern for discriminatory impact arises when sentences may be determined in part on personal characteristics of offenders. Standard 18-3.4(d) lists six personal characteristics which should not, in and of themselves, be used for any purpose in sentence determinations. Those factors are an offender's race, gender or sexual orientation, national origin, religion or creed, marital status, and political affiliation or belief. Otherwise similar offenders should not receive different sentences because one is white and the other is black, one is a man and the other a woman, and so forth. Differences in personal characteristics of this kind should not matter in sentence determinations.

With regard to personal characteristics that may be taken into account, Standard 18-3.4(c) provides that sentencing courts may properly refer to those characteristics for the purpose of determining the appropriate type of sanction to be imposed. Thus, if an offender is mentally ill or needs treatment for substance abuse, a sentencing court

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1. Factors material to an offender's culpability would be factors aggravating or mitigating the gravity of the offense. See Standard 18-3.4 and Commentary.
2. The principle underlying this part of the Standard might be stated as the principle that sentences should fit the offender as well as the offense.
may frame the sentence to include a therapeutic facility for those conditions. If an offender's current educational level is significantly below his or her potential for achievement, a sentencing court may consider an educational or vocational training program as part of the sentence.

If an economic sanction is part of an offender's sentence, in most circumstances the nature of the sanction will depend upon the offender's financial circumstances. Standard 18-3.4(b) provides that an offender's economic status and prospects may be used for this purpose.

Finally, Standard 18-3.4(c) contemplates that sentencing courts may take into account personal characteristics that are indicative of an offender's history of hardship, deprivation, or handicap for the sole purpose of imposing sentences that are less severe than otherwise would be appropriate.

**Standard 18-6.4 Sentencing to total confinement**

(a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that:

(i) the offender caused or threatened serious bodily harm in the commission of the offense,

(ii) other types of sanctions imposed upon the offender for prior offenses were ineffective to induce the offender to avoid serious criminal conduct,

(iii) the offender was convicted of an offense for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offense and thereby foster disrespect for the law, or

(iv) confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offense of conviction is unlawful and could have resulted in a longer term of total confinement.

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender's apparent need for rehabilitation or treatment.

**History of Standard**

This Standard is derived from Standard 18-2.5 (2d ed. 1979). Subparagraphs (a)(i) and (iv) are new.
18-6.4  Criminal Justice Sentencing Standards

Related Standards

Legislative authorization of the sanction of total confinement is addressed in Standard 18-3.21. Standards on guidance by the agency performing the intermediate function are found in Standards 18-3.12(c) and 18-4.4(c).

Commentary

Appropriate use of the array of authorized sanctions is a paramount concern of these Standards. Nowhere is that concern more manifest than with regard to the appropriate use of the sanction of total confinement. Standard 18-3.12 provides standards for this task at the level of the agency performing the intermediate function; paragraph (c) of that Standard states four rationales for sentencing agencies to use in guiding sentencing courts on when to impose a sentence that includes a sanction of total confinement. In paragraph (a) of this Standard, those rationales are reiterated as appropriate also to the decisions of sentencing courts.

The American Bar Association, since the first edition of these Standards, has articulated its policy choices on the necessary conditions for the use of total confinement. The Standards have always sought to set forth a complete and coherent position for when, and how much, imprisonment is appropriate in sentencing for criminal offenses. Notwithstanding the evolution of greater determinacy in sentencing over the past three decades, the crucial “in-out” decision remains largely within the discretion of sentencing courts. These Standards advocate that sentencing discretion be well guided by agencies performing the intermediate function and that all sentences, once imposed, be subject to review by appellate courts, but even with increased determinacy sentencing courts will continue to bear major responsibility for case-by-case decisions on whether individual offenders are or are not committed to prisons or jails.

In exercising sentencing discretion on whether to impose the sanction of total confinement, sentencing courts must take into account the societal purposes established by the legislature and elaborated by the agency performing the intermediate function. These policy choices, which apply throughout the jurisdiction, provide the basic framework within which each sentencing judge makes sentencing decisions in individual cases. Paragraph (a) establishes the foundational principle that the sanction of total confinement should not be used in the absence of affirmative reasons that warrant doing so.
Standard 18-3.11(a) provides that the entire array of sanctions should be available for sentence imposition in every case. Under paragraph (c) of that Standard, a legislature may mandate imposition of the sanction of total confinement in limited cases. A legislative mandate, which necessarily would apply to a defined category of offense, is proper only when the legislature has determined that no one could commit an offense in that category in circumstances that would so mitigate the gravity of the crime that a sanction or composite set of sanctions other than total confinement would be appropriate. Few offense categories would meet this condition. Even when a sanction of total confinement is mandated, the sentencing court has discretion as to length of the term. The provision in Standard 18-3.11(c) does not contemplate that the legislature would fix a minimum term of imprisonment. Standard 18-3.21(b) provides that a legislature should not prescribe a minimum term of total confinement for any offense.

Subparagraph (a)(i) states that a sentence of total confinement may be proper if the offender caused or threatened serious bodily harm in the commission of the offense. There is widespread agreement that imprisonment is an appropriate sentence for crimes of violence. Recidivists' criminal records may reveal that sanctions other than total confinement are ineffective to induce them to avoid serious criminal conduct; when such persons are before sentencing courts, the courts may consider the sanction of total confinement under subparagraph (a)(ii). The most open-ended rationale for use of the sanction of total confinement is in subparagraph (a)(iii), which allows the sanction when necessary to avoid unduly depreciating the seriousness of the offense. In the view of the Standards Committee, imprisonment of some serious "white-collar" offenders may be necessary. So, too, incarceration of major violators of narcotics laws may be appropriate. Total confinement for very brief periods, so-called shock incarceration, may be appropriate when an offender's conduct could have, but did not, result in a longer term of incarceration.

As sentencing courts weigh the possibility of imposing sentences that include the sanction of total confinement on one or more of these rationales, the courts should have the carefully developed guidance of the agency charged with the intermediate function. Each of these rationales needs further elaboration to give them meaning and to make sufficiently clear that the patterns of sentences imposed by all sentencing courts in the jurisdiction follow a common set of policies. Put otherwise, the general policies that determine use of the sanction of
total confinement should not vary from judge to judge, or from case to

case. Sentencing discretion of sentencing courts must be guided by

statewide policies and principles.

Paragraph (b) identifies two grounds for prison sentences that are

never appropriate. Some notorious or highly publicized offenses may

excite public outrage, which in turn may interfere with the sentencing
courts’ ability to determine sentences in a calm and reflective way.

Sentencing determinations should be free from the pressures of

community animus toward offenders. Paragraph (b) also rejects the

idea that an offender may be sentenced to a period of total confinement

because that may facilitate the offender’s receiving the benefit of

programs for rehabilitation or therapy. In this regard paragraph (b)

reflects Standard 18-3.12(a)(iii), which provides that rehabilitation of

offenders is never a sufficient basis, standing alone, for imposition of

a criminal sanction that is not appropriate on other, independent

grounds.

Standard 18-6.5  Sentencing for more than one offense

(a) A sentencing court should impose a sanction appropriate to

the offense of conviction and should not consider other offenses

of which the defendant was not charged, which were dismissed

prior to determination of guilt, or of which the defendant was

acquitted.

(b) In sentencing an offender convicted of multiple offenses, a

sentencing court ordinarily should impose a consolidated set of

sentences that appropriately takes into account the offender’s

current offenses and criminal history.

(c) In sentencing an offender for offenses that were part of an

episode,

(i) a sentencing court should not increase the severity of

the sentence or change the type of sanction merely as a result of

the number of counts or charges made from a single episode, and

(ii) where the separate offenses are not merged for sentenc-
ing, a sentencing court should consider imposition of sanctions

of a type and level of severity that take into account the connec-
tions between the separate offenses and, in imposing sanctions

of total confinement, ordinarily should designate them to be

served concurrently.
(d) In sentencing an offender for an offense graded by the amount of money or property involved, a sentencing court ordinarily should determine the appropriate sentence by treating the offenses as a single offense and determining its gravity by cumulating the amounts of money or property in the separate offenses.

(e) In sentencing an offender for multiple offenses not within (c) or (d), a sentencing court should be guided by the presumptive sentence derived by reference to the sentence appropriate for the most serious current offense. Under guidance from the agency performing the intermediate function, a sentencing court may impose an enhanced sentence by treating other current offenses as part of an offender's criminal history or as factors aggravating the most serious offense.

(f) When multiple sentences of total confinement are to be served consecutively, a sentencing court should impose sentences that do not exceed a total term reasonably related to the gravity of the offenses.

(g) In sentencing an offender who is subject to service of a prior sentence, a sentencing court should take into account the unexecuted part of the prior sentence in shaping a consolidated set of sentences.

History of Standard

This Standard is based on Standard 18-4.5 (2d ed. 1979).

Related Standards

Standards relating to the legislative authorization and agency guidance in sentencing for multiple offenses are found in Standards 18-3.5 and 18-3.7.

Commentary

This Standard addresses the complex and difficult questions that face sentencing courts in imposing sentences on offenders who have been convicted of more than one offense. In facing these questions, sentencing courts must have the careful guidance of policy determinations made by the agency performing the intermediate function or by the legislature. Part III of these Standards considers how an agency
or legislature might set policies on these matters. Standard 18-3.6 provides that offenses other than an offense of conviction should not be taken into account. Standard 18-3.5 provides that an offender’s criminal history is relevant to sentencing for a current offense. The most difficult questions, which arise when an offender is concurrently convicted of more than one offense, are the subject of Standard 18-3.7. This Standard addresses those same issues from the perspective of sentencing courts.

The fundamental principle of avoidance of unwarranted and inequitable disparities, declared in Standard 18-2.5(b), is seriously at risk if sentencing courts are not guided in the way they determine sentences for offenders who have committed more than one offense. Large differences in sentences imposed can and will result from absence of meaningful guidance to sentencing courts. If each sentencing judge is left to determine such matters in the court’s unfettered discretion, the outcomes will be a pattern of sentences marked by substantial unwarranted and inequitable disparities.

Standard 18-3.6 adopts the principle that only offenses of conviction may provide the basis for valid sentencing. That principle is reflected in paragraph (a) of this Standard. It should not be within the power of a sentencing court to determine the sentence for the offense of conviction on the basis of other offenses of which the defendant has not been charged or, if charged, has not been convicted.

Standard 18-3.5 recognizes that prior offenses of which an offender was convicted may be relevant to current sentencing, even if the sentences imposed for those prior offenses have been fully carried out. That principle is restated in paragraph (b) of this Standard. The weight to be afforded to an offender’s criminal history should be determined by the agency performing the intermediate function. Standard 18-3.5(c). In states that have set up an agency to perform the intermediate

1. These Standards disapprove of legislatively mandated sentence enhancement of the severity of sentences pursuant to statutory enactments like so-called habitual offender acts. Standard 18-3.5(d) provides that all sentences, when imposed, should be reasonably related in severity to the level of sentence appropriate to the current offense of conviction. An offender’s criminal history may be a relevant factor in sentence determination, but only as one factor affecting the determination of sentence for a current offense. The type of sanction imposed and the severity of that sanction should not be determined by counting the current offense together with an offender’s prior convictions. Paragraph (f) of this Standard reiterates the substance of that principle as a matter of sentencing courts’ exercise of guided discretion.
function, agencies have commonly used a two-dimensional grid to
guide sentencing courts on the appropriate weight of an offender’s
criminal history in determinations of the severity of the sanction of
total confinement, but guidance on the weight of offenders’ criminal
history is essential with regard to imposition of all types of sanctions.2

Standard 18-3.7 treats the issue of sentencing for multiple current
offenses. That Standard seeks to articulate a principled approach to a
number of multiple offense situations. The objective is to frame a single
sentence that appropriately takes into account all of the offenses for
which sentence is to be imposed. If the offenses of conviction have
“merged,” the sentence should be appropriate to the surviving offense.
Standard 18-3.7(b)(i) provides that the doctrine of merger should be
invoked when the elements of offenses of conviction substantially over­
lap. If the multiple offenses arose from a single criminal episode, even
if not merged, sentencing courts, under guidance from the agency
performing the intermediate function, should take that fact into
account. Standard 18-3.7(b)(iii). If the multiple offenses are of a kind
that is graded by the amount of money or property involved, as may
be found in certain property or narcotics crimes, the gravity of an
offender’s overall conduct may be determined for purposes of sentence
determination by adding together the amounts of money or property
in the several separate offenses. Standard 18-3.7(c). For sentencing
when the multiple offenses are not within these principles, Standard
18-3.7(d) provides that the presumptive sentence should be derived
from the most serious of the current offenses with enhancement of the
sentence for that offense determined as if the other current offenses
were part of the offender’s criminal history or, where appropriate, were
factors aggravating the most serious offense. Standard 18-3.7(e). Para­
graphs (c), (d), and (e) incorporate these Standards as appropriate to
the exercise of the discretion of sentencing courts under the guidance
of the agency performing the intermediate function.

Paragraph (g) addresses the possible situation that notwithstanding
the goal of a single sentence for all outstanding offenses, circumstances
may arise in which an offender comes before a sentencing court while

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2. Under these Standards, offenders’ criminal history may be relevant to determination
of the appropriate type of sanction to be imposed. See Standards 18-3-12(c)(ii) and 18­
6.4(a)(ii) (total confinement sanction may be appropriate if other types of sanctions
imposed for prior offenses have been ineffective to induce an offender to avoid serious
criminal misconduct).
part of a prior sentence remains to be executed. The reasons for this situation to arise are many and varied. This provision merely provides that a sentencing court should take into account the relationship between a new sentence and the unexecuted part of the prior sentence such that the combined effect of the two sentences is appropriate.
PART VII.
CHANGE OF SENTENCE

A. Reduction in Severity or Modification

Standard 18-7.1 Authority to reduce the severity of sentences

(a) The rules of procedure should authorize a sentencing court, upon motion of either party or on its own motion, to reduce the severity of any sentence. The rules should restrict the time for reduction in severity of a sentence to a specified period after imposition of a sentence.

(b) The rules should prohibit ex parte communications with the sentencing court regarding reduction of sentence and should ensure that both parties receive notice of any proposed reduction.

(c) The rules should prohibit reduction in the severity of a sentence unless the sentencing court reopens the sentencing hearing and follows the procedures in Standards 18-5.17 through 18-5.21.

History of Standard

This Standard is derived from Standard 18-7.1(a) (2d ed. 1979).

Related Standards

Standard 18-7.2 deals with modification of sentences in light of changed conditions. Resentencing for violation of the requirements or conditions of initial sentences is addressed in Standards 18-7.3 and 18-7.4.

Commentary

The arguments for a fail-safe mechanism, whereby sentencing courts are granted power for a limited time to reconsider sentences imposed, have long been perceived as compelling. At common law, sentencing courts retained power to reduce a sentence until the end of the term of
court in which the sentence had been imposed. The exercise of sentencing discretion, even within a system that guides sentencing courts, is a human process. It sometimes happens that a court, after reflection, realizes that the sentence imposed was an overreaction to some issue or factor. No public policy requires that error be perpetuated. The most efficient procedure permits a court to rectify those judgments that it realizes were excessive. In other cases, new factual information, perhaps related to an aggravating or mitigating factor, may be developed subsequent to sentencing that alters materially the information base on which sentence was imposed. The interests of justice and of sound judicial administration are served if trial judges are permitted to reduce sentences within a reasonable time.

The strongest argument against allowing sentencing courts this power is that sentences remain indeterminate for the period of time within which courts may act. It is important, therefore, that the power to reduce the severity of a sentence exist only for a specific restricted time after imposition of sentence. Paragraph (a) does not declare how long the time limit should be, but a time certain ought to be fixed in the rules of procedure.

The procedure for sentence reduction should be formal and open to public view. Ex parte communications to courts are not permissible. If a court acts on its own motion, it should do so after notice to the parties and opportunity to be heard. The first edition of these Standards remarked: "It is undesirable for a statute of this type to be used to impose a newspaper sentence on one day and a quiet reduction several days later." Paragraph (c) requires that resentence under this Standard must occur in a reopened sentencing hearing in which all normal procedural rules applicable to sentencing proceedings, including those that require open hearings, are followed. At the conclusion of the reopened sentencing hearing, a sentencing court must make any further findings of fact necessary and material to the change in sentence, Standard 18-5.18(b), and state the reasons for the revised sentence imposed, Standard 18-5.19(b).

2. Rule 633 of the Uniform Rules of Criminal Procedure (1987) provides for a period limited to four months after the imposition of sentence.
Standard 18-7.2 Authority to modify requirements or conditions of sentences in light of changed circumstances

(a) The rules of procedure should authorize a sentencing court, at any time during the period that the court has retained jurisdiction over a sentenced offender, to modify the requirements or conditions of a sanction to fit the present circumstances of the offender. Such sentences include:
   (i) a sentence to a compliance program,
   (ii) a sentence involving an economic sanction,
   (iii) a sentence to an acknowledgment sanction, or
   (iv) an intermittent confinement sanction.
(b) The rules should provide that any modification of the requirements or conditions of a sentence under this authority may not increase the overall severity of an offender's sentence.
(c) The rules should provide that either party may move for modification of sentence or the sentencing court may act on its own motion. The rules should prohibit ex parte communications with the sentencing court regarding modification of a sentence and should ensure that both parties receive notice of any proposed modification with opportunity to respond.

History of Standard

This Standard is derived from Standards 18-7.1, 18-7.3, and 18-7.4 (2d ed. 1979).

Related Standards

Authority to reduce the severity of sentences is addressed in Standard 18-7.1. Standards relating to resentencing following violation of the requirements or conditions of sentences are found in Standards 18-7.3 and 18-7.4.

Commentary

When sentencing courts impose sanctions other than total confinement, they should retain jurisdiction until the sentences to those sanctions have been fully executed. The courts' continued jurisdiction
increases the probability of offenders' compliance with the terms of sentences through the force of judicial oversight, but continued jurisdiction is also important to enable modification of sentences to take into account changes in circumstances that affect the execution of the sentences.

In terms of traditional probation, which is characterized in these Standards as a compliance sanction, the "conditions" of probation could be modified by sentencing courts over time as those conditions were perceived to be more or less successful in achieving the purposes of the courts or as those conditions had to be modified to adapt to changed circumstances. These Standards expand the application of this concept of continued jurisdiction to all sanctions other than total confinement, so that not only are compliance sanctions within the power of courts to modify and adapt but so too are economic sanctions, acknowledgment sanctions, and intermittent confinement sanctions.

This Standard adds an important dimension to the use of economic sanctions, which can be enforced realistically only to the extent of offenders' ability to pay. Offenders' economic circumstances at the time of sentencing may change over time. Periodic monitoring of payments of sentences to make restitution or pay a fine can adjust the rate of payment and, perhaps, the total amount of the sanction to take into account the offenders' financial condition and obligations. Among the steps available are: (1) partial remission of the sanction, (2) extension of the time schedule for payment, and (3) modification of the method of payment, including substitution of services or property for cash.

Paragraph (c) states an important limitation on exercise of the power to modify sentences under this Standard. The Standard does not require or contemplate a finding that an offender, whose sentence is to be modified, be in violation of the terms of the original sentence. (Resentencing following determination of violation is dealt with in Standards 18-7.3 and 18-7.4.) There is no justification, therefore, for increases in the severity of sentences under the rubric of modifications to meet changed circumstances.

This Standard deliberately does not require the full panoply of procedures applicable to sentence imposition. Less formality is appropriate and there is less need for open court proceedings, findings of fact and statements of reasons for sentences. Nonetheless, as stated in paragraph (c), proceedings that may lead to modification of sentences should not be ex parte; the prosecution and defense should have notice of any proposed modification and opportunity to respond.
B. Resentences Following Violation of Initial Sentences

Standard 18-7.3 Legislative authority to resentence offenders for violation of the requirements or conditions of sentences

(a) The legislature should authorize a sentencing court to resentence an offender, previously sentenced to a compliance program or a sentence involving an economic sanction, an acknowledgment sanction, or an intermittent confinement sanction, upon finding that the offender has committed a substantial violation of a material requirement or condition of the previous sentence.

(b) The legislature should provide that the effect of noncompliance or nonpayment should be determined after offenders' defaults and after examination of the reasons therefor.

(c) The legislature should provide that the sanctions available to a sentencing court imposing a resentence include all sanctions that were available at the time of the initial sentencing, although separate guidance by the agency performing the intermediate function may be appropriate.

(d) The agency performing the intermediate function should guide sentencing courts in the appropriate use of the authority to resentence offenders.

(i) A sentencing court should consider first whether an offender's noncompliance or nonpayment is excusable and whether substantial performance of the initial sentence can be achieved by exercise of legal power to compel or induce performance, particularly by use of measures, including civil contempt, for enforcement of economic sanctions.

(ii) A sentencing court should not sentence an individual offender to total confinement unless the conditions of Standard 18-6.4 are met. Incarceration should not automatically follow noncompliance. In the event of nonpayment of an economic sanction, total confinement should not be imposed unless the offender wilfully refused to pay or failed to make sufficient bona fide efforts lawfully to acquire the resources to pay.

(iii) A sentencing court should determine explicitly the extent to which an offender's substantial compliance with the
requirements or conditions of the initial sentence is to be credited toward the requirements or conditions of a resentence. In determining the severity of a resentence, a sentencing court should take into account an offender's substantial compliance with the initial sentence that cannot be credited toward a resentence.

(e) The legislature should prohibit sentencing courts from setting the terms of a resentence prior to finding of a violation of a requirement or condition of the initial sentence. The initial sentence should not specify the terms of a resentence in the event that the offender violates the primary sanction.

**History of Standard**

This Standard is based on Standards 18-7.3 and 18-7.4 (2d ed. 1979).

**Related Standards**

Changes in sentences on grounds other than violations of requirements or conditions of sentences are addressed in Standards 18-7.1 (reduction in severity) and 18-7.2 (modification in light of changed circumstances).

**Commentary**

Under these Standards, sentencing courts retain jurisdiction over offenders sentenced to any sanction other than total confinement. If a sentenced offender violates a material requirement or condition of a sentence to a compliance program, or an economic sanction, or an acknowledgment sanction, or a sanction of intermittent confinement, the sentencing court should have power to resentence the violator. The sentencing concept here is drawn, of course, from the prior law of probation, particularly that aspect of probation law which dealt with revocation of probation. That concept is used more broadly in these Standards and is applied to sentences involving any sanction other than the sanction of total confinement.¹

¹. The change is less substantive than may appear at first. Commonly, when a probation sentence was imposed, one or more of the “conditions” of probation might be payment of a fine or participation in a community-based program, etc. These Standards permit sentencing courts to treat violations of sanctions other than total confinement.
Paragraph (a) specifies that a sentencing court’s power to resentence should be based upon a finding that the offender has committed a substantial violation of a material requirement or condition of a sentence. The purpose of these criteria is to avoid reopening of sentences for what were termed “technical violations” of probation conditions. Before proceeding to resentence, the requirement or condition in question must be found to have material importance to the substance of the sentence and the conduct of the offender must be found to have been a substantial violation of that requirement or condition. Among the issues to be considered by the court is whether an offender’s violation, even if substantial, should be deemed excusable. See paragraph (d)(i).

After finding a substantial and nonexcusable violation of a material requirement or condition of a sentence, the sentencing court has power to resentence the offender. Paragraph (c) provides that the sanctions available to sentencing courts at this juncture should include all of the sanctions that were available at the time of the initial sentencing. This provision is not intended to preclude courts from taking into account the extent to which the offenders had “served” the prior sentence. Of course, that is and should be taken into account in determining the type of sanction to be imposed and the level of severity of the resentence. The theory underlying this provision is that, on resentence, the sentencing court is again imposing a sentence for the offense of conviction and not, in the guise of a criminal sentence, imposing a sanction appropriate to noncriminal conduct that constituted violation of the offender’s prior sentence.

It is important that the substance of a resentence be determined only after a finding of violation and after examination of the reasons for the violation. As stated in paragraphs (b) and (e), the legislature should so provide. If the terms of a resentence upon violation are fixed at the time of the original sentence, the sentencing court does not take into account the facts and circumstances that occurred following the prior sentence and does not make a current determination, as of the time of

Without the intermediate step of characterizing the violated requirement or condition as an aspect of a compliance program sanction. That is not to say, however, that one or more of the conditions of a compliance program, as provided in these Standards, may not be compliance with another sanction. See, e.g., Standard 18-313(d)(vi), (viii), (ix), and (xi).

Violations of the sanction of total confinement are generally matters of prison discipline, a subject that is beyond the scope of this chapter of the Standards.
resentence, of the most appropriate sentence to be imposed. See para-
graph (d)(iii). Paragraph (d)(ii) sets forth some of the salient consider-
ations to which a court, weighing resentence, should refer. Routine
resort to a sanction of total confinement on resentence is improper; the
criteria for utilization of that sanction set forth in Standard 18-6.4
remain appropriate. See paragraph (d)(ii).

This Standard is a particularly important part of the role of economic
sanctions in sentencing practice. Such sanctions, when initially
imposed, should not require performance that is beyond the financial
capability of offenders. Thus, in imposing fines, sentencing courts
should take into account the perceived financial circumstances and
responsibilities of offenders. Standard 18-3.16(d). In requiring restitu-
tion or reparation, sentencing courts should schedule the required
payments in light of offenders' financial circumstances. If an offender
does not perform as ordered in an economic sanction, paragraph (d)(ii)
provides that the court must determine whether the offender has
wilfully refused to do so or to make bona fide efforts to acquire the
resources needed to do so. Modification of the sentence may be appro-
priate. The court may find that measures other than confinement will
compel or induce an offender to comply with the economic sanction.

Constitutional law imposes limitation upon the power of states to
incarcerate offenders for nonpayment of fines. The Supreme Court of
the United States addressed that question in Bearden v. Georgia.2 The
Court held that when an offender had made reasonable efforts to pay
a fine, a state court's sentence to imprisonment without considering
alternative sanctions was a violation of the Due Process Clause of the
Fourteenth Amendment.

Standard 18-7.4 Procedures regarding violations of
requirements or conditions of
sentences

(a) The legislature should provide that offenders should ordi-
narily be called by summons to appear before the sentencing court
to respond to charges of violation of a requirement or condition of
sentence.

(b) The legislature should authorize arrest of an individual
offender pursuant to a warrant of arrest if the court issuing the
warrant finds probable cause to believe that:

(i) the offender has committed a substantial violation of a material requirement or condition of a sentence, and
(ii) the offender is not likely to respond to a summons to appear before the sentencing court.
(c) The legislature should authorize arrest without a warrant when the officer making the arrest has reasonable cause to obtain a warrant of arrest and reasonably believes that arrest is necessary to prevent the offender's flight.
(d) Legislation or a rule of procedure should direct that, upon arrest and detention of an offender for alleged violation of a sentence not involving total or intermittent confinement, a preliminary hearing should be held promptly to determine whether there is probable cause to believe that the offender has committed a substantial violation of a material condition of the sentence and that continued detention of the offender is necessary.
(e) Legislation or a rule of procedure should direct sentencing courts to hold hearings, within a reasonable time after preliminary determinations of probable cause, and promptly make final determinations whether the offender committed the alleged violation, provided, however, that final determination of an allegation of the commission of another offense should be made as provided in (h).
(f) The rules of procedure should provide that, at the preliminary or final hearing:
   (i) the offender should receive adequate notice of the alleged violation, including a description of the surrounding facts and circumstances, and of the offender's rights at the hearing;
   (ii) the offender should be entitled to representation by counsel and, if indigent, to have counsel appointed; and
   (iii) both the prosecution and the offender should be permitted to subpoena witnesses, call and cross-examine witnesses, offer other evidence, and present arguments.
(g) The rules should provide that, with respect to the final hearing:
   (i) the offender is entitled to discovery of all evidence intended to be used by the prosecution to show that a violation has occurred and to have access to all official records concerning the offender's case;
   (ii) the prosecution must establish a violation by a preponderance of the evidence;
(iii) the offender should be allowed to show mitigating circumstances or other reasons why the violation should not result in a resentence;

(iv) the sentencing court should make explicit findings on all material issues of fact, and a statement of the court’s reasons for its determination;

(v) the sentencing court should make and preserve a full and complete record of the hearing; and

(vi) the offender has the right to appeal a resentence to the same extent as any other sentence.

(h) When an alleged violation is based solely on the alleged commission of another offense, the rules should provide that the final hearing on the alleged violation ordinarily should be held after disposition of the new criminal charge.

**History of Standard**

This Standard is based on Standard 18-7.5 (2d ed. 1979).

**Related Standards**

Legislative authorization to resentence offenders for violation of requirements or conditions of sentences is addressed in Standard 18-7.3.

**Commentary**

Since the Supreme Court decisions in *Gagnon v. Scarpelli,*¹ and *Morrissey v. Brewer,*² states have been compelled by constitutional law to apply the basic precepts of due process of law to proceedings that may lead to reopening the sentences of offenders on the basis of violation of conditions of probation or parole. The second edition of these Standards, elaborating on basic constitutional requirements, outlined more fully the elements of procedures that should be followed in proceedings for revocation of probation. This Standard now extends those procedures to all postsentence proceedings in which the government seeks

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¹. 411 U.S. 778 (1973).
². 408 U.S. 471 (1972).
to reopen the prior sentences on the ground that the offenders have violated a material requirement or condition thereof.

The most fundamental due process concerns, notice and opportunity to be heard, are addressed by the procedures in paragraph (f). This provision declares a right to counsel in these proceedings, a right undergirded by the right to appointed counsel for individuals unable otherwise to obtain counsel. Other important procedural matters are set forth in paragraph (g). In addition to providing for offenders' prehearing discovery, this paragraph sets out the basic requisites for introduction of evidence and fact-finding in such proceedings. The only departure from the standard as stated in the second edition is the provision in paragraph (g)(ii), which posits that the burden of proof on issues of fact should be the standard of preponderance of the evidence. In the earlier edition, the burden of proof was by clear and convincing evidence.

Other parts of this Standard deal with the manner in which a proceeding to reopen a sentence for alleged violation of a material requirement or condition is initiated, particularly the matter of possible prehearing arrest and confinement of an individual alleged to be a violator. Paragraphs (a), (b), and (c) provide that the ordinary method of institution of such proceedings should be by summons to appear before the sentencing court rather than by arrest, but provide further for circumstances in which arrest, with or without a warrant, may be appropriate. For offenders arrested for alleged violation of a requirement or condition of their sentences, paragraph (d) and (e) provide for prompt judicial hearings, preliminary hearings to determine whether the arrests were proper and whether continued detention is necessary pending disposition of the motions to reopen sentence, and final hearings to dispose of the motions.

This Standard does not address arrest, detention, and other matters arising from offenders' alleged commissions of criminal offenses. If an offender, already subject to an unexecuted sentence, is believed to have committed a further crime, ordinary law enforcement processes incident to prosecution of that criminal charge apply.3 This Standard applies to all situations of alleged sentence violations of a noncriminal nature and to those situations, possibly of a criminal nature, in which the prosecution or police elect to act on the basis of an alleged violation

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3. Pretrial release is the subject of Chapter 10 of these Standards.
of the outstanding sentence rather than on the basis of a new criminal charge.

When an offender has been charged with a new offense which is also the basis for a proceeding to reopen an existing sentence, the order of proceeding on these separate matters has considerable consequence. If the motion to reopen the sentence is processed and heard before the criminal charge has been resolved, dilemmas may arise for both the government and the offender. The government's obligation to provide prehearing discovery in the proceedings to reopen may be inconsistent with the right of discovery in a criminal prosecution. An offender's right to give testimony in the proceedings to reopen may be inconsistent with exercise of the privilege against self-incrimination in a criminal prosecution. Paragraph (f) states a strong preference, therefore, for disposition of criminal charges before proceedings to reopen existing sentences.
PART VIII.

APPELLATE REVIEW OF SENTENCES

Standard 18-8.1 Jurisdiction to review sentences; reviewing courts

(a) The legislature should authorize appellate courts to entertain appeals of sentences. This should include:
   (i) Review of a sentence imposed upon conviction based on a plea of guilty or the equivalent;
   (ii) Review of a resentence following violation of the requirements or conditions of a prior sentence; and
   (iii) Review of a resentence following reversal of a prior sentence by an appellate court and remand for resentencing.

(b) The legislature should authorize appellate review of sentences in the same courts empowered to entertain appeals from convictions. Specialized courts to review sentences only should not be established.

History of Standard

This Standard is based on Standards 20-1.1 and 20-2.1 (2d ed. 1978).

Related Standards

None.

Commentary

The principle that there ought to be appellate review of sentences is now generally accepted. When the original edition of these Standards appeared in 1968, the idea that there should be any appeal from sentences that were within the limits authorized by statute had substantial opposition. Since that time, views of sentences and sentencing have undergone fundamental change. The sentencing phase of criminal
prosecutions has become increasingly regulated by rules of law, substantive and procedural.\textsuperscript{1}

Sentence review should be available in every case of a kind in which the judgment of conviction may be appealed. A purpose of this Standard is to make clear that sentence appeals should lie whether or not appeal is taken from a judgment of conviction. Thus, paragraph (a)(i) makes explicit that appellate review should be authorized even if conviction is based upon a guilty plea, a situation in which appeal from the judgment of conviction would be quite extraordinary. Many guilty plea-based convictions arise from accepted plea bargains that are followed by sentencing courts. In such cases, grounds for appeals from sentence are most unlikely to exist.\textsuperscript{2} Authorizing appellate review of sentences independent of appeal of the underlying convictions should not pose a serious caseload burden on appellate courts.

Paragraphs (a)(ii) and (iii) make clear that appellate review should be available when offenders have been resentenced, whether after a decision to reopen sentence on the ground of substantial violation of a material requirement or condition of the initial sentence or after appellate review of the initial sentence and remand for resentencing. Resentences in these circumstances should be appealable in the same manner as original sentences. This Standard does not provide for appeals when an original sentence has been reduced or modified without increase in overall severity. See Standards 18-7.1 and 18-7.2.

Appellate review of sentences should be a function of the appellate courts with jurisdiction to entertain appeals from conviction. Often appeals from sentences will be taken in conjunction with appeals of judgments of conviction. These courts have the scope of jurisdiction and competence to consider criminal appeals, whatever the grounds

\textsuperscript{1} In 1983, the Michigan Supreme Court, overturning more than one hundred years of history, held that all convicted defendants have the right to appellate review of sentences. The court concluded that no express constitutional or statutory enactment was necessary because the court's general appellate power was a sufficient basis for appellate review of sentences. The Michigan court, citing the second edition of these Standards, declared that sentence review promotes honesty and clarity in criminal appeals. The court concluded that its decision brought Michigan into line with the position of an overwhelming number of states. People v. Coles, 339 N.W.2d 440 (Mich. 1983).

\textsuperscript{2} The Standard does not recommend that sentences in plea bargain cases be categorically unreviewable. There may be instances in which appeals in such cases are valuable. Groundless appeals from sentences can be easily and promptly disposed of on the merits.
for appeal, in the context of the state's criminal justice system. Specialized tribunals, limited in duty to sentence review, should not be established.

**Standard 18-8.2  Purposes of appellate review**

(a) The legislature should identify the following objectives of sentence review:

(i) To determine whether a sentence is unlawful or excessively severe under applicable statutes, provisions guiding sentencing courts, rules of court, or prior appellate decisions;

(ii) To determine whether the action of the sentencing court was an abuse of discretion; and

(iii) To interpret statutes, provisions guiding sentencing courts, and rules of court as applied to particular sentencing decisions and to develop a body of rational and just principles regarding sentences and sentencing procedures.

(b) Reviewing courts, and particularly the highest court of the state, should seek to make effective the legislature's public policy choices regarding sentencing. Reviewing courts should also seek, through case law, to develop principles for composite sentences.

**History of Standard**

This Standard is based on Standard 20-1.2 (2d ed. 1978).

**Related Standards**

None.

**Commentary**

One of the most dramatic changes in criminal law during the past quarter of a century has been the move toward a system of criminal justice in which the historic discretionary power of sentencing courts has been complemented by the evolution of rules and techniques that guide and limit the exercise of sentencing discretion. These developments have had significant ramifications for the place and purpose of appellate review of sentences.

Trial court sentencing discretion remains vital to realization of the objective of individualization of sentences. When that discretion is very
broad, there is little occasion for appellate review beyond extreme cases in which a court might be found to have acted in an arbitrary manner in abuse of the discretion conferred upon the court. There are, however, other important objectives to be realized and these create a larger mission for appellate review. Modern criminal justice systems seek realization of the objectives of sentences that are sufficiently determinate, that are not marked by unwarranted disparities, that are within the overall ranges of severity determined to be appropriate, and that make optimal use of the resources for carrying out sentences imposed. On such matters, sentencing courts must be guided and constrained by law, law that is in part the responsibility of appellate courts to fashion and uphold.

The place and purpose of appellate review of sentences is intertwined with the intermediate function, recognized by these Standards as one of the three foundational elements of the law of sentencing. The agency performing the intermediate function introduces a body of sentencing law that deals with determinacy and disparity and sensitivity to resource utilization. With the advent of sentencing law, appellate courts’ responsibility grows. As with any other body of law, appellate courts have the function of reviewing for error the judgments of trial courts and through that process appellate courts develop a more textured jurisprudence of sentencing law.

The essence of the appellate process is the articulation and refinement of a body of legal doctrine through the discipline of multijudge courts that explain and rationalize that doctrine in the context of review of lower courts’ decisions. As with other issues of criminal law and procedure, sentence determination and sentence imposition can be brought within a coherent body of general principles, and corollaries of those principles, in order to carry out the societal purposes of the criminal justice system.

1. In some jurisdictions that lack a system of presumptive sentences promulgated by a sentencing agency, the appellate courts have stepped in to develop “benchmarks” or sentencing principles for the guidance of sentencing courts. See, e.g., Susan Di Pietro, The Development of Appellate Sentence Review in Alaska, 75 JUDICATURE 143 (October-November 1991) (description of Alaska’s “benchmark” system as elaborated by Alaska’s appellate courts); State v. Lilley, 624 A.2d 935 (Me. 1993) (remand of sentence as disproportionate and as resulting from “an error in principle” by trial court). The Standards encourage such thoughtful involvement by the appellate courts even in the absence of a formalized presumptive sentencing scheme.
Public respect for the law grows with better perception of the sharpened criteria for sentence decisions that apply across an entire jurisdiction. The pressures on individual sentencing judges, which can sometimes be enormous in highly publicized cases, are deflected when sentencing decisions are seen to be less the personal choices of particular judges and more the embodiment of a set of general rules and procedures. A prevailing sense of fair and responsible sentencing, based upon sound principles and practices, serves the public interest.

The body of sentencing law that emerges from the work of appellate courts will make the criminal justice system more comprehensible to individual offenders. Persons suffering from an acute sense that they have been treated differently and unfairly in the nature and severity of the sentences imposed upon them are unlikely to respond positively to programs intended to make it possible for them to comply with the laws that govern our society.

Standard 18-8.3  Appeals by defense or prosecution

The legislature should authorize appeals from sentence at the initiative of the offender or the prosecution.

History of Standard

This Standard is derived from Standard 20-1.1(b) (2d ed. 1978). On the matter of prosecution appeals, the Standards have varied over time. The first edition took no position on the matter but two years later, in 1970, the ABA Board of Governors endorsed the principle of government appeals of sentences. This position was reiterated in the second edition. In 1980, the ABA House of Delegates adopted a resolution opposing prosecution appeals if taken on the ground that sentences were too lenient.

Related Standards

None.

Commentary

This Standard adopts the view that appeals from sentences should be subject to the normal principle that the right to initiate appeals
should be afforded to both parties to the trial court proceedings. The law regarding sentence determination and sentence imposition has matured in the past twenty-five years. An important part of any mature body of legal norms and procedures is the oversight provided by appellate review. The case law jurisprudence provided through the corpus of appellate opinions complements and gives greater meaning to the statutory base and the guidance norms promulgated by the agency performing the intermediate function. The manifest value of appellate review of sentences is best realized if both parties have the right to take appeals.

In the evolution of appellate review of sentences, limitations on the parties' right to appeal have been considered for various reasons. Concern that the number of appeals from sentence would become an undue burden on the dockets of appellate courts led to proposals that defendants' appeals should be permitted only with permission of the sentencing court or appellate court. A system of discretionary sentence appeals may in effect add to rather than reduce the burden of judicial administration. The Standard adopts the straightforward view that appeals should be available as a matter of party choice.

This Standard does not accept proposals that have been made to restrict sentence appeals to cases in which the sentence imposed is extraordinary or unusual. If, for example, a sentencing system includes presumptive sentences, appeals might be restricted to sentences that were outside the parameters of the applicable presumptive sentences. Variants of this would apply the limitation only to prosecution appeals or only to defense appeals. The rationale for such proposals may be to preclude unmeritorious or unnecessary appeals. However, imposition of sentences within the parameters of presumptive sentences in cases that are not ordinary is no less error than is an unwarranted departure from a presumptive sentence. To the extent that parties may seek appellate review of sentences within presumptive sentences, without reasonable basis to support departures, expedited appellate review procedures should lead to prompt and summary affirmances.

Standard 18-8.4 Disposition by reviewing court

(a) The legislature should authorize reviewing courts to:
    (i) Affirm the sentence under review;
    (ii) Reverse the sentence under review and remand the case to the sentencing court for resentencing;
(iii) Substitute for the sentence under review any other disposition that was available to the sentencing court.
(b) A reviewing court should set forth the basis for its decisions.

History of Standard
This Standard is derived from Standards 20-3.1 and 20-3.3 (2d ed. 1978). Standard 18-8.4(a)(iii) is new.

Related Standards
None.

Commentary
This Standard underscores the need to grant reviewing courts wide flexibility in available dispositions. Affirmances present no issue regarding the action taken by reviewing courts. More problematic is the proper disposition when the appellate court determines that the sentence under review is not to be affirmed. It should be clear that an appellate court, upon reversal, can properly remand cases for further proceedings in the trial court. It is not a necessary incident of appellate review of sentences that the appellate court be able to determine what the correct sentences should be. The record before the appellate court may not be adequate for making such a determination; indeed, one likely ground for successful appeals may be the failure of the court below either to allow compilation of a sufficient record or to make necessary findings of fact. Appellate courts, which act only on the records before them, can be expected normally to couple decisions to reverse sentences with orders of remand for resentence in the courts below.

Nonetheless, some cases may arise in which appellate courts, having determined to reverse the sentence imposed, can proceed to declare what the proper sentence should be. Paragraph (a)(iii) so provides. Opinion has been divided on the difficult question whether an appellate court, on appeal only by an offender, should be empowered to increase the severity of sentences under review. Two arguments are generally advanced in favor of permitting appellate courts to increase sentences in this circumstance: First, it is as appropriate to correct an excessively light sentence as it is to correct an excessively severe one.
Second, the possibility of increased severity of sentences will tend to discourage appeals by offenders lacking sound bases for taking appeals. The Standards of course permit appeals to be initiated by the prosecution. See Standard 18-8.3. Prosecutors can be expected to do so when sentences are arguably too lenient, and at least to cross-appeal if defendants should initiate appeals where there are grounds for increased severity of sentences. Accordingly the Standard does not address the question of increased sentence severity when only the offender has appealed.
PART IX.

DISPUTED TERMS OF TOTAL CONFINEMENT

Standard 18-9.1  Mechanism for resolving disputes about the length of a total confinement sentence

The legislature should designate an agency in the executive branch to resolve disputes about the correct date of release of offenders serving sentences of total confinement.

History of Standard

This Standard is new.

Related Standards

None.

Commentary

Computation of the exact term of sentences of total confinement is often a complex matter about which prison administrators and confined individuals disagree. Quite frequently, disputes center on the number of days of credit due on a sentence for periods of confinement before individuals reach the institutions from which they are to be released at the conclusion of the term. Where more than one sentence of total confinement is served, whether consecutively or concurrently, ascertainment of the date of release may be problematic. Unless a better mechanism exists for resolving these questions, they can become the basis for judicial proceedings, perhaps habeas corpus actions initiated by individuals who contend that they should be free. This Standard proposes that states create an alternative dispute resolution mechanism for these matters. It is not sound policy to require courts to deal with such questions. Moreover, it is obviously desirable to resolve disputes as to the release date before the earliest date contended to be the correct date. Accordingly, the Standard provides that an administrative mechanism should be established for timely and efficient determination of these questions.